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How is Judicial Review necessary in Modern Democracy?

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ABSTRACT

This article seeks to show that the current understanding of judicial review is important in understanding the modern democracy. In this article, the author chooses to focus on specific language of judicial opinions to determine how judicial review is necessary in modern democracy.

I. INTRODUCTION

The power of judiciary to examine and review a certain aspect of law or the law itself to check its validity can be termed as “Judicial Review”. It is the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court’s opinion contravenes the Constitution.² For example, the court discussed the scope of judicial review in the Naz foundation case.³ The court exercised its power which allows it to hold any act or section to be unconstitutional if it violates the constitution. Section 377 of IPC was held to be not unconstitutional in 2014.⁴ This power of the court to review is judicial review.

Locke, Rousseau, Kant and Rawls were the ones who introduced that the conception of democracy

ultimately arises from the social contract tradition.⁵ Locke contended that the state was concerned only with public order. This was exclusively arisen from those actions that would be necessary to regulate in order to protect the public.⁶ The family of ideas of equal freedom, equal rights, and equal political participation revolves around the democracy. This is central to the natural rights theory of the social contract tradition of Locke, Kant, and Rousseau, and to the modern version of that tradition, Rawls’s justice as fairness. A modern democracy describes the concepts of freedom and equality. It is a form wherein, in order to create fairness, all eligible citizens would directly or indirectly i.e., through other elected representatives would participate in the development of state and

¹ Author is a Dual Qualified Attorney.

² Corwin, Edward S., A Constitution of Powers in a Secular State, The Michie Company, USA, 1951, p. 3-4

³ CIVIL APPEAL NO.10972 OF 2013

⁴ Naz Foundation case, CIVIL APPEAL NO.10972 OF 2013

⁵ Samuel Freeman, Constitutional Democracy and Legitimacy of Judicial review, <http://www.jstor.org/stable/pdfplus/3504771.pdf?acceptTC=true&jpdConfirm=true>, last seen at 17th July 2021

⁶ George M. Stephens, John Locke: His American and Carolinian Legacy, http://johnlocke.org/about/who_is_john_locke_essay.html, last seen at 17th July 2021

creation of laws.⁷ India can be termed as country with modern democracy since the government is chosen by the will of the people and all the eligible citizens who have the power to vote participate equally in this process. Since a modern democracy describes the concept of equality and most of its aspects are based on protection of public, it can be stated that Locke's theory actually stems out the basic concept of democracy. However, Rawl's justice of fairness wouldn't fit into the frame of modern democracy without the concept of judicial review.

India is a vast country and in a country like this with widely different regional problems, the society can be organised on basis of judicial review. It acts as the surest base of democracy.⁸ However, judicial review has evolved over years in the Indian democracy. A pro-legislature position was adopted by the court since India was steeped in the British institution of limited judicial review. This is evident from the rulings such as A.K. Gopalan, but however it did not take long for judges to *"break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament"*.⁹

The case of A.K.Gopalan v. State of Madras¹⁰ raised the issue of whether Article 19(5) and 21 and the law relating to preventive detention were subject to judicial review. Judicial process in a democracy in its traditional

perceptive is that while laws of the country are made by the legislature and the same are implemented by the executive body, the role of interpreting and applying the law to facts of any particular case in a democracy is done by the judiciary. It was held that the words *'procedure established by law'* were different from the *'substantive due process'* which are given under the 14th amendment to the US Constitution. The reasoning provided further was the framers of the Indian constitution always preferred the former phrase i.e. 'procedure established by law' over the latter phrase i.e. 'substantive due process'.¹¹ The courts interpreted that Article 21 could be interpreted to be curtailed as long as it was through a legal prescription. The literal interpretation of the phrase procedure established by law was taken into consideration and no separation of powers was concluded.

From this case, it is evident that judicial review did not subsist in India previously. The judiciary did not have the power to review any statute and only had the power to interpret it. This lack of power led to violation of the fundamental rights of the citizen. As the democracy of India strengthened, the position of judicial review changed. This changed position can be seen in the case of Maneka Gandhi.¹² Fundamental rights were given more importance. The court exercised its power to review. Judicial review of bureaucratic decision making is hence

⁷ <https://www.boundless.com/political-science/american-politics/forms-of-government/democratic-governments/>, last seen at 16th July 2021

⁸ Cardozo, The Nature Of The Judicial Process 92-94 (1921)

⁹ Gurram Ramachandra Rao, India: Judicial Review in India, <http://www.mondaq.com/india/x/20649/Con>

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¹⁰ 1950 AIR 27

¹¹ http://supremecourtindia.nic.in/speeches/speeches_s_2009/judicial_activism_tcd_dublin_14-10-09.pdf

¹² 1978 AIR 597

simultaneously ubiquitous and contestable.¹³

Further, in the case of Naz Foundation, the court states that, “A modern democracy while based on the principle of majority rule implicitly recognizes the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view. It is the job of the judiciary to balance the principles ensuring that the government on the basis of number does not override fundamental rights. After the enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme”.¹⁴

The abovementioned authority states the importance of judicial review in a democracy. A democracy protects the fundamental rights of its citizens. However, without judicial review, protection of these fundamental rights is not possible as seen in the case of A.K. Gopalan. It creates a government with unlimited power and no restrictions. However, with judicial review in the democracy, the powers of the government are limited and restricted which in turn protects the people of the country.

To ensure a well governed democracy, the scope of judicial review before Indian courts has hence been evolved in three dimensions: Firstly, to ensure that the administration actions (democracy and the people elected to represent) are fair,

Secondly, to protect guaranteed fundamental rights of citizens mentioned in Part three of the constitution and, Thirdly to rule on questions of legislative competence between the centre and the states.¹⁵

Part three of the Indian constitution lays down the fundamental rights of the people in the Indian Democracy. To protect these rights, the constitution provides powers to the High Court and the Supreme Court. The power of Judicial Review for the High court is incorporated in Articles 226 and 227 of the Constitution and in regard to the Supreme Court Articles 32 and 136 of the Constitution give the power of judicial review. The judiciary in India has come to control by judicial review every aspect of governmental and public functions.¹⁶

Hence, from the above-mentioned statements and authorities cited, it can be stated that judicial review in a modern democracy plays a vital role in governance. It is necessary in a modern democracy and this can be seen from the statement given by Bhagwati C.J. P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd.*¹⁷ declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely taken away, the Constitution would cease to be what it was.¹⁸ From the statement given it is evident that

¹³ Jeery L Mashaw, *Bureaucracy Democracy and Judicial Review: The Uneasy Coexistence of Legal, Managerial and Political Accountability*

¹⁴ Suresh Kumar Koushal and another v. NAZ Foundation and others, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>, 17th July 2021

¹⁵ Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India, *Judicial Activism under the Indian Constitution*, (Trinity College Dublin, Ireland – October 14, 2009)

¹⁶ P.P. Rao, "Basic Features of the Constitution", (2000) 2 SCC (Jour) 1; Justice Syed Shah Mohammed Quadri, "Judicial Review of Administrative Action", (2001) 6 SCC (Jour) 1; Soli J. Sorabjee Soli J. Sorabjee, "Decision of the Supreme Court in S.R. Bommai v. Union Of India: A Critique", (1994) 3 SCC (Jour) 1

¹⁷ (1980) 3 SCC 625

¹⁸ Gurram Ramachandra Rao, *India: Judicial Review in India*, <http://www.mondaq.com/india/x/20649/Con>

for a democracy to function by adhering to all the principles is not possible if it lacks judicial review. The importance of judicial review is also laid down several other cases by the Supreme Court. In *Sampath Kumar*¹⁹ the Court further declared that if a law made under Article 323-A(1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of Parliament.²⁰ From this it can be very well stated that the courts have the power to review and it is important for them to have this power in order to control the government functions and ensure a fair and just democratic system in the country. In my opinion, judicial review is the base for any democracy as it allows keeping a check on the laws laid down by the government and allows them to hold any such law unconstitutional if it violates the fundamental rights of the people. It is not only necessary but also the most important principle in a modern democracy. The three dimensions of judicial review are well established in the Indian modern democracy which ensures fairness in the administrative actions. Hence judicial review is necessary in a modern democracy.

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¹⁹ 1987 SCR (3) 233

²⁰ Supra Note 18.