27 Judicial Review

The doctrine of judicial review originated and developed in the USA. It was propounded for the first time in the famous case of Marbury *versus* Madison (1803) by John Marshall, the then chief justice of the American Supreme Court.

In India, on the other hand, the Constitution itself confers the power of judicial review on the judiciary (both the Supreme Court as well as High Courts). Further, the Supreme Court has declared the power of judicial review as a basic feature of the Constitution or an element of the basic structure of the Constitution. Hence, the power of judicial review cannot be curtailed or excluded even by a constitutional amendment.

MEANING OF JUDICIAL REVIEW

Judicial review is the power of the judiciary to examine the constitutionality of legislative enactments and executive orders of both the Central and State governments. On examination, if they are found to be violative of the Constitution (*ultra vires*), they can be declared as illegal, unconstitutional and invalid (null and void) by the judiciary. Consequently, they cannot be enforced by the Government.

Justice Syed Shah Mohamed Quadri has classified the judicial review into the following three categories[1] :

1. Judicial review of constitutional amendments.
2. Judicial review of legislation of the Parliament and State Legislatures and subordinate legislations.
3. Judicial review of administrative action of the Union and State and authorities under the state.

The Supreme Court used the power of judicial review in various cases, as for example, the Golaknath case (1967), the Bank Nationalisation case (1970), the Privy Purses Abolition case (1971), the Kesavananda Bharati case (1973), the Minerva Mills case (1980), and so on.

In 2015, the Supreme Court declared both the 99th Constitutional Amendment, 2014 and the National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional and null and void.

IMPORTANCE OF JUDICIAL REVIEW

Judicial review is needed for the following reasons:

(a) To uphold the principle of the supremacy of the Constitution.
(b) To maintain federal equilibrium (balance between the Centre and the states).
(c) To protect the Fundamental Rights of the citizens.

In a number of cases, the Supreme Court has pointed out the significance of the power of judicial review in our country. Some of the observations made by it, in this regard, are given below:

"In India it is the Constitution that is supreme and that a statute law to be valid, must be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not".[2]

"Our constitution contains express provisions for judicial review of legislation as to its conformity with the constitution. This is especially true as regards the Fundamental Rights, to which the court has been assigned the role of sentinel on the qui vive".[3]

"As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these Rights are not contravened".[4]

"The Constitution is supreme lex, the permanent law of the land, and there is no branch of government above it. Every organ of government, be it the executive or the legislature of the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty, can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits".[5]

"It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are 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 then become uncontrolled".[6]

"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 limitations"[7] .

"The founding fathers very wisely, therefore, 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, availment and enjoyment of equality, liberty and Fundamental Freedoms and to help to create a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the Constitution to meet new conditions and needs of the time".[8]

CONSTITUTIONAL PROVISIONS FOR JUDICIAL REVIEW

Though the phrase 'Judicial Review' has nowhere been used in the Constitution, the provisions of several Articles explicitly confer the power of judicial review on the Supreme Court and the High Courts. These provisions are explained below:

1. Article 13 declares that all laws that are inconsistent with or in derogation of the Fundamental Rights shall be null and void.
2. Article 32 guarantees the right to move the Supreme Court for the enforcement of the Fundamental Rights and empowers the Supreme Court to issue directions or orders or writs for that purpose.
3. Article 131 provides for the original jurisdiction of the Supreme Court in centre-state and inter-state disputes.
4. Article 132 provides for the appellate jurisdiction of the Supreme Court in constitutional cases.
5. Article 133 provides for the appellate jurisdiction of the Supreme Court in civil cases.
6. Article 134 provides for the appellate jurisdiction of the Supreme Court in criminal cases.
7. Article 134-A deals with the certificate for appeal to the Supreme Court from the High Courts.[9]
8. Article 135 empowers the Supreme Court to exercise the jurisdiction and powers of the Federal Court under any preconstitution law.
9. Article 136 authorises the Supreme Court to grant special leave to appeal from any court or tribunal (except military tribunal and court martial).
10. Article 143 authorises the President to seek the opinion of the Supreme Court on any question of law or fact and on any pre-constitution legal matters.
11. Article 226 empowers the High Courts to issue directions or orders or writs for the enforcement of the Fundamental Rights and for any other purpose.

12. Article 227 vests in the High Courts the power of superintendence over all courts and tribunals within their respective territorial jurisdictions (except military courts or tribunals).
13. Article 245 deals with the territorial extent of laws made by Parliament and by the Legislatures of States.
14. Article 246 deals with the subject matter of laws made by Parliament and by the Legislatures of States (i.e., Union List, State List and Concurrent List).
15. Articles 251 and 254 provide that in case of a conflict between the central law and state law, the central law prevails over the state law and the state law shall be void.
16. Article 372 deals with the continuance in force of the pre-constitution laws.

SCOPE OF JUDICIAL REVIEW

The constitutional validity of a legislative enactment or an executive order can be challenged in the Supreme Court or in the High Courts on the following three grounds.

(a) it infringes the Fundamental Rights (Part III),
(b) it is outside the competence of the authority which has framed it, and
(c) it is repugnant to the constitutional provisions.

From the above, it is clear that the scope of judicial review in India is narrower than what exists in the USA, though the American Constitution does not explicitly mention the concept of judicial review in any of its provisions. This is because, the American Constitution provides for 'due process of law' against that of 'procedure established by law' which is contained in the Indian Constitution. The difference between the two is: "The due process of law gives wide scope to the Supreme Court to grant protection to the rights of its citizens. It can declare laws violative of these rights void not only on substantive grounds of being unlawful, but also on procedural grounds of being unreasonable. Our Supreme Court, while determining the constitutionality of a law, however examines only the substantive question i.e., whether the law is within the powers of the authority concerned or not. It is not expected to go into the question of its reasonableness, suitability or policy implications".[10]

The exercise of wide power of judicial review by the American Supreme Court in the name of 'due process of law' clause has made the critics to describe it as a 'third chamber' of the Legislature, a super-legislature, the arbiter of social policy and so on. This American principle of judicial supremacy is also recognised in our constitutional system, but to a limited extent. Nor do we fully follow the British Principle of parliamentary supremacy. There are many limitations on the sovereignty of Parliament in our country, like the written character of the Constitution, the federalism with division of powers, the Fundamental Rights and the judicial review. In effect, what exists in India is a synthesis of both, that is, the American principle of

judicial supremacy and the British principle of parliamentary supremacy.

JUDICIAL REVIEW OF THE NINTH SCHEDULE

Article 31B saves the acts and regulations included in the Ninth Schedule from being challenged and invalidated on the ground of contravention of any of the Fundamental Rights. Article 31B along with the Ninth Schedule was added by the 1st Constitutional Amendment Act of 1951.

Originally (in 1951), the Ninth Schedule contained only 13 acts and regulations but at present (in 2016) their number is 282.[11] Of these, the acts and regulations of the state legislature deal with land reforms and abolition of the zamindari system and that of the Parliament deal with other matters.

However, in a significant judgement delivered in I.R. Coelho case (2007)[12] , the Supreme Court ruled that there could not be any blanket immunity from judicial review of laws included in the Ninth Schedule. The court held that judicial review is a 'basic feature' of the constitution and it could not be taken away by putting a law under the Ninth Schedule. It said that the laws placed under the Ninth Schedule after April 24, 1973, are open to challenge in court if they violated Fundamental Rights guaranteed under the Articles 14, 15, 19 and 21 or the 'basic structure' of the Constitution. It was on April 24, 1973, that the Supreme Court first propounded the doctrine of 'basic structure' or 'basic features' of the constitution in its landmark verdict in the Kesavananda Bharati case.[13]

While delivering the above judgement, the Supreme Court made the following conclusions:

1. A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine, or it may not. If former is the consequence of law, whether by an amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in the exercise of judicial review power of the Court. The constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test, i.e., rights test, which means the form of an amendment is not

the relevant factor, but the consequence thereof would be the determinative factor.

2. The majority judgement in the Kesavanand Bharati Case[14] read with Indira Gandhi case[15] requires the validity of each new constitutional Amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.
3. All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Articles 14 and 19 and the principles underlying them. To put it differently, even though an act is put in the Ninth Schedule by a Constitutional Amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the Fundamental Right or rights taken away or abrogated pertains or pertain to the basic structure.
4. Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Articles 14 and 19 by application of the “rights test” and the “essence of the right” test taking the synoptic view of the articles in Part III as held in the Indira Gandhi Case.16 Applying the above test to the Ninth Schedule laws, if the infraction affects the basic structure, then such a law or laws will not get the protection of the Ninth Schedule. When the triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of the right” test but also the “rights test” has to apply. There is also a difference between the “rights test” and the “essence of the right” test. Both form part of application of the basic structure doctrine. When in a

controlled constitution conferring limited power of amendment, an entire chapter is made in applicable, the "essence of the right" test as applied in Nagaraj case[17] will have no applicability. In such a situation, to judge the validity of the law, it is the "rights test" which is more appropriate.

5. If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation / infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Articles 14 and 19 and the principles underlying them.
6. Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge.

The number of acts and regulations included in the Ninth Schedule before and after April 24, 1973 are mentioned below in Table 27.1.

Table 27.1 *Number of Acts and Regulations Included in the Ninth Schedule*

Serial Number	Amendment Number (Year)	Number of Acts and Regulations Included in the Ninth Schedule
I. Included Before April 24, 1973		
1.	First Amendment (1951)	13 (1 to 13)
2.	Fourth Amendment (1955)	7 (14 to 20)
3.	Seventh Amendment (1964)	44 (21 to 64)
4.	Twenty-Ninth Amendment (1972)	2 (65 to 66)
II. Included After April 24, 1973		
5.	Thirty-Fourth Amendment (1974)	20 (67 to 86)

6.	Thirty-Ninth Amendment (1975)	38 (87 to 124)
7.	Fortieth Amendment (1976)	64 (125 to 188)
8.	Forty-Seventh Amendment (1984)	14 (189 to 202)
9.	Sixty-Sixth Amendment (1990)	55 (203 to 257)
10.	Seventy-Sixth Amendment (1994)	1 (257A)
11.	Seventy-Eighth Amendment (1995)	27 (258 to 284)

Note: Entries 87, 92 and 130 have been omitted by the Forty-Fourth Amendment (1978).

NOTES AND REFERENCES

1. Justice Syed Shah Mohamed Quadri, "*Judicial Review of Administrative Action*", 2001, 6 SCC (J), p. 3.
2. Chief Justice Kania in A.K. Gopalan v. State of Madras (1950).
3. Chief Justice Patanjali Shastri in State of Madras v. V.G. Row (1952).
4. Justice Khanna in Kesavananda Bharati v. State of Kerala (1973).
5. Justice Bhagwati in Rajasthan v. Union of India (1977).
6. Chief Justice Chandrachud in Minerva Mills v. Union of India (1980).
7. Chief Justice Ahmadi in L. Chandra Kumar v. Union of India (1997).
8. Justice Ramaswami in S.S. Bola v. B.D. Sharma (1997).
9. This provision was added by the 44th Constitutional Amendment Act of 1978.
10. Subhash C. Kashyap, *Our Constitution*, National Book Trust, Third Edition, 2001, p. 232.

11. Though the last entry is numbered 284, the actual total number is 282. This is because, the three entries (87, 92 and 130) have been deleted and one entry is numbered as 257A.
12. I.R. Coelho v. State of Tamil Nadu (2007).
13. Kesavananda Bharati v. State of Kerala (1973).
14. *Ibid*.
15. Indira Nehru Gandhi v. Raj Narain (1975).
16. *Ibid*.
17. M. Nagaraj v. Union of India (2006)