



An Overview of the Judicial Review Scenario, enshrined in the Doctrine of Separation of Power

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ABSTRACT

The three organs of government in India are the legislature, the executive and the judiciary. The legislature makes laws, the executive implements the laws and judiciary keeps an eye on both the organs specified above and ensures that the laws being made and implemented are not beyond the authority of the constitution of India. Our constitution features separation of powers to ensure that these organs function within their specified limits. Article 50 of the Indian Constitution provides about separation of powers. Here in India we have adopted the concept of separation of powers, hence we cannot embrace the power of judicial review in its full extent. If the courts assume absolute and arbitrary power of judicial review it will lead to poor performance by all organs of the government. So to do all work properly everyone has to work in the provided area. In India, we have the concept of judicial review in the basic structure of the Constitution. It helps the courts to maintain checks and balances on the other two arms of the government so that they do not abuse their power and works as per constitution. Finally, we have developed the concept of judicial review and it has become part of the basic framework in the case *Minerva Mills v/s*

Union of India. Therefore, we can say that it judicial review has grown to protect individual rights, to prevent the use of arbitrary power and to prevent miscarriage of justice.

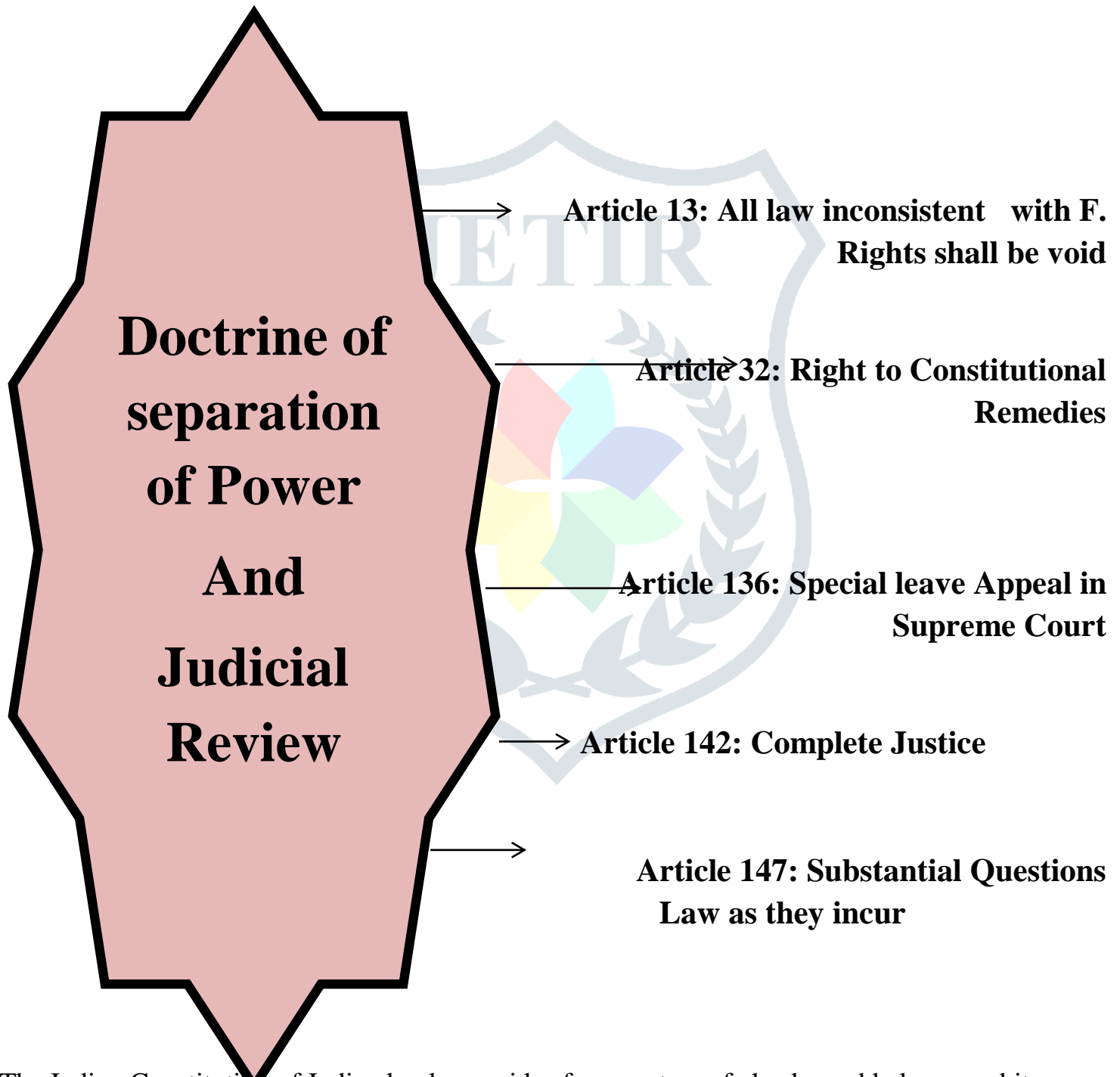
Judicial Review and Separation of Power-

The Supreme Court has repeatedly been accused of issuing that is often referred to as judicial law. This happens when, under the guise of laying down guidelines and making principles, they usurp the powers of the legislature, for example by laying down the basic structure doctrine, the Supreme Court imposed on the legislature's power to make and amend laws. The judiciary has also been accused of infringing on the powers of the other branches through the collegium system. The essential function of the judiciary is to interpret the law rather than to take an interest in the appointment of judges. After all, we have a parliament democracy in which MPs are elected by the people and they have to face the people, they are raising the slogan "**We the People**"; in comparison, judges are enjoying fixed tenure. Judicial Review concept, which evolved in *Marbury v. Madison*, is armor to check-to-check lawlessness legislative as well as executive with a review to serve "legitimacy of power" and administrative efficiency. Judicial review is the power by which judiciary aims at act vising by itself in retaining its domain of judicial activity over the state inactivity. This judicial activism is a multiortior as it makes action popularize not only popular through strategies of PIL vide pro bono public, but a rule of life for the lowly and lost, little man, deprived, underprivileged, destitute. As in India so far as the fundamental rights are concern Judicial review is provided explicitly under Article 13 of Indian constitution and for the rest of the constitutional provisions judicial review is implicit under the writ jurisdiction of the Supreme Court and the high court's given under article 32 and 226 respectively.

Further judicial review is also traceable in the “Doctrine of limited government”. And the classic examples of above are given in the case *Keshvananda Bharti v. state of Kerala* in which the Supreme Court passed orders under article 13 of Constitution and the *Bhagalpur Blinding* case of 1979-80, in which the Supreme Court ordered under Article 32 of Constitution of India. In post-independence India, the inclusion of explicit provisions for ‘judicial review’ were necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who chaired the drafting committee of our Constituent Assembly, had described the provision related to the same as the ‘heart of the Constitution’. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. While judicial review over administrative action has evolved on the lines of common law doctrines such as ‘proportionality’, ‘legitimate expectation’, ‘reasonableness’ and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence. Mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7th Schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures The Indian Constitution of India clearly provides for a system of checks and balances arbitrary or capricious use of the power derived from the said supreme document. Though, such a system appears to void the principle of separation of powers, of government and gives them both specific

and overlapping powers and functions. Thus there is no complete separation of functions between the three organs of the government.

The Principle of Separation of Power, Enshrined in the Indian Constitution, is Implicit in the Principle of Judicial Review



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2. 4. (A)- Judicial Declarations-

- **Keshavananda Bharti v. State of Kerala¹:** In this case, the Supreme Court that the amending power of Parliament is subject to the basic features of the Constitution. Hence any amendment violating the basic features will be declared unconstitutional.
- **Ram Jawaya Kapoor vs. State of Punjab²:** In this case it was held that the Indian Constitution has not actually enshrined the principle of separation of power in its full rigor, but has adequately recognized the functions of different parts or branches of the government. Differentiated and consequently it may very well be said that our constitution does not contemplate the assumption by one organ or part of the state of functions which are essentially related to another.
- **Swaran Singh Case³:** In this case, the Supreme Court declared the pardon granted by the Governor of Uttar Pradesh to a convict as unconstitutional.
- **Indira Gandhi v. Raj Narayan⁴:** Where the dispute related to the election of the Prime Minister was pending before the Supreme Court. It was held that the decision of a specific dispute is a judicial function which the Parliament, even under its constitutional amendment power, cannot perform. Therefore, the main ground on which the amendment was held to be ultra vires that when the constitution body that the election of the Prime Minister would not be void, it discharged a judicial function it should not have performed according to the principle of separation of powers. After this decision the pace of this

principle in the Indian context became clear to some extent. The separation of power is a part of the basic structure of the constitution. So, the schemes of the constitution cannot be changed even after restoring Article 368 of the Indian Constitution.”

- In **Asif Hameed v. State of Jammu and Kashmir**⁵, the Supreme Court observed that:-
“Though the constitution has not recognized the doctrine of separation of powers in its absolute rigidity, the drafters of the constitution have diligently defined the powers and functions of various organs. The legislature, executive and judiciary have to function within their own domain prescribed by the constitution. No organ may arrogate the functions allotted to another.”

Reference:

1. Keshvanand Bharti v/s State of Kerala 1973,4 SCC 225, AIR 1973
2. Rai Sahib Ram Jawaya Kapur and Ors. vs The State Of Punjab AIR 1955, SC 459
3. Swaran Singh v. State of U.P. 1998
4. AIR 1955 S.C.
5. AIR 1989 SC1899

