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JUDICIAL ACTIVISM AND **JUDICIAL INTERVENTION IN** **INDIA IN TERMS OF JUDICIAL** **REVIEW- A CRITICAL ANALYSIS**

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The closing strength is vested in the judiciary to keep the test and stability between the three organs of the government.

We adhere to the rule of law in India, which holds that the constitution is the best law of the United States of America and that any laws that clash with it are unconstitutional. A judge has the power to declare something unconstitutional and invalid when they find that a law, executive order, or other respectable action breaches the written constitution.

Using the tool of judicial review, one of the powers granted to the court is to certify the validity of legislative and judicial acts.

Basically, the strength of judiciary is exerted to have a look at the constitutionality of motion of the legislature and executive.

Judicial Review refers to the Judiciary's authority to study the Constitution and void any applicable law, legislative order, or presidential order. If it discovers that they do not comply with the Indian Constitution.

Judicial overview serves two essential purposes, such as legitimising authorities motion and defending the regulation from any immoderate authorities intrusion.

Keywords: Judiciary to review, Judicial Review, power of Judiciary, constitution of India, government action

“Judicial review...can be characterised as the rule of regulation in action...”

Introduction

"It is emphatically the province and obligation of the judicial department to mention what the law is. Those who study the guideline of thumb to particular cases, have to of necessity expound and interpret that rule. If prison recommendations conflict with each other, the courts need to parent out at the operation of each."¹

- **“Chief Justice John Marshall”**

The governing rule embodies judicial adjudication. It is the courts that judge the habits of the legislative and administrative bodies. He is also credited with redefining the judicial movement with the help of superior judicial authority. The court must consider the legitimacy of any agreement or attempt, whether it is prison or not. This is the concept of the rule of law. Judicial review is a test and a stabilizer for maintaining separation of powers. The separation of powers is the basis for jurisdictional control, because of the unusual separation of powers between our three legislative, administrative and judicial branches.

The division of powers describes the scope of judicial review. The illegal and unenforceable declaration of any regulations or ordinances that contradict or conflict with the traditions or fundamental foundations of the Constitution of India is a magical weapon in the hands of the courts. The two basic principles of judicial expertise are "limited government theory" and "constitutional supremacy with the requirement that the Constitution be checked on a daily basis".²

As guardian of the Constitution, the Supreme Court of India has the power to declare any central or national action or any administrative order in violation of the principles of the Constitution as super. bacteria. The power of the judiciary in monitoring legal directives from the legislature or government to determine their constitutional validity is well known. such as “The doctrine of judicial supervision”.³

America is the first home of Judicial Review. It was an established development in America.

¹ Available at <http://streetlaw.org/en/case/1%22> (last visited on 30 December, 2021).

² Prashant Gupta, “Doctrine of Judicial Review: A Comparative Analysis Between India, U.K. and U.S.A” IJLDAI 49

³ Available at www.quora.com/what-is-meant-by-the-doctrine-of-the-judicial-review (last visited on 01 December, 2021)

In the well-known case of *Marbury v. Madison (1803)*⁴ “Chief Justice John Marshal of the United States tacitly emphasized that the Court has the power to declare law or legal directives of the board to be supreme. Marshal asserted that this form of court sanction comes from the famous "Due Technique of Law" clause of the US Constitution. One of the Declarations of Rights of the United States Constitution is that "No man or woman shall be deprived of life, liberty, or property except by a system of laws.”.

There is no judicial review in the UK. England has a verbal constitution. The British Parliament is the supreme body. The Chief MP and the MLA are merged and the Cabinet is headed by the Prime Minister ensuring the best cooperation between Parliament and the Government. therefore, judicial expertise is not necessary. Judicial valuation is an essential stage of the Indian Constitution. similarly, the scope of judicial review in India has not always been as extensive as in the United States. Since the Constitution of India is the longest written charter in the world, judicial review is limited in India. In India, the indispensable rights have limited the scope of judicial review because there is a very important difference between the two provisions in each of the American and Indian charters, due process of the Constitution. United States law and "the procedure is bound by law". of the Constitution of India. Article 21 of the Constitution provides that "no man or woman shall be disadvantaged in his private way of life and his right to freedom"⁵ freely but not according to the technique established by law.” The "law" period set forth in the charter of India no longer proposes the regulation of herbal medicine but rather covers national law.

Chapter 2- Judicial Review

1.1 Meaning of Judicial Review

Legally speaking, national constitutions serve as the ultimate law of the land and the source of all other secondary norms, including statutory laws, executive orders, and ordinances.

Several judicial entities (courts or special constitutional tribunals) are asked to declare the contested legislation unlawful when these secondary norms violate the constitution. Only this process is subject to judicial or constitutional scrutiny.

So, under a constitutional form of government, the term "judicial review" refers to the job done

⁴ Available at www.history.com/this-day-in-history/marbury-medison-establishes-judicial-review (last visited on 2 December, 2021).

⁵ Article 21 Constitution of Indian

by the judiciary. The work associated with the two elements that make up this specific activity may be further analyzed as follows:-

The definition of "judicial" is: relating to or denoting a decision made by a court of law; having the role of a judge or making judgments; making a determination or judgment about something;

a) A review is a judgment, and

b) The process of reviewing something once again with the intention of fixing or enhancing it; a sentence being changed by a different court or authority; an investigation; a broad examination or reexamination of a topic or item; a review of the previous activities in the past;

A subsequent or repeated look.

"The ability of the court to hold unconstitutional any statute or official action that it considers to be in contradiction with the fundamental law, or the Constitution," is the definition of judicial review. 3

Judicial review is defined as "the authority of any court to rule unconstitutional and consequently unenforceable any statute, any official action based upon it, and any criminal activity by a public official that it considers to be in contradiction with the Basic Law" by Professor Henry J. Abraham.

A review is often defined as a second inspection or examination of something with the goal of fixing or enhancing it. It implies that there is something that has previously been done by another party that needs to be corrected or improved.

So, under a constitutional form of government, the term "judicial review" refers to the job done by the judiciary. The work associated with the two elements that make up this specific activity may be further analyzed as follows:-

(a) The definition of "judicial" is: of or pertaining to a decision made by a court of law; having the role of a judge or making judgments; making a determination or judgment about something; what constitutes sound judgment, and

(a) The term "review" refers to the process of going through something once more in order to make corrections or improvements; a sentence being changed by a different court or authority; an investigation; a broad examination or reexamination of a topic or item; a review of the previous activities in the past; A subsequent or repeated look.

Evolution and History of Judicial Review

In the early years of government, justice in England was a private business. Due to their land holdings, certain landowners organized themselves into private courts known as Hundreds, Shires, and Boroughs to administer justice to those residing within their spheres of influence. For a very long time, only private institutions handled other issues of social concern.

The way government was run completely changed with the arrival of the Normans. First, the King assumed private citizens' property ownership; second, because the King owned the whole realm of England, he was responsible for administering justice through his officials. The Monarch first created a set number of regular courts. Some cases that were formerly handled by private courts were allocated to these courts. Then the courts were founded to protect the royal interests in the exercise of the royal prerogative. Later, several other administrative issues impacting the King's interests were transferred from private organizations to public authority. Throughout time, the superior courts' system of judicial review disintegrated into several legal branches. The guiding principles of the control that had to be conducted were crucial factors in the administration system.

As a result, a significant number of issues were removed from the purview of private organizations, necessitating the development of a framework to ensure that the different public administration institutions operated within their respective purviews. In this case, the superior courts took the lead and established a system of control.

Exercise of their own authority over certain things. They argued that under the new administration's structure, topics that had previously been within their purview no longer came under their purview. This summarizes the system of judicial review of administrative action's historical basis.

Throughout time, the superior courts' system of judicial review disintegrated into several legal branches. The guiding principles of the control that had to be conducted were crucial factors in the administration system.

Later on the doctrine of judicial review can be traced back from the United States of America in the case of *Marbury Vs. Medison* Whereas different charter of the world developed the thought in the course of 18th century. In Indian judicial gadget the thought of judicial overview

is primarily based on the Rule of law. In India Since, Govt. of India Act 1858, viz-viz Indian Council Act 1861 imposed numerous restrictions on the strength of Governor General in council in evading legal guidelines as there had been no provisions for judicial review. The Court has only power to implement those laws. In 1877 *Emperor Vs. Burhah*⁶ was the first case whereby the court docket interpreted as nicely as originated the notion of judicial evaluate in India. In this case the court docket dominated that the birthday party turn out to be aggrieved through the legislation, he has the proper to task the constitutionality of the act enacted by way of the Governor Council in get right of entry to of the electricity conferred upon him by using the imperial parliament. The excessive court docket and privy council has adopted the view the Indian Courts has energy to assessment the legislature with some limitations.

Again in, *Secretary of State v. Moment*⁷ Lord Haldane observed that “the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858”.

In another case, *Annie Besant v. Government of Madras*,⁸ though, the predominant components of the charter of India has been browed from Government of India Act, 1935, the stated act had no provisions pertaining to Judicial Review which motive issues to the court docket and necessitated the adoption of Judicial review. Hence, the Constitution of India explicitly point out the Doctrine of judicial evaluate vide its Art. 13, 32, 131-136, 137, 143, 226, 227, 245, 246, 372.⁹

1.2 Judicial Review in India

Indian Constitution is the blend of ideas of several constitution of the world. The impotence of the Indian Constitution as explained by H.C.L. Merrilat,¹⁰ he stated that "it shows the union of the British parliamentary system where the executive is accountable to the legislature and the constitution is written on the American model, including the declaration of human rights and the separation of powers and the principles of law." federal rule by dividing power between the center and the federation.” units, leading to a unique constitutional position in judicial review in India.”

⁶ 1877 3. ILR 63 (Cal)

⁷ 1913 40. ILR 391 (Cal)

⁸ 1918 . AIR 1210 (Mad)

⁹ M.Laxmikanth, Indian Polity (Tata McGraw Hill Education Private Limited, New Delhi, 2010)

¹⁰ H.C.L. Meillat, University of Toronto Law Journal, Vol. 15, 1963-64, pp. 489-492, quoted by P. Ravi Jashuva

Regulatory supremacy is the spirit of the Indian Constitution. In India, "the doctrine of trial" is the main structure of the Indian Constitution. It is mainly based on the idea of the rule of law. Although the doctrine of judicial oversight is neither described in the Constitution of India nor implicitly emphasized, it is the fundamental stage of the Indian Constitution of India. Judicial oversight, in the Indian constitution, has been added to tighten checks and balances among the three bodies, namely the legislature, the judiciary and the executive.

Various provisions of the Indian Constitution explicitly mention about the judicial review to the court such as Articles 13, 32, 131- 136, 137, 141, 143, 226, 227, 245, 246, 372.

The most prominent goal of judicial expertise is to protect citizens against abuses of power by the legislature or the executive. The man or woman is treated simply and honestly. The simple basis of judicial review is to assert the alleged right of an event in order to mitigate other unpleasant facts by declaring the enactment of the legislature null and void. But, the real purpose is to serve something greater, which is that no law unconstitutional should be enforced with the aid of the courts.¹¹

The Constitution of India, like many other written statutes, provides for the "separation of powers" among the three organs of the constitution. There is no body that fights the forces as much as the various organs endowed with them. The doctrine of separation of powers mentioned in its inflexible part holds that each body of the constitution, namely the legislature, the government, and the judiciary, must operate on the strength of the themselves within the individual and there is no conflict between their activities. The Indian constitution is not about the rigid empirical division of powers, but about equality in a flexible way that can be easily distinguished. It is quite possible that our charter no longer reflects the hypothesis, through a body of characteristics that in fact belong to someone else.¹²

1.3 Constitutional Provisions regarding Judicial Review

The father of the Constitution of India noted the great importance of checks and balances between the three bodies, as he stated by Lord Acton that "power tends to corrupt; absolute power corrupts absolute" means that when an agency has absolute power, it needs another body

¹¹ Justice CK Thakkar and Justice Arijit Pasayat, Dr. CD Jha Judicial Review of Legislative Acts 116 (2nd, Lexis Nexis Butterworths Wadhwa, Nagpur 2009)

¹² Ram Jawaya Kapoor v. State of Punjab, AIR 1955 SC 549 at 556.

that can monitor its actions. In the Constitution of India, judicial review has been noted to oversee the actions of the executive and legislative bodies.

Article 13 and 32 of the Indian Constitution signify the attachment of founding father with fundamental rights enshrined in Part III of the Indian Constitution. The Hon'ble High Court and Supreme Court have been bestowed with the power of judicial review in following aspect.

- (i) The Judicial evaluation potential the energy of the greater courtroom to investigate the delegated or subordinate law in context with their compatibility with dad and mom act. This is known as the “doctrine of extremely vires.
- (ii) Under the Federal Constitution, the courts are capable of confirming the concept of the transfer of administrative power between the central government and the provincial government. This biological potential is innate in the Synthetic Energy Structure independent of whether that current is explicitly or surely supplied or essentially collected. Statutory audits in this sense are consistent with government constitutions, comparable to those of the United States and India, and are therefore not defined by the British Constitution as unitary and unwritten. Judicial appreciation in one-third of its most frequent experience allows the Court to declare any action unconstitutional if it is no longer in accordance with the fundamental principles of the law. Indian charter. This is the essence of what was proposed by Judge Marshall and the same is done by the Indian and American courts.¹³
- (iii) The basic feature of Indian Constitution of India is that the Supreme Court in ***Keshavanand Bharti Vs. State of Kerela***,¹⁴ asserts that the Legislature has the power to amend any phase of the Constitution of India in addition to amending the basic form of the Constitution of India. The Court of Honor formulated the concept of "simple structure of doctrine" in the Constitution of India. The Legislature cannot damage the basic function of the Constitution of India. It should be pointed out that the one-of-a-kind judges on the bench have claimed unique core characteristics, but the concept of judicial expertise is no longer protected on the list. Later on, in the case of ***Minerva Mills v. Union of India***,¹⁵ the “doctrine of judicial review” has been added in the list and the constitutional amendment has been tested on the grounds of “***basic structure doctrine***” the Hon'ble Supreme court struck down certain provisions (amendments) only on the

¹³ Encyclopedia of the American Constitution 1054 (1986), quoted by V. Nageswara Rao and G.B.Reddy, Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead, ”(1997) 39 JILI. 415.

¹⁴ (1973) 4 SCC 225

¹⁵ AIR 1980 SC 1789

grounds of infringing the basic structure of the constitution as that amendment has ousted the power of the judicial review of supreme court and High Court. ¹⁶

The necessity of courts to declare any act or statute unconstitutional occur now not due to the fact the judiciary is the supreme as a substitute it keep the assessments and balances amongst legislature or govt in one hand and in any other hand affords capability to right the errors of one and other or both. The responsibility of judiciary is to shield the errors or the different organs and hold regulation and order in the society.

The exercise of judicial review by constitutional courts is not restricted but it has certain limitations. The limitations or restrictions are covered mostly of the constitution itself. According to D.D Basu,¹⁷ there are three kinds of barriers prescribed therein in the constitution- Constitutional limitations, intrinsic issue or self- imposed limitation. The constitution of India by way of more than a few articles excluded sure provisions from judicial review. These are Article 31 A, 31-B study with Ninth Schedule, 31-C, 74(2), 77(2), 105(2), 194(2), 122, 232-A, 323-B, 239(a) 359, 361-A, 363, 368 (4) and Tenth Schedule. Whereas later on, certain articles were included in the list of judicial review. The Hon'ble court in the case of *L. Chandrakumar Vs. UOI*,¹⁸ ruled that the judicial review is the basic feature of the Indian Constitution.

In the case of *IR Coelho Vs. State of Tamil Nadu*,¹⁹ the supreme court considering the view taken in *Keshavanand Bharti*,²⁰ ruled that the judicial evaluate is most essential aspect of Indian Constitution of India and Schedule 9 can additionally no longer be alibi from Judicial review. Any acts inserted in agenda 9 of Indian Constitution of India are concern to judicial overview to extent it abridges crucial rights of the individuals.

In India judicial evaluation is now not confined to the extent of charter itself instead there are various different statute as properly which prescribe judicial evaluation like-wise Section 114 Order forty seven Code of civil process 1908 (hereinafter C.P.C), part a hundred and fifteen of C.P.C, Section 397, 399 of Criminal method code (herein after Cr.p.c). There are different provisions enshrined in the many statutes which impliedly guide judicial evaluate in India.

¹⁶ P. Sambhamurthy v. State of A.P. AIR 1987 SC 663; Kihota v. Zachillu (1992) Supp. (2) SCC 651; L. Chandra Kumar v. U.O.I. AIR 1997 SC 1125.

¹⁷ D.D. Basu, Commentary on the constitution of India, 5th Ed., Vol. 1, p. 170.

¹⁸ 1997 (2) SCR 1186

¹⁹ AIR 2007 SC 861

²⁰Supra

Features of Judicial Review

In my opinion, India is a democratic united states because of this that withinside the phrases of Abraham Lincon, “Democracy is a government of the people, thru the human beings and for the people”. In democratic usa of the us the government is administered with the useful resource of the people. Every unmarried citizens have right to stable vote and determine on their representatives. It is basically, one-of-a-kind from monarchy or dictatorship, in dictatorship there may be one king who has all of the authority of Government.”

Coming to the judicial evaluate concept, in democratic usa except judicial overview the democracy can't subsist. As democracy is for the advantages of the human beings and the representatives elected by way of the humans characterize them in the each homes of parliament. The regulation making energy subsist with the legislature whereby they make the law. And the thought of judicial assessment bestow the strength to the judiciary to scrutinize the regulation made by means of the legislature and if some thing observed opposite the fundamentals of the constitution, declare that act unconstitutional.

Judicial Review of State or central Laws

Article 13 of Constitution of India provides judicial review. Laws made by Centre or State are subject to Judicial Review which is inconstant with fundamental right under Part III of the Constitution.

Application of Judicial Review

The judicial review is not automatically (Suo Motu) applied or challenged until and unless it is not challenged. It is applied or challenged when there is question of law or rule involved and the same is challenged.

Principal of Judicial Review

Judicial review is based upon the principal of “Procedure established by law” enshrined under Art. 21 of the Constitution of India or “Due process of Law” impliedly taken from the U.S Constitution. Basically, Due process of Law means the Law must be just and fair. It should not be arbitrary.

There are three types of Judicial review:-

Review appertaining to Legislative action:

The law making power bestowed upon the legislature and the legislature are bound to comply the provisions of constitution while making the law.

Review of Administrative action:

Administrative are the enforcement agencies and this is a tool for exercising the discipline while implementing the law by administrative agencies.

Review of Judicial decisions:

The judiciary is the backbone of Indian democratic system and it cannot be ruled out to that judiciary has a wide power among two other organs. it has power to change its descision under Art. 137, 145, 226, 32 of the Constitution of India.

1.4Judicial Activism in context of Rule of Law

Judicial Activism is a dynamic process in Indian Judiciary. The term “judicial activism” refers when the judiciary exceeds it power; stepping in the shoes of legislature and coming with a new rules and regulations. In another sense the law making power bestowed upon the legislature whereas judiciary can neither make the law nor direct to make the laws. In judicial activism not only he makes the law rather it also tells the legislature what and how it does make laws.

For the first time **Arthur Schlesinger** introduced the term “judicial activism” in a January 1947 fortune magazine article titled “The Supreme Court: 1947”²¹ According to Justice J.S Verma, Judge Supreme Court of India, “The role of the judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of Judicial Activism.”

The time period judicial activism can be traced again in 1893. When Allahabad High Court choose S. Mahmud held that the pre-condition for listening to a case would be performed solely when any individual speaks. In the case, the beneath trial was once no longer in a role to have

²¹ Hon’ble Mr. K.G. Balakrishnan, Judicial Activism under the Indian Constitution available at http://www.sci.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf , Visited on 31.11.2021

the funds for a legal professional (Justice Mahmud, 1893).²²

Judicial Activism is based on two main theories (i) Theories of vacuum filing (ii) Theories of Social want.

(A) Reasons for growth of Judicial Activism

It is more difficult to identify the growth of Judicial Activism as there is not a single reasons wherein the evolution of judicial activism takes place.

In India, Rule of Law has given the highest place and in this way, the judicial activism derived impliedly from the Rule of law as Rule of law has the synthesis from (i) Supremacy of Law (ii) Equality before law (iii) Absence of Arbitrary. The judicial activism keeps all the principle in consonance with the rule of law.

By the way there are following reasons which cannot be denied to the reasons of evolution of rule of law. (i) Judicial enthusiasm, (ii) Legislative vacuum, (iii) Moral pressure on judiciary, (iv) Near collapse of responsible government, (v) The Constitutional provisions, (vi) Guardian of Fundamental Rights, (vii) Public confidence, (viii) Enthusiasm of the individual players.

(B) Evolution of Judicial Activism in India

In India judicial activism mainly taken place in the year 1950 to 2000 in broad sense, the court emphasizes over the constitutional validity of laws affecting the fundamental rights of the individual.

One of the land mark cases appertaining to judicial activism is ***Keshavanand Bharti Case***,²³ wherein the court formulated doctrine of basic structure as the question tabled before the Supreme Court that to what extent the parliament can amend the constitution. Basically, the apex court by formulating the doctrine of basis structure; overruling ***Golaknath Case***.

The main question arose that the court has not the power of making laws or directing to make laws whereas in the instant situation the Apex Court outlined the concept of basic structure doctrine limited the amending power of the legislative. The legislature can amend any part of

²² Evolution & Growth Of Judicial Activism In India', Shodhganga at 79, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf (Last accessed on 10.12.2021).

²³ Supra

the constitution but he cannot abridge the fundamental rights of the people or cannot alter the basic structure of the Indian Constitution. In this way, the court step his foot in the shoes of legislature.

Introduction of PIL and Judicial Activism

As said there is catena of judgments, wherein the court has not deferred himself from evolving judicial activism, introduction of PIL in Indian history is itself an strong example of judicial activism. It was introduce in the case of Bangladesh as an outcome of *Kazi Moklesur Rahman v. Bangladesh*,²⁴(hereinafter referred as “*Berubari case*”) in which the matter of locus-standi was came into consideration and later on, in the case *Dr. Mohiuddin Farooque v. Bangladesh & others*,²⁵. The PIL was introduced to protect the interest of the individuals, when their legal rights get infringed.

Problems and Criticism with Judicial Activism

Sometimes the court abuses its authority in the name of judicial activism and frequently combines personal prejudice and opinions with the law. With judicial activism, the notion of the three branches of the state's separation of powers is put to the test. Under the guise of activity, the court frequently meddles in administrative affairs and engages in judicial adventurism or overreach.

Problems with Judicial Review

As previously discuss in this project/ article, judicial review is the core of democratic country, there are some problems subsist with judicial review as well.

There is some problems outline as follows:

- (i) Excessive use of judicial power by the judicial authority.
- (ii) The judicial review limit the power of government; sometime cause unnecessary intervention by the courts in the work of government.
- (iii) Unnecessary bias on the part of judiciary.

²⁴ 1974, 26 DLR 44(AD)

²⁵ 1977, 49 DLR 1 (AD)

Chapter 3. Rule of Law

1.1 Evolution of Rule of Law

Rule of law means the law regulates everything besides the government or other authority. In democratic country the government is chosen by the people but it runs within the sphere of law. In simple term nothing is above than the law.

The time period rule of regulation derives from the French phrase 'la principe de legalite' which capacity the 'principal of legality'. It refers about a authorities based totally upon ideas of regulation and now not of men. In different sense, ideas of 'la principe de legalite' adversarial the arbitrary energy of the government.

The thinking of Rule of regulation is an historic exercise and can be traced lower back at the time of historical Greek Philosopher Aristotle or Plato round 350 BC.

Plato wrote: "Where the law is a challenge to some other authority and has none of its own, the give up of the state, in my view, is not far off; however, if the law is the grasp of the government and the government is its slave, then the situation is full of promise and men take pleasure in all the benefits that the gods shower on a state," said Benjamin Franklin. Aristotle also advocated for the idea of Rule of Law, stating in his writings that "law must dominate and those in positions of authority must be slaves of the laws."²⁶

The third principle discharges one of the most prominent obligations, declaring the role of judiciary in enforcing the rights of the individuals. Dicey tells mere declaration of rights in the book would be futile until and unless there is enforcement mechanism. The rights can be amended or abrogated without such authority. We can see a situation in the year 1975 when the Indira Gandhi led government proclaim emergency in the country abrogating all rights of the individuals. Wherein it was realizes that the absence of strong or powerful judiciary, despite written constitution.

²⁶ Flathman Richard (1994). 'Liberalism and the suspect Enterprise of political Institutionalism: the case of the Rule of Law', *The Rule of Law: Nomos XXXVI*, New York: New York University Press

1.2 Criticism of Dicey's Rule of Law

The idea that the rule of law precludes even broad discretionary authority by the government has gravely questioned Dicey's first principle (supremacy of regular law as opposed to the impact of arbitrary power). The large number of statutes that are yearly enacted by parliament or other legislatures give the president many discretionary powers that are essential to contemporary government. It appears that Dicey's wording could be read to oppose the thousands of rules that are made at the discretion of delegated officials in our society. This first principle also conflicts with the fact that many modern laws give police the authority to hold individuals for a brief period of time based only on a plausible suspect. This is essential for efficiency reasons. Jennings, Ivor

The second interpretation of Dicey emphasises how everyone is equally subject to the law. A constitutional guarantee of equality before the law may allow legislation that discriminates between people on reasons that are deemed irrelevant, undesirable, or offensive to be declared unlawful. Although Dicey's beliefs have long prevented the proper understanding of administrative law, it is now impossible to dispute the necessity of such law in a democracy. The existence of administrative courts safeguards the person from illegal actions by public entities. Equal treatment under the general law of the land, Dicey's second principle, may also be contested under current legal standards. Although it is true that public officials who commit crimes or torts are liable before the ordinary courts (except for circumstances of nonjusticiability, such as in *The Church of Scientology v Woodward*,²⁷ it is not true that those public officials and private citizens have the same rights, and are thus equal. "A tax investigator, for example, has powers which the taxpayer does not possess". In addition, police officers might be able to use much greater legal authority than a typical citizen might over other members of society.

The equality earlier than the regulation premise has created serious troubles for the rule of law. It would be unfair if the regulation assumed that all of us was once equal and entitled to the identical treatment, brushing off social disadvantage. This led Hayek to try to adapt the rule of regulation in a manner that Joseph Raz concept created "exaggerated expectations" for it . Hayek stated: "The requirement that the guidelines of actual regulation be prevalent does now not suggest that on occasion one of a kind guidelines may additionally no longer follow to

²⁷ Church of Scientology v Woodward, (1983) 57 ALJR 42

distinctive lessons of humans if they refer to residences that solely some human beings possess... Such distinctions will now not be arbitrary; will no longer difficulty one crew to the will of others, if they are equally identified as justified by means of these internal and these outdoor the group". This assertion lead Raz to allege it was once a assurance of freedom and a "slippery slope main to the identification of the rule of regulation with the rule of top law". In his 1/3 definition of the term, Dicey strongly favoured the frequent regulation standards that judges had deemed to be the cornerstone of people' rights and liberties. Dicey was once wondering of the imperative political liberties, such as freedom of speech, freedom of association, and freedom of the individual. Today, it is difficult to share Dicey's faith that the frequent regulation is the predominant criminal device for defending a citizen's rights towards the state. First, Parliament can also weaken frequent regulation imperative liberties and provide them a residual character. Second, the frequent regulation does now not assurance the monetary and social protection of the citizen. Third, whilst ample criminal redress are crucial, a proclamation of a person's crucial rights and freedoms can be valuable. Diceyan idea might also be in addition criticised due to his appreciation of the "sovereignty of Parliament and the supremacy of the rule of (ordinary) law". Keith Mason has pointed out that Australian parliaments may also be supreme, however they are now not sovereign. "The rule of regulation affirms parliament's supremacy while at the identical time denying it sovereignty over the Constitution." Criticisms of Diceyan idea have lead to unique formulations of the rule of law; however Dicey's method nevertheless displays some of the critical standards of the rule of law. In following his system some commentators decide on the slim time period 'government beneath law' as a substitute than 'rule of law'. However, different writers select to outline the rule of regulation as a "statement of constitutional and juridical principle, a juristic reserve, an thought of a profound legality superior, and maybe previous, to specific legislation" as an alternative than as an true rule of regulation in itself. It is tough to characterise exactly because, like these different excellent negatives, peace and freedom, it on occasion suggests itself as greater of an absence than a presence.

Assault on Independence of Indian Judiciary

"The millions of people who suffer are served by India. It signifies the cessation of poverty, illiteracy, sickness, and opportunity inequity. The greatest guy of our time has made it his mission to dry every last tear. Even if it may be beyond our power, as long as there are tears

and pain, our task is not done".²⁸

As soon as the constitution 24th amendment was challenged in the case of ***Keshavanand Bharti Case***,²⁹ the SC by a majority of Judgement overruled the decision of rendered in Golaknath's Case and held that the parliament has very wide power to amend the constitution subject to abrogation of basic structure of the constitution. There is implied restrictions contained in Art 368 to amend the constitution and the parliament has to work within that sphere. Justice HR khana played a pivotal role in preserving the rule of law by giving dissenting opinion. As soon as the judgement delivered, the Indira ghnadhi led government influenced the president and appointed Justice A.N Ray as the Chief Justice of India bypassing four senior most judges of the Supreme Court. The three judges resigned the post in the name of settled convention to make the senior most judge as the chief justice of India.

Justice Ray had given dissenting opinion in favour of the Govt. in several cases like, Bank Nationalization case and Privy Purses case.

1.3 Habeas Corpus Case (A Black Mark on the Rule of Law)

In the year 1975, the Indira Ghandhi led govt. proclaim emergency and when the people oppose the autocracy of govt. The widespread illegal detention came into the consideration before the court laying with bunch of Habeas Corpus petition, seeking setting aside the unlawful detention of the citizen or political leaders all over the country. With all other high court, Nine High Court took the notice that the fundamental rights under Art. 14,19,21 & 22 should not be suspended, hence the petition are maintainable.

In ***A.D.M Jabalpur Vs. Shivkant Shukla***,³⁰ the Supreme Court overturned the verdicts of these High Courts but a majority of 4:1 and he pointed out that neither detainees nor their representatives have the right to appeal to the courts for suspension of fundamental rights under habeas corpus. This decision either precluded an appeal against a lawful arrest warrant or was abusive. H. It was not issued by an authorized person or to the wrong person. The majority consisted of Chief Justice A N Ray, Justices MH Beg, Y V Chandrachud and P N Bhagwati, with the sole dissent being Justice H R Khanna.

²⁸ Jawaharlal Nehru

²⁹ AIR 1973 SC 1461

³⁰ AIR 1976 SC 1207

Strong Comments have been made in opposition to the majority judgments and the position of Justice H R Khanna was once liked and applauded all over the world. Mr. V M Tarkunde, an eminent legal professional and editor of *The Radical Humanist*, characterized the majority judgments as “Judicial Suicide”. H M Servai, a main Commentator on Constitutional Law and former Advocate General of Bombay wrote: The Four judgments delivered in the darkest hour of India’s records independence, and they made that darkness complete... Ordinary guys and girls may want to apprehend Satan saying, ‘evil be thou my good’, however they had been bewildered and confused to be informed by way of 4 realized judges of the Supreme Court that in substance the founding fathers had written into the emergency provisions of our charter ‘lawlessness be thou our law³¹’.

The Supreme Court reached its best hour in the unforgettable dissent of Justice H R Khanna. He refused to bow down to the powers that be and immortalized the incredible spirit of the judiciary and the rule of regulation in his stinging dissent, observing: It has been argued that suspending the proper of a Person to cross any court docket for enforcement of proper to existence and private liberty is completed underneath a constitutional provision and consequently it can't be stated that the resulting scenario would be the absence of the rule of law. This argument, in my opinion, can't stand shut scrutiny for it tries to equate phantasm of the rule of regulation with the fact of rule of regulation . In his autobiography, Justice Khanna recounts that he informed to his Younger sister Santosh, “I have organized a judgment which is going to fee me the chief Justiceship of India³²”. That got here to be proper and Khanna used to be Superseded b Justice Beg all through Emergency. He thereupon resigned.

But any lookup on Rule of regulation is incomplete except a reference to the editorial in the New York Times which regarded on April 30, 1976, quickly after Habeas Corpus case. The Paper wrote: if India ever finds its way lower back to the freedom and democracy that had been proud hallmarks of its first 18 years as an unbiased nation, any individual will simply erect a monument to Justice H R Khanna of the Supreme Court. It was once Mr. Justice Khanna who spoke out fearlessly and eloquently for freedom this week in dissenting from the court’s choice upholding the proper of PM Indira Gandhi’s Government to imprison political opponents at will and besides courtroom hearings. Indian democrats are probably to bear in mind solely in infamy the 4 judges who obediently over grew to become the selections of a half of dozen

³¹ Seervai H M (1993). *Constitutional Law of India*, Bombay: Tripathi Publishers.

³² Khanna H R (1987). *Neither Roses nor Thorns*, Lucknow: Eastern Book Company

decrease courts scattered throughout India which had dominated in defiance of the government.....But they will lengthily cherish the lonely choose who said, in phrases reminiscent of different enduring declarations for freedoms: "...The Principle that no one shall be disadvantaged of his lifestyles and liberty besides the authority of regulation is rooted in the consideration that existence and liberty are treasured possessions"The submission of an unbiased judiciary to absolute authorities is truly the final step in the destruction of a democratic society; and the Indian Supreme Court's selection seems shut to utter surrender.

How the emergency got here to an stop and Indira Gandhi used to be defeated at the polls is every other story. Neither Chief Justice Ray nor Chief Justice Beg have been in a position to stay down their judgments. Justice Chandrachud and Justice Bhagwati each grew to be the Chief Justice of India after the Emergency used to be withdrawn on the foundation of seniority however they by no means commanded the respect, affection and reverence which Justice Khanna Commanded. Justice Khanna used to be in the Mould of Chief Justice Coke who may want to face up to "the frowns of power" and the refused to be "Craven and cringing.

Judicial review of legislative action

Judicial Review of Amending Power of Parliament:

(i) Theoretical Perspectives on Amending Power:

The term "amend" denotes "to improve" in everyday usage. Yet, its definition becomes highly precise and detailed when employed in the context of constitutional revision. As a result of this analysis, the term "constitutional amendment" is used to refer to any alteration, addition, or deletion of any provision that affects the body of the basic legislation of the country. That is, it "carries all shades of meaning, including amendment, revision, repeal, addition, variation, or delegation of any provision of the Constitution" when used in reference to a constitution. 1 2 3 "It has evolved to indicate every form of change brought about by the process of amending the constitution," according to usage. To the extent of declaring "to modify is to reconstruct and reconstitute," a well-known foreign author.

(ii) Operational Perspective on the Amending Power of Parliament:

The following clauses discussing the competence of the Parliament to change the Constitution are found in Part XX of the Indian Constitution. Article 368, paragraph 1, of this section of the Constitution states. "Despite any other provisions of this Constitution, Parliament may, in the

exercise of its constituent authority, alter any provision of this Constitution by way of an addition, a modification, or a repeal in accordance with the method set forth in this article." Sub section 2 of Article 368 of the Constitution outlines the procedural requirements for the amending power, as follows: "(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting."

(iii) **Limitations on the Amending Power:**

The term "legislative action" refers to any activity carried out by an organization with the intent of establishing rules of conduct. This activity can take the shape of original legislation, secondary legislation, or even the creation or amendment of a constitution. The specific categories of legislative powers chosen for study include primary legislation, such as the amending power of parliament, executive powers, such as the ability to enact laws after delegating such authority, and administrative powers, such as the ability to levy taxes, create delegated laws, and adopt specific other administrative measures.

Conclusion/ Suggestions/ Remarks

In my Concluding remarks, I would definitely not deferred myself saying that Judicial Review is a rule of law in context of judicial Activism, without Judicial review there would be anarchy in the state as the judicial review used to maintain checks and balances between the three organs. Judicial Review also maintains law and order in the society that no single organ command or keep power with them.

As Rule of Law have three principles (i) Supremacy of Law (ii) Equality before law (iii) absence of Arbitrariness.

The Judicial Review in India keeps all the three concepts of with consonance of Rule of Law. It keeps the law in supremacy also empowers the court to scrutinize the law made by the parliament in consonance with the fundamentals of the law. If the same is not in consonance with the fundamental principles of law. The court can turned the same down.

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