

**JUDICIAL REVIEW AS
DEFINED UNDER
ARTICLE 13**

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1.1 INTRODUCTION

The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy. All this is possible thanks to the power of judicial review.

All this is not achieved in a day it took 50 long years for where we are right now, if one thinks that it is has been a roller coaster ride without any hindrances they are wrong Judiciary has been facing the brunt of many politicians, technocrats, academicians, lawyers etc. Few of them being genuine concerns, and among one of them is the aspect of corruption and power of criminal contempt.

The rule of law is the bedrock of democracy, and the primary responsibility for implementation of the rule of law lies with the Judiciary. This is now a basic feature of every Constitution, which cannot be altered even by the exercise of new powers from Parliament. It is the significance of Judicial Review, to ensure that democracy is inclusive and that there is accountability of everyone who wields or exercises public power.

As *Edmund Burke* said: "all persons in positions of power ought to be strongly and lawfully impressed with an idea that "they act in trust," and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people".

India opted for parliamentary form of democracy, where every section is involved in policy-making, and decision taking, so that every point of view is reflected and there is a fair representation of every section of the people in every such body. In this kind of inclusive democracy, the Judiciary has a very important role to play. That is the concept of accountability in any republican democracy, and this basic theme has to be remembered by everybody exercising public power, irrespective of the extra expressed expositions in the constitution.

The principle of Judicial Review became an essential feature of written Constitutions of many countries. Seervai in his book Constitutional Law of India¹ noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India, though the doctrine of Separation of Powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another.

The power of Judicial Review has in itself the concept of separation of powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The power of Judicial Review is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the judiciary in India has come to control by Judicial Review every aspect of governmental and public functions.

¹ Vol.3, 4th Edition

‘Judicial Review’ is the power of courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void. “Judicial Review” said Khanna,J., in the *fundamental rights case*², “has thus become an integral part of our Constitutional System and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any of the articles of the Constitution which is the touchstone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provisions”.

That power corrupts a man and a absolute power corrupts absolutely which ultimately leads to tyranny, anarchy and chaos has been sufficiently established in course of evolution of human history, and all round attempts have been made to erect institutional limitations on its exercise. When Montesquieu gave his doctrine of separation of powers, he was obviously moved by his desire to put a curb on absolute and uncontrollable power in any one organ of the Government. A legislature, an executive and a judicial power comprehend the whole of what is meant and understood by Government. It is by balancing each of these two powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in the Constitution.

Judicial Review is thus the interposition of judicial restraint on the legislative as well as the executive organs of the Government. The concept has the origin in the theory of limited Government and in the theory of two laws an ordinary and supreme. From the very

² Kesavananda Bharati v. State of Kerela, AIR 1973 SC 1461

assumption that there is supreme law which constitutes the foundation and source of other legislative authorities in the body polity, it proceeds that any act of the ordinary law-making bodies which contravenes the provisions of the supreme law must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts void.³

1.2 BACKGROUND

The doctrine of judicial review was for the first time propounded by the Supreme Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. The power of judicial review was however, assumed by the Supreme Court of America for the first time in 1803, the Supreme Court, led by Chief Justice John Marshall, decided the landmark case of *William Marbury v. James Madison, Secretary of State of the United States*⁴ and confirms the legal principle of judicial review the ability of the Supreme Court to limit Congressional power by declaring legislation unconstitutional in the new nation.

The court ruled that the new president, Thomas Jefferson, via his secretary of state, James Madison, was wrong to prevent William Marbury from taking office as justice of the peace for Washington County in the District of Columbia. However, it also ruled that the court had no jurisdiction in the case and could not force Jefferson and Madison to seat Marbury. The Judiciary Act of 1789 gave the Supreme Court jurisdiction, but the Marshall court ruled the

³ Basu's Commentaries on Constitution of India, Vol.1.

⁴ 5 U.S. 137 (1803)

Act of 1789 to be an unconstitutional extension of judiciary power into the realm of the executive.

In writing the decision, John Marshall argued that acts of Congress in conflict with the Constitution are not law and therefore are non-binding to the courts, and that the judiciary's first responsibility is always to uphold the Constitution. If two laws conflict, Marshall wrote, the court bears responsibility for deciding which law applies in any given case. Thus, Marbury never received his job.

Jefferson and Madison objected to Marbury's appointment and those of all the so called "midnight judges" appointed by the previous president, John Adams, after Jefferson was elected but mere hours before he took office. To further aggravate the new Democratic-Republican administration, many of these Federalist judges although Marbury was not one of them were taking the bench in new courts formed by the Judiciary Act, which the lame-duck Federalist Congress passed on February 13, 1801, less than a month before Jefferson's inauguration on March 4.

As part of the "Revolution of 1800," President Thomas Jefferson and his Democratic-Republican followers launched a series of attacks against the Federalist-controlled courts. The new Democratic-Republican-controlled Congress easily eliminated most of the midnight judges by repealing the Judiciary Act in 1802. They impeached Supreme Court justice Samuel Chase, but acquitted him amidst inner-party squabbles. The Chase acquittal coupled with Marshall's impeccably argued decision put an end to the Jeffersonian attack.

ARTICLE 13

Laws inconsistent with or in derogation of the fundamental rights

1. All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
2. The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
3. In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
4. Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.

Article 13 (1): Existing laws inconsistent with the Constitution. - This clause provides that all 'Laws in force' at the commencement of the Constitution which clash with the exercise of the fundamental rights conferred by Part III of the Constitution shall, to the extent be void.

1. But this does not make the existing laws which are inconsistent with the fundamental rights void *ab initio*. The entire Part III of the Constitution including Art. 13(1) is prospective. Hence, existing laws which are inconsistent with any provisions of Part III are rendered void only with effect from the commencement of the Constitution, which for the first time created the Fundamental Rights. The inconsistency referred to in Art.13(1), therefore, does not affect the transaction past and closed before the commencement of the Constitution or the enforcement of rights and liabilities that had accrued under the 'inconsistent laws' before the commencement of the Constitution.
2. On the other hand, it does not mean that unconstitutional procedure laid down by a pre-Constitution Act is to be followed in respect of 'pending' proceedings or in respect of new proceedings instituted with regard to pre-Constitution rights or liabilities. Just as there is no vested right in any course of procedure there is no vested liability in matters of procedure in the absence of any special provision to the country.
3. But if the proceedings had been completed or become final before the commencement of the Constitution, nothing in the Fundamental Rights of the Constitution can operate retrospectively so as to affect those proceedings. For the same reason, it is not possible to impeach the validity of that part of the proceedings which had taken place under the 'inconsistent' law, prior to the commencement of the Constitution.

4. The effect of Art. 13(1) is not to obliterate the inconsistent law from the statute book for all times or for all purposes or for all people. The effect is that the inconsistent law cannot, since the commencement of the Constitution, stand in the way of exercise of fundamental rights by persons who are entitled to those rights under the Constitution. It remains good, even after the commencement of the Constitution, as regards person who have not been given fundamental rights, e.g., aliens.
 - a. It follows, therefore, that if any subsequent point of time, the inconsistent provision is amended so as to remove its inconsistency with the fundamental rights, the amended provision cannot be challenged on the ground that the provision had become dead at the commencement of the Constitution and cannot be revived by the amendment. All acts done under the law since the amendment will be valid notwithstanding the fact of inconsistency before the amendment. It is known as the doctrine of 'eclipse'.
 - b. For the reason, if the Constitution itself is amended subsequently, so as to remove the repugnancy, the impugned law becomes free from all blemishes from the date when the amendment of the Constitution takes place⁵.

Constitutionality of pre-Constitution order.-

1. The provisions of Part III of the Constitution having no retrospective effect, any action taken under any law which was valid at the time when such action was taken (i.e., prior to the coming into force of the Constitution) cannot, after the commencement of the Constitution, be challenged as Unconstitutional on the score of its infringing any of the fundamental rights.

⁵ Quasim Razvi Syed v. State of Hyderabad, AIR 1953 SC 355

2. A person whose interest had been lawfully put to an end before the Constitution came into force is not entitled to invoke the protection of Art. 19.

Clause (2): Post-Constitution laws which are inconsistent shall be void *ab initio*.-

1. This clause provides that any law made by any Legislature or other authority after the commencement of the Constitution, which contravenes any of the fundamental rights included in Part III of the Constitution shall, to the extent of the contravention, be void. An amendment made after the commencement of the Constitution to an existing law will come within the purview of the clause.
2. As distinguished from Cl. (1), Cl. (2) makes the inconsistent laws void *ab initio* and even convictions made under such unconstitutional laws shall have to be set aside. Anything done under the unconstitutional law, whether closed, completed or inchoate, will be wholly illegal and relief on one shape or another has to be given to the person affected by such unconstitutional law. Nor is it revived by any subsequent event.
3. This does not, however, mean that the offending law is wiped out from the statute book altogether. It remains in operation as regards persons who are not entitled to the fundamental right in question.
4. Nor does Cl (2) authorize the Courts to interfere with the passing of a bill on the ground that it would, when enacted, be void for contravention of the Constitution. The jurisdiction of the Court arises when the bill is enacted into law.

‘Shall be void’.-

This expression “shall be void” occurs in Cls. (1) and (2). It does not appear that an inconsistent law becomes void without any declaration from the Court to that effect. A citizen who is possessed of a fundamental right and whose right has been infringed can apply

to the Court and relief upon a declaration that the law is inconsistent with the Constitution. But if a citizen is not possessed of the right, he cannot claim this relief.

But once the statute is declared invalid for contravention of a fundamental right, the invalidity attaches to the law from the date of commencement of the Constitution in the case of a pre-Constitution law and from the date of its enactment in the case of a post-Constitution law.

Who can challenge the Constitutionality of a law.-

1. No one but whose rights are directly affected by a law can raise the question of the Constitutionality of the law.
2. A person who challenges the Constitutionality of a statute must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of enforcement of the statute and that the injury complained of is justiciable.

This does not mean that there may not be cases where the mere operation of an enactment is prejudicial to the exercise of a fundamental right of a person. Where an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms, the aggrieved person may at once come to the court without waiting for the state to take some overt action threatening to infringe his fundamental right.

3. A person who is not possessed of a fundamental right cannot challenge the validity of a law on the ground that it is inconsistent with the fundamental right.
4. A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the shareholders would be

entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the shareholders have been affected by the impugned statute.

But it may happen that while the statute infringes the fundamental rights of a company, it indirectly affects the interests of its shareholders; in such a case the shareholders also can impugn the Constitutionality of the statute. In such a case, the joinder of the company as co-petitioner would not bar relief to the shareholder even though the company, not being the 'citizen', would not be entitled to relief. Possibility of financial loss due to the taking over the management of the company by the Government is sufficient to give *locus standi* to a shareholder.

Clause (3) (a): ‘Law’.-

Law, in this Article, means the law made by the Legislature and includes intra vires statutory orders and orders made in exercise of power conferred by statutory rules, but not administrative orders having no statutory sanction. A statutory scheme is a ‘law’, but not the bye-laws made by a co-operative society, which are in the nature of articles of association, unless such bye-laws have been made in exercise of statutory power or the society acts as an agency of the Government.

This does not however, mean that an administrative order which offends against a fundamental right will, nevertheless, be valid because it is not a ‘law’ within the meaning of Art. 13(3). So is a custom having the force of law.

In view of the present definition, a rule, order or notification issued under a statute may be held invalid for contravention of a fundamental right even though the statute under which it was issued may not offend against the Constitution, or the validity of the latter is not challenged.

In the case of an absolute sovereign like the Ruler of an erstwhile Indian State, ‘law’ is to be distinguished from a grant which is founded upon an agreement and not on the command of the sovereign. Nevertheless, grant by a Ruler which is inconsistent with a fundamental right shall be void.

Constitution of India is not a Statute. It is fountain head of all the statutes. Provisions of Clauses (1) and (2) are not applicable to a law declared by the Supreme Court under Art. 141 and the directions/order issued under Art. 142⁶.

Sub- clause (b): ‘Law in force’.-

This expression is defined in the present clause in the identical language used in the definition of the expression in Explanation 1 to Art. 372 i.e., and should receive the same interpretations in the same both Articles.

The expression “Law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or particular areas.

There is no material difference between ‘existing law’ as defined in Art. 366 (10) and ‘law in force’.

By reason of the word ‘includes’, the definition should be treated as not exhaustive, and would, therefore, include not only laws made by the Indian Legislatures, but also English rules of common Law as applied in India, subordinate legislation such as order, by-law, rule, regulation, notification, as well as personal law, custom or usage having the force of law.

It follows that a custom which is inconsistent with fundamental right must be held to be void, e.g., a custom of succession to hereditary village offices, which are now held under the state is void for contravention of Art. 16(1)⁷.

⁶ Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201

The words ‘notwithstanding areas’ mean that any law which was on the statute book at the commencement of the Constitution would come under the sub-clause, even though it might not yet have been brought into operation. The service rules framed under the statutory provisions have the force of law.

Clause (4): Article. 13 not to apply to a law for amendment of Constitution.-

Clause (4) was inserted by the Constitution (24th Amendment) Act, 1971, with effect from 5-11-1971, to override the view taken by Subba Rao, C.J., for the majority, in **Golak Nathe v. State of Punjab**⁸, that a Constitution Amendment Act, Passed according to Art. 368, is a ‘law’ within the meaning of Art. 13 and would, accordingly, be void if it contravenes a fundamental right. This Amendment was declared void in **Minerva Mill’s case**⁹.

⁷ Dasaratha Rama Rao Gazula v. State of A.P.,AIR 1961 SC 564 (570-72)

⁸ AIR 1967 SC 1643 (1659, 1670, 1718)

⁹ (1980) 3 SCC 625

3.1 SCOPE OF ARTICLE 13

This Article had a controversial role in the history of constitutional development. Having asserted its significance in serving as a balance-wheel between the power of judicial review and constitutional development, this Article retains itself yet as the conscience of Part III of the Constitution. When pressed into service this Article has a double role. On the first hand, this Article is the sheet-anchor of the valid laws or any provision or provisions thereof. On the other hand, this Article is a death-blow to the laws or provisions thereof found to be invalid either as contravening any provisions of the Part III of the Constitution or otherwise unreasonable or ultra vires.

Under the Constitution of India, the power to decide whether any given piece of legislation is void or not is given to the court, i.e., the judiciary and nobody else. The power of Judiciary in this respect is supreme. The fundamental rights recognized in the Constitution, though, to some extent constitute limitations on the power of Parliament and State Legislatures to enact Laws and some of them were extended in the interests and for the benefit of the minorities. To what extent the control should be permitted and whether the Legislature is enacting a particular law transgressed its limits without any justification and whether such transgression is within reasonable bounds are matters left for courts to decide.

The provisions of Part III of the Constitution which have guaranteed fundamental rights to the citizens have nothing to do with rights of the individual citizens inter se. thus, a right of a municipal councilor to attend the meetings is a right other than fundamental right.

3.2 Applicability of Article 13.-

In *State of M.P v. G. C. Mandawar*¹⁰, the Supreme Court holds that the power of the Court to declare law void under Article 13 should be exercised with reference to the specific legislation which is impugned. Where the same Legislature has enacted two different laws but apparently one in substance, it may be open to the court to disregard the form and treat them as one and strike it down, if in their conjunction they result in discrimination, though such a course would not be open where the two laws so sought to be read in conjunction are by different Legislatures. The striking down of a law of one State on the ground that in contrast with a law of another State, on the same subject, its provisions are discriminatory is not authorized. The source of the two statutes being different, a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments would, similarly be unauthorized.

Article 13 has no application to the other Articles of the Constitution. It follows that an order made by the President under some provisions of the Constitution cannot be said to have offended Article 14 of the Constitution. Nor can Article 13 be read so as to render any portion of the Constitution invalid.

¹⁰ 1955 SCR 599

3.3 Judicial Review as a part of the Basic Structure:

In the celebrated case of **Keshavananda Bharati v. State of Kerala**¹¹, the Supreme Court of India propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. The Judges made no attempt to define the basic structure of the Constitution in clear terms.

S.M. Sikri, C.J mentioned five basic features:

1. Supremacy of the Constitution.
2. Republican and democratic form of Government.
3. Secular character of the Constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution.

He observed that these basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the Constitution.

The Constitutional bench in **Indira Nehru Gandhi v. Raj Narain**¹² held that Judicial Review in election disputes was not a compulsion as it is not a part of basic structure.

¹¹ AIR 1973 SC 1461

¹² 1975 Supp SCC 1

In *S.P. Sampath Kumar v. Union of India*¹³, P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd*¹⁴, 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. In *Sampath Kumar* case 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.

In *Kihoto Hollohan v. Zachillur*¹⁵ another Constitution Bench, while examining the validity of Para 7 of the Tenth Schedule to the Constitution which excluded judicial review of the decision of the Speaker/Chairman on the question of disqualification of MLAs and MPs, observed that it was unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and para 7 of the Tenth Schedule violated such basic structure.

Subsequently, in *L. Chandra Kumar v. Union of India*¹⁶ a larger Bench of seven Judges unequivocally declared:

"that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure".

¹³ (1987) 1 SCC 124 at 128

¹⁴ (1980) 3 SCC 625

¹⁵ 1992 Supp (2) SCC 651, 715, para 120

¹⁶ (1997) 3 SCC 261

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognizing judicial review as a part of basic feature of the constitution Courts in India have given a different meaning to the theory of Check's and Balances this also meant that it has buried the concept of separation of powers, where the judiciary will give itself an unfettered jurisdiction to review any thing every thing that is done by the legislature.

DOCTRINE OF ECLIPSE

The Doctrine of Eclipse is based on the principle that a law which violates Fundamental Rights is not nullity or *void ab initio* but becomes; only unenforceable i.e. remains in a moribund condition. "It is over-shadowed by the Fundamental rights and remains dormant, but it is riot dead." Such laws are not wiped out entirely from the statute book. They exist for all post transactions and for the enforcement of the rights acquired and liabilities incurred before the commencement of the Constitution. It is only against the citizens that they remain in a dormant or moribund condition but they remain in operation as against non-citizens who are not entitled to Fundamental Rights.

Can such a law which becomes unenforceable after the Constitution came into force be again revived and made effective by an amendment in the Constitution?

For solving such a problem, Supreme Court formulated the doctrine of eclipse in **Bhikhaji v. State of M.P**¹⁷. In this case the provisions of. C.P. and Berar Motor Vehicles (Amendment) Act 1948 authorized the State Government to take up the entire motor transport business in the Province to the exclusion of motor transport operators. This provision though valid when enacted, but became void on the commencement of the Constitution in 1950 as they violated Article 19(1) (g) of the Constitution. However, in 1951 Clause (6) of Article 19 was amended by the Constitution (1st Amendment Act) so as to authorize the Government to monopolies any business. The Supreme Court held that the effect of the amendment was to remove the shadow and to make the impugned Act free from

¹⁷ AIR 1955 S.C. 781

blemish or infirmity. It became enforceable against citizens as well as non-citizens after the constitutional impediment was removed. This law was eclipsed for the time being by the fundamental rights. As soon as the eclipse is removed, the law begins to operate from the date of such removal.

The doctrine of eclipse envisages that a pre-Constitution law inconsistent with a Fundamental Right was not wiped out altogether from the statute book after the commencement of the constitution as it continued to exist respect of rights and liabilities which had accrued before the date of the constitution. Therefore, the law in question will be regarded as having been 'eclipsed' for the time being. Such a law was not dead for all purposes. If the relevant fundamental right is amended then the effect would be "to remove the shadow and to make the impugned Act free from all blemish or infirmity". The law would then cease to be unconstitutional and become revived and enforceable.

The doctrine of eclipse has been held to apply only to pre-constitution and not to the post constitution laws. The reason is that while a pre-constitution law was valid when enacted and, therefore was not void ab initio, but its validity supervened when the constitution came into force, a post constitution law infringing a fundamental right is unconstitutional and a nullity from its very inception. Therefore, it cannot vitalize by a subsequent amendment of the constitution removing the infirmity in the way of passing the law. The Supreme Court has distinguished between article 13(1) and 13(2), as the phraseology of the two is different from each other.

Article 13(2) which applies to the post-constitution laws prohibits the making of a law abridging fundamental rights while article 13(1) which applies to the pre-constitution laws

contains no such prohibition. Under article 13(1), the operation of the pre-constitution law remains unaffected until 26-01-1950, even if it becomes inoperative after the commencement of the constitution. Under article 13(2), the words “the state shall not make any law” indicate that after the commencement of the constitution, no law can be made so as to contravene a fundamental right. Such a law is void ab initio. Therefore, the doctrine of eclipse cannot apply to such a law and it cannot revive even if the relevant fundamental right is amended later to remove the hurdle in the way of such a law.

In case the law contravenes a fundamental right limited to the citizens only, it will operate with respect to non-citizens, but it will not be revived qua-citizens merely by the amendment of the fundamental right involved. Because article.13(2) affects the competence of the legislature to enact it with respect to the citizens, the law will have to be re-enacted after the constitutional amendment if it is desired to make it operative qua the citizens as well.

An Act declared unconstitutional under articles 14, 19 and 31(2), is revived when it is put in the ninth schedule. The express words of article 31B cure the defect in such an Act with retrospective operation from the date it was put on the statute book. Such an Act even though in force and vigour retrospectively as soon as it is included in the IX schedule. It is not necessary to re-enact such an Act.

From this arises another question. When a post-constitution law is held inconsistent with fundamental right, can it be revived by amending the Act in question so as to remove blemish, or will it have to be re-enacted as a whole? The Delhi High Court has held by a majority that the Act will have to be re-enacted and it cannot be revived by its mere

amendment¹⁸. This view appears to emanate logically from the position adopted by the Supreme Court in treating such a *void ab initio* and not applying the doctrine of eclipse to the post-constitutional laws.

There is no direct Supreme Court case on the specific point. The nearest authority on the point is the *Shama Rao case*¹⁹. An Act was challenged on the ground of excessive delegation. Pending the decision, the legislature passed an amending Act seeking to remove the defect. The Supreme Court ruled by a majority that when an Act is bad on the ground of excessive delegation, it is still born and void ab initio, it cannot be revived by amending Act seeking to remove the vice. The whole Act should be re-enacted in the modified form.

This ruling supports the proposition that an Act held invalid under article 13(2) could not be revived merely by amending it but will have to be re-enacted. The same proposition will apply when an Act merely infringes a fundamental right applicable to the citizens only. Such a law will be regarded as “still-born” vis-à-vis the citizens even though it may be operative qua the non-citizens, and so it will have to be re-enacted if it is desired to make it valid qua the citizens.

A reference may be made here to *Hari Singh v/s Military Estate Officer, Delhi*²⁰, the Punjab public premises Act was declared void by the Supreme Court as being inconsistent with article 14. There was a corresponding law made by parliament enacted in 1958. Consequent upon the Supreme Court decision on the Punjab Act, parliament re-enacted its own law in 1971, seeking to remove the blemish pointed out by Supreme Court, and made it operative

¹⁸ P.L.Mehra v. D.R. Khanna, A.I.R 1971 Del.1.

¹⁹ AIR 1967 SC 1480

²⁰ AIR 1972 SC 2205

retrospectively with effect from the date of commencement of the original Act. A new clause was also added saying that all orders made under the old law would be deemed to be valid and effective as if they were orders made under the new law. This clause was challenged, the argument being that the 1958 Act being unconstitutional, there could not be validation of anything done under an unconstitutional Act. holding the clause to be valid, the supreme court called it a fallacious argument for it overlooked the crucial point that the 1971 Act was made effective retrospectively from the date of the 1958 Act and the action done under the 1958 Act was deemed to have been done under the 1971 Act, and the new Act was valid under article 14.

DOCTRINE OF SEVERABILITY

According to article 13, a law is void only “to the extent of the inconsistency or contravention” with the relevant Fundamental Right. The above provision means that an Act may not be void as a whole; only a part of it may be void and if that part is severable from the rest which is valid, then the rest may continue to stand and remain operative. The Act will then be read as if the invalid portion was not there. If, however, it is not possible to separate the valid from the invalid portion, then the whole of the statute will have to go.

It is not the whole Act which would be held invalid by being inconsistent with Part III of the Constitution but only such provisions of it which are violative of the Fundamental Rights, provided that the part which violates the Fundamental Rights is separable from that which does not isolate them. But if the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder the court will declare the entire Act void. This process is known as Doctrine of Severability or reparability.

The Supreme Court considered this doctrine in **A.K. Gopalan v. State of Madras**²¹, and held that the preventive detention minus section 14 was valid as the omission of the Section 14 from the Act will not change the nature and object of the Act and therefore the rest of the Act will remain valid and effective.

²¹ A.I.R. 1950 S.C. 27

The doctrine was applied in **D.S. Nakara v. Union of India**²², where the Act remained valid while the invalid portion of it was declared invalid because it was severable from the rest of the Act. In **State of Bombay v. F.N. Balsara**²³, it was held that the provisions of the Bombay Prohibition Act, 1949 which were declared as void did not affect the validity of the entire Act and therefore there was no necessity for declaring the entire statute as invalid

The doctrine of severability has been elaborately considered by the Supreme Court in **R.M.D.C. v. Union of India**²⁴, and the following rules regarding the question of severability has been laid down:

- (1) The intention of the legislature is the determining factor in determining whether the valid parts of a statute are severable from the invalid parts.
- (2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from the another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid what remains is itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest had become unenforceable.
- (3) Even when the provisions which are valid, are distinct and separate from those which are invalid if they form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.
- (4) Likewise when the valid and invalid parts of a Statute are independent and do not form part of a Scheme but what is left after omitting the invalid portion is so thin and

²² AIR 1983 S.C. 130

²³ AIR 1951 S.C. 318

²⁴ AIR 1957 S.C. 628

truncated as to be in substance different from what it was when it emerged out of legislature, then also it will be rejected in its entirety.

- (5) The severability of the valid and invalid provisions of a Statute does not depend on whether provisions are enacted in same section or different section, it is not the form but the substance of the matter that is material and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.
- (6) If after the invalid id portion is expunged from the Statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void as otherwise it will amount to judicial legislation.
- (7) In determining the legislative intent on the question of severability, it will be legitimate to take into account the history of legislation, its object, the title and preamble of it.

To some extent there exists inconsistency between the Thappar²⁵ and the R.M.D.C case. When an offending provision is couched in a language wide enough to cover the restrictions within and without the constitutionally permissible limits, according to Thappar case it cannot be split up if there is a possibility of its being applied for purposes not sanctioned by the constitution, but according to the R.M.D.C case such a provision is valid if it is severable in its application to an object which is clearly demarcated from other objects falling outside the constitutionally permissible legislation. The Supreme Court has itself pointed out this

²⁵ Romesh Thappar v. State of Madras, AIR 1950 SC 124

aspect of the matter in *Supdt. Central Prison v/sDdr. Lohia*²⁶, left open the question. The Court, however, stated that in the R.M.D.C. case, the difference between the two classes of competitions, namely, those that are gambling in nature and those in which success depends on skill, was clear cut and had long been recognized in legislative practice. But when the difference between what is permissible and what is not permissible is not very precise, the whole provision is to be held void, whether the view taken in the Romesh Thappar or the R.M.D.C. case is followed.

²⁶ AIR 1960 SC 633

WAIVER OF FUNDAMENTAL RIGHTS

Can a person waive any of his Fundamental Rights?

The doctrine of waiver has no application to the provision of law enshrined in Part III of the Constitution. It is not open to an accused person to waive or give up his Constitutional rights and get convicted

In *Behram v. State of Maharashtra*²⁷, divided the Fundamental Rights into two broad categories:

- a. Rights conferring benefits on the individual, and
- b. Those rights conferring benefits on the general public.

The learned Judge opined that a law would not be nullity but merely unenforceable if it was repugnant with a Fundamental Right in the former category, and that the affected individual could waive such an unconstitutionality, in which case the law would apply to him.

The majority on the bench, however, was not convinced with the argument and repudiated the doctrine of waiver saying that the Fundamental Rights were not put in the Constitution merely for individual benefit. These Rights were there as a matter of public policy and, therefore, the doctrine of waiver could have no application in case of Fundamental Rights. A citizen cannot invite discrimination by telling the state 'you can discriminate', or get convicted by waiving the protection given to him under Arts. 20 and 21.

²⁷ AIR 1955 SC 123

The question of waiver of Fundamental Right has been discussed more fully by the Supreme Court in *Basheshar Nathe v. I.T. Commissioner*²⁸ the petitioner's case was referred to Income Tax-Investigation Commission under Sec.5 (1) of the relevant Act. After the commission had decided upon the amount of concealed income, the petitioner on May 19-1954, agreed as a settlement to pay in monthly installments over Rs. 3 lacs by way of tax and penalty. In 1955, the Supreme Court declared S. 5 (1) ultra vires Art. 14. The petitioner therefore challenged the settlement between him and the commission, but the plea of waiver was raised against him. The Supreme Court however upheld his contention. In their judgments, the learned Judges expounded several views regarding waiver of Fundamental Rights:

1. Art. 14 cannot be waived for it is an admonition to the state as a matter of public policy with a view to implement its object of ensuring equality. No person can, therefore, by any act or conduct, relieve the state of the solemn obligation imposed on it by the Constitution.
2. A view, somewhat broader than the first, was that none of the Fundamental Rights can be waived by a person. The Fundamental Rights are mandatory on the state and no citizen can by his act or conduct relieve the state of the solemn obligation imposed on it.

The Constitution makes no distinction between Fundamental Rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

²⁸ AIR 1959 SC 149

Large majorities of the people in India are economically poor, educationally backward and politically not yet conscious of their rights thus it is the duty of the state to protect their rights against themselves.

3. The minority judges took the view that an individual could waive a Fundamental Right which was for his benefit, but he could not waive a right which was for the benefit of the general public.

In view of the majority decision in *Bheshar*, it is now an established proposition that an individual cannot waive any of his Fundamental Rights. This proposition has been applied in number of cases.

In *Olga Tellis v. Bombay Municipal Corporation*²⁹ the court asserted that the high purpose which ‘the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit the individual but to secure the larger interests of the community.’ Therefore, even if a person says, either under mistake of law or otherwise, that he would not enforce any particular Fundamental Right, it cannot create an estoppel against him. “Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful state could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits.”

In *Nar Singh Pal v. Union of India*³⁰ the Supreme Court asserted:

“Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor there can be any estoppel against the exercise of Fundamental Rights available under the Constitution.”

²⁹ AIR 1986 SC 180

³⁰ AIR 2000 SC 1401, 84 (2000) DLT 31 SC

The doctrine of non-waiver developed by the Supreme Court of India denotes manifestation of its role of protector of the Fundamental Rights. It may be of interest to know that in the U.S.A., a Fundamental Right can be waived.

Is Constitutional amendment a ‘Law’ under Article 13 (2).-

The question whether the word ‘law’ in clause (2) of Article 13 also includes a ‘Constitutional amendment’ was for the first time considered by the Supreme Court in *Shankari Prasad v. Union of India*³¹. The court held that the word ‘law’ in clause (2) did not include law made by Parliament under Article 368. The word ‘law’ under Article 13 must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of Constitutional power and, therefore, Article 13 (2) did not affect amendments made under Article 368. This interpretation of Shankari Prasad’s case was followed by the majority in *Sajjan Singh v. State of Rajasthan*³².

But in historic case of *Golak Nath v. State of Punjab*³³, was heard by a special bench of 11 judges as the validity of three constitutional amendments was challenged.

The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter III of the constitution the court observed.

(1) Article 368 only provides a procedure to be followed regarding amendment of the constitution.

(2) Article 368 does not contain the actual power to amend the constitution.

³¹ AIR 1951 SC 458

³² AIR 1965 SC 845

³³ AIR 1967 SC 1643

(3) The power to amend the constitution is derived from Article 245, 246 and 248 and entry 97 of the union list.

(4) The expression 'law' as defined in Article 13 (3) includes not only the law made by the parliament in exercise of its ordinary legislative power but also an amendment of the constitution made in exercise of its constitution power. ,

(5) The amendment of the constitution being a law within the meaning of Article 13 (3) would be void under Article 13 (2) if it takes away or abridges the rights conferred by part III of the constitution.

(6) The First Amendment Act 1951, the fourth Amendment Act 1955 and the seventeenth Amendment Act. 1964 abridge the scope of Fundamental Rights and, therefore, void under Article 13 (2) of the constitution.

(7) Parliament will have no power from the days of the decision to amend any of the provisions of part III of the constitution so as to take away or abridge the Fundamental Rights enshrined there in.

The validity of the Constitution (24th Amendment) Act, 1971 was considered by the Supreme Court in Kesavananda Bharati case. The court overruled the Golak Nath case and upheld the validity of the same amendment.

CONCLUSION

The growth of *judicial review* is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of the rights in the people; the trend of judicial scrutiny of every significant governmental action and the readiness even of the executive to seek judicial determination of debatable or controversial issues, at times, may be, to avoid its accountability for the decision, have all resulted in the increasing significance of the role of the judiciary. There is a general perception that the judiciary in this country has been active in expansion of the field of judicial review into non-traditional areas, which earlier were considered beyond judicial purview.

The Judges have a duty to perform, which is even more onerous to keep the judicial ship afloat on even keel. It must avoid making any ad hoc decision without the foundation of a juristic principle, particularly, when the decision appears to break new grounds. The judgments must be logical, precise, clear, and sober, rendered with restraint in speech avoiding saying more than that, which is necessary in the case.²⁷

It must always be remembered that a step taken in a new direction is fraught with the danger of being a likely step in a wrong direction. In order to be a path-breaking trend it must be a sure step in the right direction. Any step satisfying these requirements and setting a new trend to achieve justice can alone be a New Dimension of Justice and a true contribution to the growth and development of law meant to achieve the ideal of justice.

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