

JUDICIAL REVIEW AND PROTECTION OF FUNDAMENTAL RIGHTS

15.1 INTRODUCTION

You have read in detail about the fundamental rights available to the people of this country. You also know that our Constitution is the supreme law of the land. Two questions emanate from this. First, Is mere enumeration in the Constitution sufficient to guarantee the fundamental rights? Second, Who will ensure that the supremacy of the Constitution is maintained? The answer to these questions lies in Supreme Court and its power of judicial review. You have already learnt about the organization, functions and powers of the Supreme Court. In this lesson you will learn how the Supreme Court protects our fundamental rights and its role of judicial review in our Constitutional system.

15.2 OBJECTIVES

After studying this lesson, you will be able to :

- recall that the Indian Constitution is supreme and the organs of the government have to function within certain limitations;
- recapitulate Article 32 which provides remedies to the citizens in case of violation the fundamental rights;
- analyse the concept of judicial review and ascertain that it is an important weapon to keep the government in the right direction;
- recall that public interest litigation has played an important role in protecting of our rights.
- establish the importance of the fundamental rights and fundamental duties;
- appreciate the special features that distinguish the Indian Constitution from other Constitutions of the world.

15.3 WHAT IS JUDICIAL REVIEW

The principle that the Constitution is the fundamental law of the land is the basis of our political set-up. The three organs of the government have been well defined with their powers and functions.

They have to function within the constitutional boundaries prescribed for them. The Constitution recognises independent and strong judiciary as one of the main pillars of our democracy. The Parliament, our legislature, enacts laws for the well being of the people, which are implemented by the executive. Sometimes there is a chance for a clash between individual rights and needs or claims of society. For example, in an area where there is a shortage of water, government has to take care that reservoirs are built or river flows are diverted to that area. This sometimes causes displacement of some people. Whether the interests of the society are more important or the rights of a few is a difficult question to be answered but adjustment is very important for harmonious social life.

Take another example, many of our villages do not have proper roads. If the government wants an approach road to be built for a particular village, the personal property rights of the people living in that village may have to be curtailed. In case the people whose interests are hurt they approach the court for redressal, the court has to strike a balance between the individual interest placed against the need for social control or social requirements. In other words, the courts have to weigh the benefits with the needs of the people and see which is heavier. In this process, the Supreme Court sometimes criticizes the government for issuing orders contrary to the rights of the people and also declares that a particular law is not constitutional and should not be applied. However, if the Parliament is not satisfied with the verdict or decision of the Court. As the representative of the people, Parliament has the power to amend the Constitution. Thus, ultimately, the supremacy of the Constitution is maintained.

So what is judicial review? In various cases where courts have to deliver judgements, they take recourse to the Constitution. Though our Constitution describes all organs of the government and our rights extensively, still confusion arises as to the correct meaning of the words and phrases in the Constitution. The Supreme Court has the power to interpret the Constitution, i.e. to explain what the Constitution really means. In this process and in various cases, if the Supreme Court finds that some provisions of the Constitution have been violated in certain laws of Parliament or executive orders, it can invalidate such laws and orders. This means that those laws and orders will not be operational any longer. This is judicial review.

Where does the court derive its power of judicial review from? In other words, judicial review is the power of the courts to declare the constitutionality or otherwise of legislative enactments and executive orders. In certain cases, the Supreme Court may declare that a particular law is valid, i.e. it is in accordance with the principle of the Constitution. In some cases, if the court so feels, it may declare that the expunged law or order does not conform to the Constitution. The court may then declare it illegal or ultra-vires.

Ultra vires means not in conformity with the Constitution. In other words, it is unconstitutional and, therefore, not fit for application.

The Constitution does not specifically mention judicial review. Judicial review can be inferred from many provisions of the Constitution. These are: Firstly, Article 13 which stipulates that state and local governments and legislatures will not make any law which takes away or abridges the fundamental rights. If at all they do so, such orders or laws will become void.

Secondly, Article 32 and 226 which talk about the protection of fundamental rights through writs issued by courts, confer upon the Supreme Court the sacred duty of upholding the Constitution.

In March 1997, the Supreme Court delivered a landmark judgement in which it ruled that Parliament cannot take away the power of judicial review from the courts even by constitutional amendment. It stated that judicial review derived from Articles 32 and 226 is an integral part of the basic structure of the Constitution.

The concept of judicial review is derived from the American Constitutional system. The courts in the US acquired that power by chance during the course of a case. It is now firmly placed in the American Constitutional system based on the doctrine of 'due process of law'. It means that in USA, the courts not only invalidate an unconstitutional law but also suggest the right direction. It also means that the courts not only can declare a law invaled if it is contrary to the Constitution but also if the law is unjust or wrong. In India we do not have due process of law. We have what is known as 'procedure established by law.' This means that the courts can only see whether the legislature is competent or authorised to pass a law and that the formalities of law are maintained. In England the Parliament is supreme. There, the laws made by the Parliament cannot be challenged in any court of law. In India the three organs are expected to function harmoniously within their boundaries. The Supreme Court checkmates them. However, Parliament has the power of constitutional amendment to nullify or neutralise the effect of judicial review, if it feels that social and economic justice to the people demand so.

INTEXT QUESTION 15.1

1. What is Judicial Review?
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2. What do you understand by interpretation of the constitution?
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3. From which Constitutional System the concept of "Judicial Review" is derived?
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4. Who has the power of constitutional amendment in our country?
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15.4 PROTECTION OF FUNDAMENTAL RIGHTS (ART. 32)

You have learnt about the fundamental rights in detail in Lesson 6. You also know that mere enumeration of the fundamental rights in the Constitution without an adequate guarantee or remedial action in case of their violation would negate the very meaning of the rights. Hence, the Constitution has set up the Supreme Court and other courts as the custodian and guarantor of the rights.

In Section 15.3 you have read Article 13 that the laws inconsistent with the fundamental rights would be void. Article 32 and Article 226 vest in the Supreme Court and High Courts the authority to apply constitutional remedies for the protection of the fundamental rights. These Articles guarantee the right to move the Supreme Court for enforcement of the rights. The Supreme Court has the power to issue appropriate directions, writs and orders. The right to make use of constitutional remedies itself is made a fundamental rights in Part-III of the Constitution. In 1951, in a case (Chintamanrao vs State of Madhya Pradesh), the court had held that the Supreme Court watches and guards the rights guaranteed by the

Constitution. In exercising its functions it has the power to set aside a legislative act if it is in violation of the freedoms guaranteed by the Constitution.

Article 32 that contains the right to constitutional remedies was described by Dr. Ambedkar as heart and soul of the Indian Constitution. This Article provides for enforcement of the fundamental rights by the Supreme Court. It confers on the people the right to move the Supreme Court in case of encroachment of the fundamental rights by the State. For the purpose of protection of the fundamental rights Supreme Court possess the right of Judicial review. It can issues various *writs*. These are:

1. **The writ of Habeas Corpus:** The term *habeas Corpus* means 'you may have the body'. By this writ, the Supreme Court can direct the arresting authority that the arrested person to be produced in body before the court. If a person is detained without any valid reason and trial the court after ascertaining the reason of arrest may conclude that detention is unlawful and may issue *writ* for the immediate release of the person under detention.
2. **The writ of Mandamus:** Mandamus is a command by which the courts can order public officials, institutions or corporations to perform their public duties in which they are failing. Such orders are issued only for public duties and not for personal interest.

The applicant must also show to the court that his rights have been infringed due to inaction of some public official. For example, a person has not been issued appointment letter inspite of all other formalities. In case of appeal to the court, the court may issue 'mandamus' to the concerned authorities for issuing the appointment letter.
3. **The writ of Prohibition:** Prohibition is issued by a superior court to a lower court to prevent it from dealing with a matter over which it has no jurisdiction. Prohibition can be issued only to judicial functionaries and not to government servants.
4. **The writ of Certiorari:** By this writ superior court directs a lower court to submit the records of a case pending before it in order to be fully informed of it. Thus a case may be brought from a lower court to a higher court and the former's decisions may be reversed.
5. **The writ of Quo warrant:** It means 'by what authority'. It is an injunction issued to a person who acts in a capacity to which he is not entitled. It is issued to officers of the Union or State government, who claim or usurp office to ascertain on what grounds they are doing so.

By these writs the courts prevent the misuse of power and protect the rights of the people.

Now we will see how supreme Court has protected the fundamental rights in some cases, what is the scope of judicial review in the fundamental rights and how, through public interest litigation, the Supreme Court has taken upon itself a role that encompasses virtually all aspects of human life. It has led to a debate on *Judicial activism vs Judicial restraint* about which you will read in a subsequent lesson.

INTEXT QUESTIONS 15.2

1. What does Article 13 mean?
2. Which Article of the Constitution provides for enforcement of the fundamental rights by the Supreme Court?
3. Who protects and guards the fundamental rights?

4. Name any two of the writs and orders that can be issued by the Courts under Article 32?

15.5 GROWTH OF JUDICIAL REVIEW AND PROTECTION OF FUNDAMENTAL RIGHTS

The scope of judicial action in the protection of the fundamental rights is somewhat limited. First of all, the Constitution itself spells out reasonable restrictions that can be placed by the State on the fundamental rights. It means that in the interest of public order, security of the state, decency, morality, public health and friendly relations with foreign countries and prevention of incitement to violence, rights may be curtailed. However, the judiciary can scrutinize the law in terms of its reasonableness. The Supreme Court has held that a restriction will not be regarded as reasonable if it is excessive, i.e. greater than that required under prevailing circumstances, objective of restrictions and protection of public interests.

The Directive Principles of State Policy are a necessary appendage to the fundamental rights. You have read about these in Lesson No. 7. They were conceived and placed in the Constitution with the objective of bringing socio-economic justice to masses. Economic and social rights which could not be guaranteed due to paucity of resources were placed in these directives. As you know, these are only directives to the States and are non-enforceable by courts. However, they also impose restrictions on fundamental rights.

In implementing the fundamental rights the Parliament has passed certain laws that infringe the fundamental rights. Many of these have been nullified by Court. This has led to a controversy on the superiority of fundamental rights or directive principles.

15.5.1 Judicial Review and Fundamental Rights

The Preamble to our Constitution envisages a society based on the principles of socio-economic justice. In keeping with this the Parliament passed many laws that related to abolition of landlordism or zamindari system. These laws were challenged in the courts on the ground that they violated fundamental right to property. In Shankari Prasad case (1950) Supreme Court upheld Parliament's power of amending the Constitution including Part III. In this case, the Supreme Court held that laws under Article 13 meant only ordinary laws and not Constitutional amendment (Shankari Prasad). It implied that the Parliament could abridge the rights through constitutional amendment.

This decision of the court was overruled by the Supreme Court itself in 1967 in Golaknath case in which it stated that the Fundamental rights cannot be amended. This curbed the hands of the Parliament in bringing about social legislation. At the same time, there were two important cases which tested the power of judicial review and the Parliament's power to amend the fundamental rights.

In 1969, 14 banks were nationalised in public interest. Next year, the President issued an ordinance which abolished privy purses. Former rulers of native states had joined India at the time of independence and were given privy purses or sort of annual pocket money in lieu of their territories. A few years after the independence it was realized that privy purses violated the principle of equality. Hence, the abolition of privy purses. Both these orders were declared unconstitutional by the court. The Parliament then brought about two important amendments which loaded the balance in favour of the Directive Principles of State Policy or the need for bringing about socio-economic equality.

In 1971 the 24th and 25th amendments to the Constitution restricted the fundamental rights by saying in amendment 25th that if a bill was passed to provide for deconcentration of

economic power (as enshrined in 39B and C of Directive Principles), it could not be challenged in a Court even if it violates certain fundamental rights.

The 24th amendment provided that Constitutional amendment shall not be included under the term law. It meant that the Parliament could restrict the fundamental rights through Constitutional amendment.

Thus these two amendments considerably restricted the operation of judicial review in regard to the fundamental rights.

In Kesavanand Bharti case the Supreme Court upheld the validity of these amendments and overruled Golaknath case by holding that it is competent for Parliament to amend Fundamental Rights. However, it added that the basic structure of the Indian Constitution should not be altered.

Further blow to the Judicial Review was given by the 42nd amendment which reiterated that no amendment of the Constitution including Part III could be challenged in any court on any ground.

Supreme Court restored its power of Judicial Review in Minerva Mills case by striking down that part of the 42nd amendment which gave unbridled power to the Parliament to amend the Constitution. The 44th amendment took away the right to property from the list of fundamental rights.

Hence the position regarding fundamental rights is that we have only six fundamental rights now with the Parliament retaining the power to amend them. So far we have seen how the Supreme Court's power of Judicial Review had tried to protect fundamental right to property until it was deleted by the 44th amendment.

In respect of other rights, the aggrieved person may directly appeal to the Supreme Court under Article 32.

Let us now see how the Supreme Court has played its role as custodian of rights and in particular to these fundamental rights.

The right to equality is an important right which enshrines equality before the law and equal protection of laws. It means absence of special privileges and equality of treatment. We believe that absolute equality is impossible, hence the right to equality would mean, as the Supreme Court has interpreted it, that all persons similarly circumstanced must be treated equally both in terms of privileges and liabilities. A teacher teaching in a school and a farmer working in a field are differently placed and working under different circumstances. Similarly, the Constitution guarantees men-woman equality but they are not equal in all situations. Hence, the Supreme Court has relied on the doctrine of **reasonable classification or protective discrimination**. For example, a state may impose total prohibition but allow the members of the armed forces to indulge in drinking. Similarly, an educational institution can give awards to students on the basis of merit and this would be valid. But providing library facilities to some and denial to others would be illegal. Special provisions for physically or mentally disabled would be a case of protective discrimination.

The right to equality enshrines that citizens cannot be discriminated on the basis of religion, race, caste, or place of birth. The Supreme Court has struck down many laws that discriminated citizens on these grounds. The Constitution allows special provision for backward classes, scheduled castes and scheduled tribes. This has led to reservation of seats for them in educational institutions. However, in some cases in some states, reservation, to a great extent, tends to discriminate against meritorious students. In the State of Kerala vs. Dr. K. V. Gupta (1980), the Supreme Court held that if only two per cent seats were left to be filled by open competition, after making reservation for all categories, reservation was

arbitrary and unreasonable.

The Supreme Court has given the ruling that in no case the reservations for all categories should exceed 70 per cent. Thirty per cent seats in medical institutions should be filled purely on the basis of merit through open competition held on all-India basis.

The Supreme Court has safeguarded freedom of speech and expression in many cases. The Constitution guarantees six fundamental freedoms and personal liberty in Articles 19 and 20 which are subject to certain limitations.

These freedoms include freedom of speech and expression, to assemble without arms, to form associations or unions, to move freely and settle in any part of India, to practice any profession, trade or business. The Supreme Court in one of its earlier cases added freedom of press as freedom of speech and expression as it was not included in the Article. Similarly, the Supreme Court also stated that this freedom also included the freedom of circulation. Tamil Nadu Government had banned entry of a newspaper into that state which Supreme Court struck down. The Supreme Court held that if there was no circulation of newspaper there could be no dissemination of ideas and news. The Supreme Court has regarded right to know as an important right to be able to take part in the participatory process of development and democracy. The Supreme Court has supported the freedom to produce and exhibit films criticising government policy.

These freedoms are subject to reasonable restrictions. The Supreme Court has stated in two cases that a restriction is reasonable only when there is a proper balance between the rights of the individual and those of the society. The test of reasonableness applies to each statute individually and no abstract or general pattern of reasonableness could be applicable to all cases.

The Supreme Court has supported citizens' right to organize or hold public meetings provided the assembly is unarmed and peaceful. The Court has sustained government's power to impose conditions upon holding or taking part in public processions for purpose of maintenance of public order as reasonable.

The Supreme Court has safeguarded the freedom of movement by contending that it is a free right of all citizens to go wherever they like in the Indian territory without any kind of restriction whatsoever. They can move not merely from one state to another but from one place to another within the same state. (N.B. Khare vs State of Delhi, 1988) the right to travel abroad, though not mentioned in the fundamental rights, is an important right, stated the Supreme Court.

Under the emergency, provisions in the Constitution, rights can be suspended. The Supreme Court has given the interpretation that it is not the rights, but the operation of the rights that gets suspended temporarily during the emergency. The 44th amendment in 1978 held that the right to move court for enforcement of Articles 20 and 21 shall not be suspended even during an emergency.

The Supreme Court has upheld that delay in trial constitutes denial of justice. Speedy trial is an important right.

In interpreting Articles 20 and 21, the Supreme Court has laid down that speedy trial, release on bail of undertrials, prisoners, free legal service to the poor and accused are also the fundamental rights within the meaning of Articles 20 and 21 and it is State's duty to respect these rights by appropriate action.

The Supreme Court has taken action to protect bonded labour, prevent exploitation of women, children and weaker sections. In spite of abolition of untouchability, under the right to equality.

the scheduled castes are still not allowed inside many temples. The Supreme Court supported the right of Harijans to visit temples in Venkat Raman vs. Mysore case, 1958. Nobody can be forced to do labour under its rights against exploitation.

The Supreme Court has stated that lower wages than stipulated would be a case of forced labour, thus it forced administration to pay more wages in Asia workers case (1982). The Supreme Court also protected daily wagers of post and telegraph department.

In regard to the rights of Muslim women, the Supreme Court has delivered important judgements. Muslim fundamentalists have challenged and not accepted such decisions of court.

Muslim personal law allows four marriages to a man. In Subanu Begum case (1987), the Court's verdict was that inspite of the second marriage of a man, his first wife has the right of compensation from her husband. Even if the husband is willing to keep his first wife along with the second, the former has the right to stay and ask for compensation from him.

Earlier, in 1985, the Supreme Court, in Shah Bano case, had given the verdict that a divorced Muslim woman has the right of compensation from her former husband. However, the government was forced into passing Muslim Women Act to nullify the effect of the Court's verdict.

The Supreme Court has stood guard of linguistic rights of minorities. The Court held that the State cannot decide medium of instruction in schools managed and run by minorities.

In regard to the religious rights of the people, the Supreme Court has prevented forcible covnersion to different religions. It means that conversion by force, allurement, or fraud is not allowed.

Thus, the Supreme Court through its power of judicial reveiw and its general power of protection of the fundamental rights has guarded our rights. However, its power of judicial review is criticized on certain grounds. First of all, it is said that unrepresentative judiciary or a few judges can invalidate a law that has been passed by majority of representatives of people in the Parliament.

Second, it is also alleged that it has encouraged litigation. More and more people are approaching the courts and wasting money, instead of mutually settling the issues. It has also been shown, especially in regard to the right to property that the Supreme Court has blocked progressive legislation.

INTEXT QUESTIONS 15.3

1. Write two limitations on the scope of judicial action in the fundamental rights.

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2. What was the decision of the Supreme Court in Shankari Prasad's case?

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3. Why is Golaknath case important?

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4. What was the Court's verdict in Kesavanand Bharti case?

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15.6 PUBLIC INTEREST LITIGATION (PIL)

Earlier, it was held that a writ under Article 32 could be filed only by a person whose fundamental rights have been violated. Subsequently, Court permitted representative proceedings on the ground of public interest litigation. It means that any person who feels that the rights of some sections of people have been violated can appeal to the Court on their behalf. This is important because justice is not easily accessible to the poor and weak people. A number of cases have been taken up by the Supreme Court on the basis of letters received from journalists, lawyers and social workers and even on the basis of newspaper reports. Under PIL, the rights of undertrials under illegal detention have been restored. The Supreme Court held that many undertrials have spent more time in detention than their crime would have warranted if their cases were fast taken up. Thus, the Supreme Court ordered release of many detainees without trial on the ground of their personal liberty which could not be curbed due to judicial or bureaucratic inefficiency. The Supreme Court has also taken up steps to free bonded labourers, tribals, slum dwellers, women in government-run rescue homes, children in juvenile institutions, child labour, etc. In a recent case (1997) the Supreme Court has given a decision against child labour even in the homes of government servants or institutions.

Regarding pollution as dangerous to the right to life the Supreme Court has coaxed the government to take steps to control pollution.

In a case of environmental pollution, a social worker Shri M.C. Mehta filed a *writ* petition in the Supreme Court seeking its indulgence in a pollution-free river Ganga, the Supreme Court, in 1987, ordered closure of a few factories near Kanpur. The scope of PIL has also widened. A person can approach the Court through a letter and if the Supreme Court believes that the person is affected, it can consider the letter to be a *writ* and direct the relevant authorities to consider the letter by providing justice.

PIL has widened the scope of the Supreme Court in relation to the fundamental rights. PIL is associated with the names of Justice P. N. Bhagwati and Sabyasachi Mukherji. A letter was written to the Court on behalf of B.C. Oraon who had been illegally kept in Ranchi mental asylum for over 13 years even after he had been certified fit for discharge. The Supreme Court ordered his release on 12th August, 1983 with a compensation of Rs. 15,000-. You will read more about PIL in the next lesson.

WHAT YOU HAVE LEARNT

The Abstract or mere declaration of the fundamental rights in the Constitution is meaningless unless there is an effective machinery for the enforcement of the rights. The Supreme Court has been assigned by the Constitution its special role as the protector and guarantor of the fundamental rights. Judicial vigilance through judicial review has prevailed upon the State i.e., the executive and legislature to honour the rights of the people while maintaining the needs of society.

In India, we recognise the supremacy of the Constitution. All organs of government function within their prescribed limits. The Supreme Court enjoys the apex position in our judicial system. It upholds the Constitution and protects our fundamental rights. Its power of judicial review and interpretation has made it an abler guardian of the people's rights and custodian

of the Constitution. The Parliament retains the right to constitutional amendment if it feels that judicial review blocks its steps towards the welfare State. The Supreme Court has the power of reviewing its own decisions hence, the nature and scope of judicial review and protection of the fundamental rights changed with the needs of society and circumstances. The Supreme Court's power of judicial review has the capacity to check the abuse of power. The innovation of our courts in public interest litigation has enabled our masses to secure justice which otherwise could not be available to them due to their weak economic social status.

TERMINAL EXERCISES

1. What do you mean by judicial review? What is the basis of judicial review in the Indian Constitution?
2. Explain the various writs that can be issued under Article 32?
3. Write a brief note on how the Supreme Court protects the fundamental rights.
4. How has public interest litigation expanded the role of the Supreme Court in the protection of the fundamental rights?

ANSWERS

Intext Questions 15.1

1. Power of the court to declare the constitutionally or otherwise of a legislative enactment.
2. To clarify or explain the meaning of words, phrases or provisions of the Constitution.
3. American Constitution
4. Parliament of India

Intext Questions 15.2

1. Laws inconsistent with the fundamental rights shall become void.
2. Article 32
3. The Supreme Court and other Courts
4. Writ of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo-warranto. (any two)

Intext Questions 15.3

1. Article 13: 25th amendment that gives primacy to certain Directive Principles.
2. Fundamental rights can be restricted by constitutional amendment as law under Article 13 does not cover the constitutional amendment.
3. In Golaknath case, the Supreme Court reversed its decision in Shankari Prasad's case and stated that fundamental rights cannot be amended.
4. In Keshvanand case, the Supreme Court gave the verdict that the Parliament has the power of amendment of the Constitution including the fundamental rights but the basic structure of Constitution should not be altered.

HINTS TO TERMINAL EXERCISES

1. Refer to section 15.3
2. Refer to section 15.4
3. Refer to section 15.5.1
4. Refer to section 15.6