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Critical Analysis Of Grounds Of Exclusion Of Judicial Review In India

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“ Judicial Review of administrative action is inevitably sporadic and peripheral. The administrative process is not and can not be a succession of justiciable controversies. “¹

1. Conceptual basis of Judicial Review in India :

Power of Judicial review is founded on principles developed by courts in United Kingdom. However the source of this power in UK is merely statutory² whereas, the source of this power in India is Constitutional³. Moreover, in UK there is nothing like basic structure as evolved in India through the judicial decision of apex court in exercise of power of Judicial review itself. ⁴. Judicial Review in India is constitutionally guaranteed and judicially rediscovered. Judicial Review in India is well entrenched as the Principle of Constitutional Supremacy is entrenched as opposed to the doctrine of Parliamentary Supremacy in UK. In UK, the consequent result of Parliamentary Supremacy is that there is only power of Judicial Review of Administrative action available to courts in UK, whereas, the consequent result of Constitutional Supremacy in India is that, powers of Judicial Review of both Legislative & Administrative action are available to courts in India. Therefore , as rightly observed by Justice Untwalia- ...” *Supreme Court is watching tower above all big structures of other limbs of state like sentinel to see that they are working in accordance with law and the constitution, as the constitution is supreme.* “⁵

¹ De Smith, Judicial Review of administrative action, p.1

² S.31 of Supreme Court Act 1981,

³ Articles 13,32,131,132,133,134,135,136,143, 226,227 of Constitution of India

⁴ The Doctrine of Basic Structure which limits the power of amending the constitution was laid down in celebrated ruling of Supreme Court in *Keshavananda Bharati vs State of Kerla AIR 1973 SC 1461*

⁵ *Union of India vs S.H.Seth (AIR 1977 SC 2328)*

2. Scope of Judicial Review :

Judicial review in India is of widest amplitude, than prevailing in other democratic countries, on the basis of following salient constitutional features , provisions and judicial principles –

1. Constitutional Supremacy as integral component of Basic Structure,⁶
2. Judicial Review as integral component of Basic Structure,⁷
3. Power to issue 5 writs - “ *writs in the nature of* “ widening the ambit of Article 32 and empowering the Supreme Court to pass any other suitable order, direction, injunction in the same writ petition,
4. High Courts power to enforce nonfundamental rights through issue of writs, under Article 226
5. Liberalization of the rule of locus standi to promote public interest lawyering⁸
6. Scope of Article 14 is widened beyond the guarantee of right to equality to include – compliance of Natural Justice Principles⁹ and freedom from arbitrariness¹⁰,
7. Implying compliance with “ due procedure established by law “ under Article 21 , has added meaningful content to the power of Judicial Review of both Legislative & Administrative action,¹¹

Thus the range of judicial review recognized by higher judiciary in India is perhaps the widest and most extensive known to the world. However, the 3 recognized grounds common to UK on which the higher judiciary in India exercises the power of judicial review are – Illegality , Impropriety and Irrationality, but the 4th one recognized in UK i.e. Disproportionality, has so far not been recognized as a ground of Judicial Review in India.

3. Grounds of exclusion of Judicial review in India-

Following are the recognized statutory or constitutional grounds that exclude the power of Judicial Review, popularly termed as-

1. Ouster clauses,
2. Time Limit clauses,
3. Privative clauses,
4. Saving of Laws,

⁶ Supra Note 4

⁷ Ibid

⁸ ABSK Railway vs Union of India (AIR 1981 SC 298)

⁹ Dr.Tulsiram Patel vs Union of India (AIR 1985 SC 1416)

¹⁰ E.P.Royappa vs State of Tamilnadu (AIR 1974 SC 355)

¹¹ Maneka Gandhi vs Union of India (AIR 1978SC597)

5. Validating Acts and Regulations,
6. Barring jurisdiction of Courts,
7. Taking away locus standi to move to courts during emergency,
8. Conferring the status of finality to decisions of administrative authority,
9. Acts of state,
10. Political Questions,
11. Policy Matters,

4. Judicial Response to legislative attempts of exclusion of Judicial Review-

There have been legislative attempts to exclude the power of Judicial Review, vide above referred grounds, the judicial response to it can be described as of striking a balance between – Judicial Activism and Judicial Self Restraint. As Judicial Review is meant to be supervisory, it is imperative for the judiciary to maintain the discipline of Judicial Self Restraint for the reason that judiciary can not substitute its own finding for that of authority and sit in appeal as *super legislator* or *super executive*. Therefore the discipline of self restraint has been maintained in case of recognized grounds of statutory exclusion i.e. Ouster clauses, Time Limit clauses, Privative clauses. So also the same discipline of restraint has been maintained in cases of recognized grounds of constitutional exclusion- i.e. –

1. Acts of state,¹²- court did not intervene in the matters of allotment of Government Contracts,
2. Political Questions,¹³- court did not intervene in the matter of invocation of Article 356, but in subsequently decided case of *S.R.Bommai vs Union of India*,¹⁴ court has ruled that Presidents satisfaction in invoking Article 356 is not absolutely subjective but open for objective assessment,
3. Policy Matters¹⁵- court did not intervene in the matter of disinvestment policy of government.

However, the higher judiciary has also asserted that Judicial Review can not be absolutely ousted as it is integral part of Basic Structure and frustrated the legislative attempt to exclude judicial review in following celebrated cases-

1. *Keshavanand Bharati vs State of Kerla*¹⁶-

The second part of 25 th constitutional amendment which attempted to exclude the power of judiciary to see whether the compensation paid was just and fair and was struck down as violative of basic structure,

2. *Indira Gandhi vs Raj Narayan*-¹⁷

¹² West Bengal vs B.K.Mondal (AIR 1962 SC 779)

¹³ Bhootnath vs State of West Bengal (AIR 1974 SC 806)

¹⁴ AIR 1994 SC 1918

¹⁵ BALCO Employees Union vs Union of India (AIR 2002 SC

¹⁶ Supra Note 4

39th Constitutional amendment was struck down on the ground that it violated basic structure for it attempted to oust the power of court to examine election petitions against Prime Minister and Speaker,

3. *Minerva Mills vs Union of India*¹⁸

42nd constitutional amendment was struck down as violative of the basic structure for it attempted to oust the power of courts to examine whether the purpose mentioned in the recital was infact the purpose of the Act or not,

4. *Wamanrao vs Union of India*¹⁹

Apex Court ruled that even the Act put into IXth schedule, is judicially reviewable if it is violative of basic structure of the Constitution,

5. *Kihoto Holohan vs Zochilhu*²⁰

Apex Court ruled that Xth Schedule does not create a non-justiciable constitutional area and the decision of speaker is challengable on questions of law and can be scrutinized in exercise of writ jurisdiction.

6. *L.Chandra Kumar vs Union of India*²¹

Apex court ruled that, Administrative Tribunals are not worthy substitutes of High Court as they do not possess the power to issue writs and therefore, attempt to oust writ jurisdiction was struck down,

5. Conclusions-

Following conclusions may be drawn on the basis of foregoing analysis made-

1. Judicial Review in India is constitutionally guaranteed and judicially rediscovered, it is well entrenched as the Principle of Constitutional Supremacy is entrenched as opposed to the doctrine of Parliamentary Supremacy in UK.
2. In UK, the consequent result of Parliamentary Supremacy is that there is only power of Judicial Review of Administrative action available to courts in UK, whereas, the consequent result of Constitutional Supremacy in India is that, powers of Judicial Review of both Legislative & Administrative action are available to courts in India.
3. The range of judicial review recognized by higher judiciary in India is perhaps the widest and most extensive known to the world.

¹⁷ 1975 AIR 865

¹⁸ AIR 1980 AIR 1789

¹⁹ AIR 1981 SC271

²⁰ AIR 1993 SC 412

²¹ AIR 1997 SC 1125

4. The 3 recognized grounds common to UK on which the higher judiciary in India exercises the power of judicial review are – Illegality , Impropriety and Irrationality, but the 4th one recognized in UK i.e. Disproportionality, has so far not been recognized as a ground of Judicial Review in India.
5. The discipline of self restraint has been maintained in case of recognized grounds of statutory exclusion i.e. Ouster clauses, Time Limit clauses, Privative clauses.
6. Discipline of restraint has been maintained in cases of recognized grounds of constitutional exclusion-like Acts of state, Political Questions, Policy Matters. But at the same time through rulings referred above, asserted that Judicial review is integral part of Basic Structure and can not be ousted in toto.