

## Examrace

# Judicial Review of Political Questions and as a Part of the Basic Structure

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## Judicial Review of Political Questions

- In the initial stages of the judicial adjudication Courts have said that where there is a political question involved it is not amenable to judicial review but slowly this changed, in Keshavananda Bharathi's case, the Court held that, "it is difficult to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal constitution ... . Judicial Review of constitutional amendments may seem involving the Court in political question, but it is the Court alone which can decide such an issue. The function of Interpretation of a Constitution being thus assigned to the judicial power the State, the question whether the subject of law is within the ambit of one or more powers of the legislature conferred by the constitution would always be a question of interpretation of the Constitution."
- Than it was in Special Courts Bill, 1978, In re, case where the majority opined that, "The policy of the Bill and the motive of the mover to ensure a speedy trial of persons holding high public or political office who are alleged to have committed certain crimes during the period of emergency may be political, but the question whether the bill or any provisions are constitutionally invalid is a not a question of a political nature and the court should not refrain from answering it." What this meant was that though there are political questions involved the validity of any action or legislation can be challenged if it would violate the constitution. This position has been reiterated in many other cases and in S. R. Bommai's case the Court held, "though subjective satisfaction of the President cannot be reviewed but the material on which satisfaction is based open to review ..." the court further went on to say that, "The opinion which the President would form on the basis of Governor's report or otherwise would be based on his political judgment and it is difficult to evolve judicially manageable norms for scrutinizing such political decisions. Therefore, by the very nature of things which would govern the decision-making under Article 356, it is difficult to hold that the decision of the president is justiciable. To do so would be entering the political thicker and questioning the political wisdom which the courts of law must avoid. The temptation to delve into the President's satisfaction may be great but the courts would be well advised to resist the temptation for want of judicially manageable standards. Therefore, the Court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be male fide."
- As Soli Sorabjee points out, "there is genuine concern about misuse by the Centre of Article 356 on the pretext that the State Government is acting in defiance of the

essential features of the Constitution. The real safeguard will be full judicial review extending to an inquiry into the truth and correctness of the basic facts relied upon in support of the action under Article 356 as indicated by Justices Sawant and Kuldeep Singh. If in certain cases that entails evaluating the sufficiency of the material, so be it.”

- What this meant was the judiciary was being cautious about the role it has to play while adjudicating matters of such importance and it is showing a path of restraint that has to be used while deciding such matters so that it does not usurp the powers given by the Constitution by way of the power of review at the same it is also minimizing the misusing of the power given under Article 356 to the President.

### **Judicial Review as a Part of the Basic Structure**

- In the celebrated case of *Keshavanda Bharathi v. State of Kerala*, the Supreme Court of India the 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:
  - Supremacy of the Constitution.
  - Republican and democratic form of Government.
  - Secular character of the Constitution.
  - Separation of powers between the legislature, the executive and the judiciary. 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* (1975 Supp SCC 1.) held that Judicial Review in election disputes was not a compulsion as it is not a part of basic structure. In *S. P. Sampath Kumar v. Union of India* ( (1987) 1 SCC 124 at 128.) , P. N. Bhagwati, C. J. , relying on *Minerva Mills Ltd.* ( (1980) 3 SCC 625.) declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review were absolutely taken away, the Constitution would cease to be what it was. In *Sampath Kumar* 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. Zachillhur* (1992 Supp (2) SCC 651,715, para 120) 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* ( (1997) 3 SCC 261) 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” .
- 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 Checks 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 everything that is done by the legislature.

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