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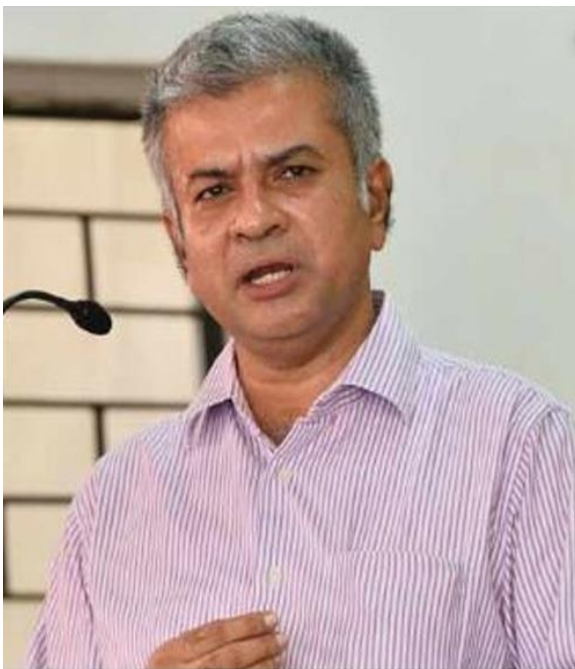
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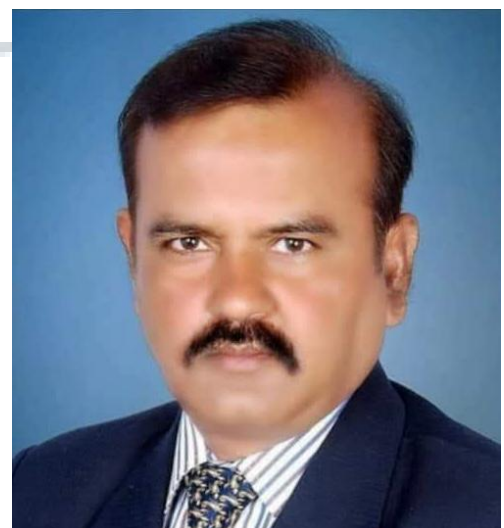
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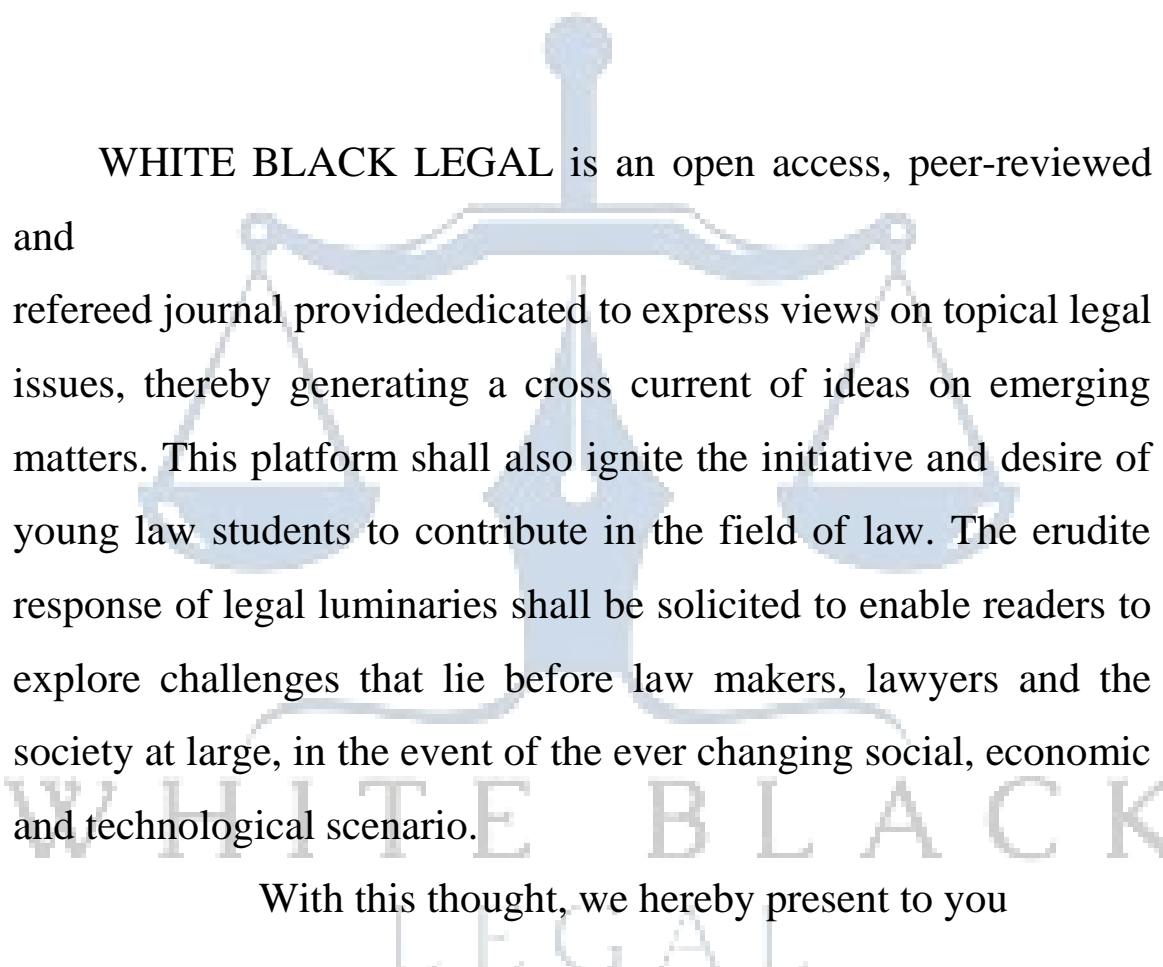


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

JUDICIAL REVIEW IN INDIA: A CRITICAL ANALYSIS

AUTHORED BY - VIPIN KUMAR¹

Abstract

The expression "**Judicial Review**" refers to the ultimate judicial authority to examine and decide how to implement a statute or order. Since, the Constitution is the ultimate law of the country and any other legislation conflicts with it, laws in India are governed by the rule of law. Judicial review refers to "the power of the court to inquire whether the law governing it or any other legal act is contrary to the written Constitution and if the court concludes that it does so, it means that it is unconstitutional and ineffective." The judiciary has the authority to examine the judicial, legislative, and executive branches of government in order to make sure that their activities comply with the constitutional framework of the country. Judicial review means that High Court and Supreme Court has power to interpret the Constitution and declare any such law or order of legislature or executive void if it violates the basic structure of the constitution. The review of law has two crucial purposes: it legitimizes the actions of government and safeguards the constitution against arbitrary state interference. The majority democratic nations with parliaments include clear judicial reviews in their constitutions, which enable a certain number of lawmakers to file complaints against the law when there isn't a strong enough argument. The primary finding of the unknown review is that the most significant outcomes are both predicted and erroneous. Furthermore, due to the unclear review, far more legal proposals are made than expected while you are away. As the model concludes, the legislation's guidelines for sentencing determine how to strike this equilibrium. Unexpectedly, despite having a significant influence on policy, an unbiased court will sit in a subordinate court.

Keywords: Judicial Review, Evolution, Necessity, Provisions in the Indian Constitution.

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INTRODUCTION

“**Judicial review**” is the power of the High court and the Supreme Court of India to evaluate and assess the constitutional activities of legislative, executives and administrative actions of the government to find out the actions or decisions taken by the government are consistent with the constitution of India. Those decisions or actions which are inconsistent with or violate the basic structure of the constitution, the High Court and the Supreme Court has power to declare such law null and void (Unconstitutional). When judicial review is used by judges or court, then it becomes very powerful tool. It includes the right of a court to declare any law or order that is based on a law or another action taken by the government that is at conflicts with the fundamental law of the country² to be unconstitutional and unenforceable. The United States of America provided genesis to the doctrine judicial review. The concept of judicial review was initially introduced by **John Marshall**, the US Chief Justice at the time, in the landmark decision of **Marbury v. Madison**³. According to **Chief Justice, John Marshall**, he noted that the court has the responsibility to define the law and held that the Constitution is supreme law of the country. This is fundamental to the role of the judge. Why else does the Constitution require judges to swear allegiance to it?

In the famous **Keshavananda Bharti Case**⁴ decision, the Apex Court of India developed the idea of **Basic Structure** by utilizing the **Doctrine of Judicial Review**. In the landmark judgment of **Raj Narain v. Indira Gandhi**⁵, the Supreme Court declared that the Judicial Review is an essential component of the Basic Structure and cannot be eliminated through **Article 368** of the constitution of India. The Supreme Court said in the leading case of **Minerva Mills Case**⁶ that the Constitution established an independent judiciary with the authority to execute judicial reviews to ascertain the legitimacy of laws and the constitutionality of administrative acts. According to the Constitution, the judiciary's exclusive responsibility is to use its judicial review authority as a watchdog of quorum lives to maintain the various state organs within the bounds of the authority bestowed upon them.

➤ **EVOLUTION OF JUDICIAL REVIEW:-**

Yet, parliamentary form of government in the British model of administration (parliamentary sovereignty) adopting a method of judicial review is never implemented although the basis of

² Henry Abraham cited in *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261,292: AIR 1997 SC 1125.

³ 2 L ed 60: 5 US (1 Cranch) 137 (1803).

⁴ AIR 1973 SC 1461

⁵ AIR 1980 SC 1789, 1925-1926

the birth of such theory was British model. The Parliament has always held **Supreme Authority** in Britain. Since the Parliament is supreme above all other bodies, it was not claimed that the judiciary had the authority to evaluate its actions. The executive actions continued to be the sole subject of judicial review. Though not expressly stated in British law, the judiciary was responsible for ensuring that the executive branch operated in accordance with the principles of the Constitution. Courts have the authority to review executive and administrative actions in Britain, but Parliament has limited the scope of judicial review to Primary legislation (legislation passed by Parliament) with the exception of a limited number of cases involving the protection of human rights and freedoms of individuals. As a result, judicial review does not apply to Primary legislation; rather, it only applies to Secondary legislation (rules, regulations, and acts of Ministries).

The judiciary continued the myth that judges do not make laws, despite broadening the definition of negligence through decisions such as “**RYLANDS V. FLETCHER (1868) (STRICT LIABILITY PRINCIPLE) and DONOGHUE V. STEVENSON (1932)** (goods manufacturer has duties towards ultimate consumer with whom there is no contractual relation)”. Britain also introduced the idea of judicial review to its colonies. For this reason, the idea has always been a part of the Indian system. The U.S.A. scenario was identical. As an English colony, it acquired the common law system. The common law system served as the foundation for the development of the judicial review notion in the United States of America. In the **1803** case of **Marbury v. Madison**, the **UNITED STATES SUPREME COURT** established for the first time that legislative actions fall under the jurisdiction of judicial review. The Constitution of the United States of America does not contain specific provisions regarding the use of the capability of the review by the court. There is a claim that the Court acquired the power of judicial review by them in the **Marbury case**.

➤ **WHAT JUDICIAL REVIEW MEANS:-**

The term "**Judicial Review**" refers to a court's authority to examine the activities of other arms of the government, particularly the authority to declare legislative and executive actions unconstitutional⁷. Courts have the power to use judicial review to determine whether any legislative, executive, or administrative action taken by the federal government or state governments is constitutional. Using the instrument of judicial review, the courts have an

⁷ Black's Law Dictionary (8th Edn.) 864.

obligation to uphold the separation of powers.

There are three main areas to study judicial review:-

- Constitutional amendments subject to judicial review.
- The judicial review of legislation passed by state and federal legislatures.
- Judicial review of directives issued by subordinates, the Union government, and state governments.

➤ **JUDICIAL REVIEW UNDER INDIAN CONSTITUTION**

When the legislative, executive branch and judiciary undermine and violate constitutional values and rights, then judicial review becomes an essential deterrent for protecting the constitutional values. The judiciary's appraisal is regarded as a necessary component in the nation. India implements parliamentary democracy, which involves all segments of the population participating in higher order political and intellectual processes. It is true that upholding the rule of law is the court's primary responsibility and that it forms the basis for social equality. The rule of law that the courts are assigned with preserving cannot be altered by performing acts of additional powers granted by Parliament. Everyone who is performing official duties has responsibility. It must operate within India's Constitution's democratic framework. Judicial review is the idea of the rule of law and a division of powers. Under **Articles 32 and 136** of the Indian Constitution for the review and **Articles 226 and 227** merely in case of court, the impact of judicial review has been said welcome.

In India after independence, unique "judicial review" provisions were required in order to give effect to the rights of individuals as well as groups specified in the Constitution. The provision in question has been referred to as the "**Heart and Soul of the Constitution**" by **Dr. B.R Ambedkar**, who chaired the constitutional committee of our Constituent Assembly. According to **Article 13(2)** of the Indian Constitution, neither the Union nor the States may enact laws that restrict or deny any of the fundamental rights, and any legislation enacted in disagreement with this mandate will be invalid to the degree of the disagreement.

The common law doctrines of "**proportionality**", "**legitimate expectation**", "**reasonableness**," and **natural justice principles** have shaped the evolution of body procedure review. Consequently, the Supreme Court of India and several High Courts have the

authority to rule on the constitutionality of legislative actions as well as physical actions that protect and uphold the fundamental rights guaranteed by **Part III** of the Constitution of India. As a clear demarcation and a point of intersection between the Union Parliament's legislative powers and those of the various State Legislatures, Article 246 of the Constitution, which examines with the seventh schedule, empowers the High Courts to rule on matters pertaining to legislative competency. This power is mainly used in the context of **Center-State relations**.

As a result, the realm of review available to Indian courts has expanded to include three main objectives: ensuring body action fairness; protecting voters' fundamental rights as guaranteed by the constitution; and making decisions regarding legislative ability between the federal government and the states. **Article 32 of the Constitution** gives the Supreme Court of India has tremendous power to enforce fundamental rights. It gives citizen's right to file an immediate case with the Supreme Court in order to seek remedies for the infringement of such fundamental rights.

➤ **NECESSITY OF JUDICIAL REVIEW**

For Indian democracy, the judicial review system is essential. The federal and state constitutions of India are incredibly advantageous to the country as a whole. Judicial review serves as the foundation for the government's power division; only defense is allowed to preserve civil liberties and rights while limiting the authority of government. Judicial review may also serve as the foundation for the work. The system of judicial review works as a check and balance in the constitution of India. Additionally, judicial review serves as the foundation for the defense work done by Supreme Court and High Court authorities. The survival of the federal and state governments may be threatened by the absence of judicial review authority. If a conflict arises between a state or a few states and the central government on a particular matter, it is only natural for the Apex Court to resolve it; yet, the court lacks the authority to declare state and federal legislation to be unconstitutional. Thus, it would have been dangerous for unions and units to continue to exist. Therefore, it is only right that the conflicts were resolved by the judicial review power by destroying the states and unions inside the borders have been successful in securing the states and the union. The Apex Court of India is not just a court; it is also an authoritative constitutional authority. It periodically interprets the Constitution, deeming the actions of the administrative agencies. Evaluating and analyzing judicial decisions and other judgments is one of the main responsibilities of the Apex Court.

This means that any statute approved by the state legislature or parliament may be subject to judicial review by the supreme court, which may declare it unconstitutional if it violates someone's fundamental rights. It is evident that in order to preserve the constitution, the judiciary must restrain the legislature's skepticism and recklessness.

Threats to the existence of the federal government and the states due to the absence of judicial review might be present. Through judicial review, the Supreme Court examines not only laws passed by the federal government or state legislatures, but also executive orders to ensure that they do not conflict with the spirit or the intent of the constitution. Such order or statute should be identified; the court can invalidate it by declaring it unconstitutional.

Thus, the Apex Court might be considered a government precursor that made an important contribution to the growth of Indian administration. Addressing the necessity of judicial review, **Justice Mukherjee** stated that while many aspects of the British parliamentary system have been incorporated into the Indian constitution, the concept of parliamentary supremacy has not been acknowledged with regard to the enactment of laws. Concerning this, the Constitution of United States of America and other constitution based on it. As members of political organizations, individuals believe that the constitution's limitations on both the executive and the legislative branches are necessary to safeguard both individual and public rights. The vast majority's despotism is hampered by these limitations. This is entirely contingent upon the judiciary's ability to examine any executive, judicial, and administrative duties that infringe upon, impinge against, or breach of individual liberties. The Indian constitution contains the concept of judicial review in several sections. However, the present state of the idea of judicial review is largely due to the gradual development of this notion.

There are three unavoidable requirements for judicial review. They are as follow:-

- Rigid and Written constitution.
- Separation of power between the Union and States.
- Fundamental rights given in the third part of the Constitution.

The Indian constitution satisfies all these requirements, so irrespective of the lack of explicit constitutional provisions; the Apex court has applied it in numerous judgments through implementing the principle of judicial review and stating that the executive and legislative branches of government statutes and operations are unconstitutional because they violate the constitution's provisions. In India, judicial review could be an appropriate tool for establishing

an effective system of checks and balances between the legislative and executive branches of government. Judicial review has been given in various provisions of constitution India as follows:-

Article 13 of the Constitution of India states that all laws are inconsistent with or in violation of the fundamental rights shall be null and void, and the most important doctrines of judicial review given under **Article 13** such as **Doctrine of Severability**, **Doctrine of Eclipse** and **Doctrine of Waiver**. Additionally, it allows for the "judicial review" of all existing and previous Indian laws.

In this way, where our constitution confers the right to protect and interpret the entire document, including fundamental rights, **Article 32** guarantees the right to approach the Supreme Court for the enforcement of the fundamental rights given in the third part of the constitution and gives the Supreme Court authority to issue directives, orders, or writs for such purposes. On the other hand, amending any part of the constitution, including fundamental rights, makes the parliament's legislative power apparent. This demonstrates that the legislative and judicial branches are independent within their respective domains and are not permitted to encroach into one another's jurisdictions.

- **Article 122** and **212** of the Constitution of India, the process of enacting law and the proceedings of the Parliament and legislature of state cannot be examined by the court on the basis of unreasonable irregularity; Court cannot intervene in such matter.
- **Article 131** of the Constitution of India provides for the original jurisdiction of the Apex Court in center-state and inter-state disputes.
- **Article 132** of the Constitution of India states about the **Appellate Jurisdiction** of the Apex court in constitutional Cases.
- **Article 133** of the Constitution of India provides for the **Appellate Jurisdiction** of the Supreme Court in civil cases.
- **Article 134** of the Constitution of India provides for the **Appellate Jurisdiction** for the Supreme Court in criminal cases.
- **Article 134-A** of the Constitution of India deals with the certificate for appeal to the Supreme Court from the High Courts.
- **Article 135** of the Constitution of India empowers the Apex Court to exercise the jurisdiction and power of the federal court under any pre constitutional law.

- **Article 136** of the Constitution of India authorizes the Supreme Court to grant a **Special Leave Petition** from any court or tribunal except military tribunal and court martial.
- **Article 143** of the Constitution of India provides the **President** to seek the opinion of the Supreme Court on any question of law or fact and on any pre-constitution legal matters.
- **Article 226** of the Constitution of India empowers the high court's to issue directions or orders or writs for the enforcement of the fundamental rights and for any other purpose.
- **Article 227** of the Constitution of India vests in the high court's the power of superintendence over all courts and tribunals with their respective territorial jurisdictions (except Military Courts or Tribunals).
- **Article 245** of the constitution of India provides that the **territorial extent** of laws made by parliament and by the legislature of states.

In Indian Constitution, judicial review can conveniently be classified under *three* heads⁸. They are as follow:-

- Judicial Review of Constitutional Amendments:-

The Supreme Court has considered this issue in a number of instances; some of them are noteworthy. These include: **Shankari Prasad case**⁹, **Sajjan Singh case**¹⁰, **Golak Nath case**¹¹, **Kesavananda Bharati case**¹², **Minerva Mills case**¹³, **Indira Gandhi case**¹⁴. Complying with the fundamental principles of the Constitution serves as the litmus test for constitutional amendments.

- Law made by Parliament, State Legislatures as well as subordinate legislation can also be reviewed by the judiciary.
- Administrative action of the Center as well as the State Governments and Other Authorities comes under the definition of State under article 12 of the constitution of India.

⁸ AIR 1997 SC 1125,1150 : (1997) 3 SCC 261

⁹ Shankari Prasad Singh v.Union of India, AIR 1951 SC 458.

¹⁰ Sajjan Singh v.State of Rajasthan, AIR 1965 SC 845.

¹¹ Golak Nath v.State of Punjab, AIR 1967 SC 1643.

¹² Kesavananda Bharati v.Union of India,AIR 1973 SC 1461

¹³ Minerva Mills v.Union of India, AIR 1980 SC 1789.

¹⁴ Indira Nehru Gandhi v.Raj Narain, 1975 Supp SCC 1.

LANDMARK JUDGMENT OF JUDICIAL REVIEW IN INDIA

The primary role of the judicial system is to settle disputes between people and the government, as well as between states and the union. In the process of performing so, the courts may be asked to interpret the constitution's provisions and laws; the Supreme Court's interpretation is then upheld by all other courts across the nation. There is no appeal available for the Supreme Court's judgment.

- In the landmark judgment of *Shankari Prasad vs. Union of India*¹⁵ the first Constitutional Amendment Act of 1951 was challenged before the Apex Court on the condition that the Act violated the **right to property** and that it could not be amended as there was certain limitation on the amendment of Fundamental Rights given under Article 13 (2) of the constitution of India.

The Supreme Court held unanimously, dismissing the argument. "Article 368's provisions are extremely broad, granting the parliament has absolute authority to modify the constitution.

Article 13(2) does not apply to modifications made under Article 368 since law in the context of Article 13 must be interpreted to mean rules or regulations enacted in the exercise of ordinary legislative powers and amendments to the constitution made in the exercise of constituent power.

The constitutionality of parliament's enactment of the 17th constitutional amendment Act was challenged in *Sajjan Singh's case* and the Apex Court reiterated the judgment of *Shankari Prasad Case*.

In the landmark judgment of *Golak Nath vs. The state of Punjab*¹⁶ was considered by a constitutional bench of 11 judges as the validity of three constitutional amendments (1st, 4th and 17th constitutional amendment act) was challenged. By a vote of 6 to 5, the Supreme Court overruled its previous judgment and held that the parliament has no authority to restrict or amend the Fundamental Rights under article 368.

Section 4 of the 42nd Amendment Act, which gave the **Directive Principles of State Policy** priority over Articles **24, 19, and 31** of Part III of the Constitution, was repealed by the

¹⁵ AIR 1951 SC 458

¹⁶ AIR 1967 SC 1643

Supreme Court in the **Minerva Mills case**¹⁷ by a majority decision. The reasoning behind this decision was that Part IV and Part III of the Constitution are equally important, and it would be improper to grant absolute supremacy over the other because it could disturb the balance of the document.

The highest court in the country decided that anything that violates the two sides' equilibrium will Ipso Facto demolish a fundamental component of our constitution's framework.

The Supreme Court affirmed the constitutional validity of the **Muslim Women (Protection of Rights on Divorce) Act, 1986** in **Danial Latifi v. Union of India**, ruling that a Muslim woman who has been divorced is entitled to support even after the **Iddat Period**.

Section **118 of the Indian Succession Act** had been challenged in **John Vallamattom v. Union of India** as a violation of Article 14. Section 118 of **Indian Succession Act** prohibited a Christian's ability to leave his property to a charity or religious organization if he had a nephew, niece, or close relative. "**Very near relative**" included an adopted son rather than the wife. Since **Section 118 of Indian Succession Act** violated Article 14, and the Court held that it is unconstitutional.

Section 6(a) of the **Hindu Minority and Guardianship Act, 1956** was challenged under Article 14 and 15 in the case of **Githa Hariharan v. Reserve Bank of India** on the grounds of gender discrimination. This section stated that the mother of a Hindu minor is placed in a subordinate position and that the father is the only guardian. She could only succeed her father as guardian. Despite the fact that this clause infringed on the right to equality, the court chose not to invalidate it. After reading the provision aloud, the court concluded that **Section 6(a)** allowed the mother to take on the role of natural guardian for the father while he was still alive provided the father was not actually in charge of the minor's affairs. Courts developed a method of interpreting a statute to keep it within the bounds of the constitution. Personal laws like succession and marriage laws also exhibit gender imbalance. A Muslim guy is permitted under Islamic personal law to have four wives at once or to dissolve a marriage by **Triple Talaq**. Women are not entitled to these "**so called privileges.**"

¹⁷ AIR 1980 SCC 625

In the landmark judgement of **Vishakha v. State of Rajasthan**, the Supreme Court established comprehensive rules that apply to all employers and managers of workplaces in both the public and private sectors. These rules are intended to stop working women from being sexually harassed at work until specific laws are passed. Employers were therefore required by Articles 14, 19, and 21 to defend the fundamental rights of women.

CONCLUSIONS

As a result, our country's governance structure integrates the legislative sovereignty of the parliament with the judicial independence of the judiciary in the area of judicial review. Parliament has the authority to enact laws, including amendments to the constitution, but this authority is only recognized until the law is legally questioned. As the guardian of the constitution, the judiciary has the authority to declare any law passed by the parliament to be invalid if it violates the citizens' fundamental rights and the fundamental spirit of the constitution. However, even the parliament should not place such statute in the Constitution's ninth schedule due to the judiciary's supremacy and independence over legislative actions. Furthermore, in the event that a court declares a legislative statute invalid due to a mistake, the parliament can maintain its sovereignty by reversing the court's ruling by retrospectively eliminating the offending error from the law. Additionally, by using the authority granted by article 145, the parliament has the ability to alter the court's jurisdiction.

However, the Supreme Court has the ability to invalidate any and all constitutional violations committed by the executive and administrative branches through the power of judicial review. This helps to safeguard the Constitution. The final interpretation of the constitution that all parties must agree to is that which is determined by judicial review. The Indian constitution has accepted the concept of judicial review because the Supreme Court is now the ultimate interpreter and guardian of the constitution.

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