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Article 13 and Pro Tanto Supremacy of the constitution of India

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Abstract
Article 13 is one of the most fasciculus articles which are comprised in the Part III of the Constitution headed "Fundamental Rights". Doubtless with the adoption of a written constitution and incorporation of fundamental rights therein, the validity of all laws have to be tested on the touchstone of the Constitution, the framers of the Constitution, nevertheless, unlike the American Constitution, did not wish to leave it to the judiciary to assume for itself that power. Accordingly, the justiciability of the fundamental rights has been explicitly provided in the provisions of Article 13 of the Constitution. "The Inclusion of Articles 13(1) and 13(2) in the Constitution", according to Kania, CJ., appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactment to the extend it transgresses the limit, invalid. Article 13 deals with both the post-constitutional and pre-constitutional laws and further defines one of the most important concepts in Constitutional Jurisprudence, "Law" and "Laws in force". The significance of Article 13 lies in the fact that the doctrine of judicial review inheres in this article and there can be no doubt as to the indispensability of the very control of the constitutionality of laws.

Keywords: constitution of India, article 13, judicial review, severability, fundamental rights

Introduction
"The greatest of all the means for ensuring the stability of Constitutions – but one which is nowadays neglected – is the education of the citizens in the spirit of their Constitution. There is no profit in the best of laws, even when they are sanctioned by the general civic consent, if the citizens themselves have not been attuned by force of habit and the influence of teaching, to the right constitutional temper. The mere existence of the Constitution does not ensure constitutionalism, constitutional morality or a constitutional culture. It is the political maturity and traditions of a people that impart to a Constitution and help develop Constitutional culture. It is in this depth of this ocean that the Constitution finds its meaning (Aristotle)

Supremacy of the Constitution in a democratic legal order does not result from an abstract legal postulate, but rather from the importance the Constitution has as a political act with corresponding democratic contents and determined class substance, which precisely make it the most important act in a State. In this way, the Constitution represents the act, by means which, as it has been observed in the theory, politics is transferred into law. In this sense, the laws are nothing but the instrument of realization and application of the Constitution and by the very fact, also of the politics which the latter expresses. The US Constitution contains no express provision that a law contravening the Constitution is pro tanto void. But the position was established by Marshall CJ in Marbury v. Madison [1]. He said that those who framed written constitution contemplated them on forming the fundamental and paramount law of the nation and the theory of every such government must be that an act of legislature repugnant to the constitution was void. The particular phraseology of the US Constitution confirmed and strengthened the principle that a law repugnant to the Constitution was void. The Judiciary is thus to act as the guardian of the fundamental rights guaranteed by the Constitution and in exercising that function, it has the power to set aside an Act of the Legislature of it is in violation of those rights [2].

But as observed by the Supreme Court in the case of A.K. Gopalan v. Union of India [3] "The inclusion of Article 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extend it transgresses the limits, invalid. The existence of Article 13(1) and Article 13(2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extend it is permitted to be abridged by the Constitution itself." The reason is that the very adoption of a written Constitution with a Bill of Rights and Judicial Review implies that the Courts shall have power to strike down a law which contravenes a fundamental right or some other limitation imposed by the Constitution [4].

The present paper is an attempt to interpret one of the most interpreted articles of the Constitution of India, to define the prospect and retrospect of Article 13 and to analyze how he Supreme Court acts as the "sentinel on the qui vive" in relation to fundamental rights.

International Perspective and Other Constitution
"We are under a Constitution, but the Constitution is what the Judges say it is."

Governor Charles Evan Hughes

In Trop v. Dulles [5] Earl Warren CJ American Supreme Court said, "We are oath bound to defend the Constitution. The delegation requires that congressional enactments be judged by the standards of the Constitution. The judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of the citizen, the safeguards of the Constitution should be examined with special diligence. The provisions of the Constitution are not timeworn adages or hollow shibboleths. They are living principles that authorize and limit governmental powers in our nation. They are rules of the Government. When the constitutionality of an act of Congress is challenged in the court, we must apply these rules. If we do not, the words of the Constitution become little more than good advice. When it appears that an Act of the Constitution become little more than good advice. When it appears that an Act of the Congress conflicts with one of those provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of Constitutional adjudication."

Brown, Chief Justice of Nigeria, interpreting the effect of Article 13 said, "The point that I wish to make is that by Article 13 of the Constitution, all laws which are inconsistent with the Part III of the Constitution of India are to declared to be void by the Constitution itself. The task of the Courts is to determine whether the law is inconsistent. Having found that it is nothing more in strictness remains to be done, because the Constitution has already declared the law to be void and the court's declaration that the law is void merely reaffirms what the Constitution has already declared [6].

Article 8(1) of the Constitution of Pakistan says, "Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by the Chapter, shall to the extent of such inconsistency, be void. The State shall not make any law which takes away or abridges the rights so conferred and any law made in the contravention of the clause, shall to the extent of such contravention be void."

Article 36 of the Constitution of Switzerland says, "Any limitation of a fundamental right must be justified by public interest or serve for the protection of fundamental rights of other person. Limitation of the fundamental right must be proportionate to the goals pursued."

Article 4 of the Singapore Constitution says, "This Constitution is the Supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution, which is inconsistent with the Constitution shall, to the extend be void."

Article 98 of the Japan Constitution states that the Constitution of Japan is the Supreme law of the State and no public law or ordinance contrary to the provisions of the Constitution shall have no legal force or validity.

Article 25(a) of the Constitution of Sri Lanka explains the provision of any law inconsistent with this chapter to be repealed, "In this event of any inconsistency between the provisions of any law and this provisions of this chapter, the provision of the Chapter shall prevail."

The principle of judicial review on the ground of unconstitutionality is now firmly established in Eire [7] The power to declare invalid any repugnant law under Article 15(4) of the Ireland Constitution is vested in the High Court under Article 34(2) [8].

Article 1(3) of the West German Constitution says, "The following basic rights shall be binding as directly valid law on legislation, administration and judiciary." Article 19(2) says that in no case may the essence of a basic right be infringed.

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 [9].

Article 13 clears the doubt as to the indispensability of the very control of the constitutionality of laws. It acts as a protection of our reservations which we have granted to ourselves with the enactment of Constitution. Article 13 has played a pivotal role to protect the basic structure of the Constitution by granting a legal protection to individual rights and withholding the principle of "lex superior" of the Constitution. Article 13 has been a crucial instrument to protect and preserve Constitutionalism in India.

Analyzing Article 13

1. The Constitution of India has no retrospective effect

The legislative competence of an enactment is to be determined with reference to the constitutional provisions as they stood at the time when the Act was made, expect where an amendment of the Constitution is given retrospective effect [10]. A person may be prosecuted and punished under a pre-Constitutional law even after the commencement of the Constitution, for an offence committed before the Constitution came into force, even though the law which made the offence punishable is inconsistent with Part III of the Constitution [11]. The procedure for such prosecution after the commencement of the Constitution must not however be repugnant to the Constitution. Where though the statute is a pre-constitution law, it is sought to be enforced after the commencement of the

Constitution, the validity of the executive action can be challenged without involving a challenge as to the validity of the pre-Constitution statute. The Constitution has no retrospective effect [12].

All inconsistent existing laws, therefore, becomes void only from the commencement of Constitution. Acts done before such commencement in pursuance or in contravention to the provision of any law which after the commencement becomes void because of inconsistency with the fundamental rights are not affected. The inconsistent law is not wiped out in as much as the past acts are concerned.

2. Pre-Constitution laws inconsistent with the Constitution

In Saghir Ahmed v. State of UP [13] Court held that Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book. Such law existed for all the past transactions and for the enforcement of rights and liabilities before the date of the Constitution as was held in the case of Keshava Madhava Menon v. State of Bombay [14].

3. Doctrine of Eclipse

If the Constitution 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 place [15]. The doctrine of eclipse was formulated by Das CJ., in the case of Bhikaji v. State of Madhya Pradesh. The doctrine of eclipse can be invoked in the case of a pre-Constitution law which was valid when it had been enacted, but the shadow was cast by a supervening event, namely, inconsistency with the Constitution which came into existence subsequently; if and when the shadow is removed, the pre-Constitution becomes free from all infirmity [16]. H.M. Seervai in the Constitutional Law of India says that the doctrine applies to both the pre-constitutional and post constitutional law relying upon the judgment of Supreme Court in the case of State of Gujarat v. Ambica Mills [17].

4. Post- Constitutional laws which are inconsistent shall be void ab initio

Constitution is the will of the people whereas statutory laws are the creation of legislators who are the elected representatives of the people. Where the will of the legislature - declared in the statutes - should in opposition to that of the people - declared in the Constitution the - will of the people must prevail [18].

In the case of Mahendra v. State of U.P., the Supreme Court explained the difference of clause (2) of Article 13 with clause (1) as, "Article 13(2) begins with an injunction to the State not not to make a law which takes away or abridges the rights conferred by Part III. There is thus a constitutional prohibition to the State against making laws taking away or abridging fundamental rights. The legislative power to Parliament and the legislatures of States under Article 245 is subject to the other provisions of the Constitution and therefore subject to article 13(2), which specifically prohibits the State from making any law taking away or abridging the fundamental rights. Therefore, it seems to us that the prohibition contained in clause (2) makes the State as much incompetent to make law taking away or abridging the fundamental rights as it would be where law is made against the distribution of powers contained in the Seventh Schedule to the Constitution between Parliament and the Legislature of a State. Further, Article 13(2) provides that the law shall be void to the extent of the contravention. Now contravention in the context takes place only once which takes away or abridges the fundamental rights. Therefore, where there is a question of a post-constitution law, there is a prohibition against the state from taking away rights under Part III and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Article 13(1) which was valid when made, the law made in contravention of the prohibition contained in Article 13(2) is a still born law either wholly or partially depending upon the extent of the contravention [19]

5. Constitutional limitation in Indian Constitution can be classified as (1) Express and Implied [20], and (2) Direct and Indirect [21].

6. Grounds of unconstitutionality

A law may be made unconstitutional on the following grounds,

1. Contravention of any fundamental right, specified in Part III of the Constitution [22].
2. Legislating on a subject which is not assigned to the relevant Legislature by the distribution of powers made by the Seventh Schedule read with the connected Articles [23]
3. Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Article 301 [24].
4. In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State [25].
5. That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body [26].

In absence of the foregoing conditions, the Court will not interfere with the wisdom of the Legislature or matters involving Government policy or legislative policy, e.g., in the matter of classification under Article 14, or on the ground of malice, or intrude upon non- justiciable matters. In effecting the constitutionality of laws, the constitutional court does not evaluate the opportunity of laws, and, therefore, there exists no possibility of evaluating a policy which the representative body determines as the supreme organ of authority. Consequently the court is not transformed nor can it be transformed into the organ which directs policy, though the decision of Constitutional Courts can be more or less of political significance [27].

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In Sivamurthy v. State of Andhra Pradesh [28], court declared

that "broadly a policy decision is subject to judicial review on the following grounds:-

a. If it is unconstitutional,
b. If it is de hors the provisions of the Act and regulation,
c. If the delegate has acted beyond its powers of delegation,
d. If the executive policy is contrary to statutory or larger policy."

Power to frame policy by executive or legislative decision includes the power to withdraw the same and judicial review is excluded unless the same is affected by mala fide exercise of power or the said decision is an abuse of power [29],

7. The Doctrine of Severability

In the case of Mahendra v. State of Uttar Pradesh [30]. the Supreme Court held that, "The words – to the extent of inconsistency or contravention- makes it clear that when some of the provisions of a statute become unconstitutional on account of inconsistency with a fundamental right, only the repugnant provisions of the law on question shall be treated by the courts as void, and not the whole statute, subject of course, to the doctrine of severability." The doctrine of severability means that when some provisions of a statute offends against a constitutional limitation, but that provision is severable from the rest of the statute, only that offending provision will be declared void by the Court and not the entire statute.

The American doctrine of severability is explained by Dr. C.D. Jha in his book Judicial Review of Legislative Acts as, "If a statute is constitutional in part and unconstitutional in part and the two are separable and independent, the constitutional part will be given effect, otherwise the whole statute will be declared invalid [31]. In AG for Albertas v. AG for Canada, it was observed that; "The real question is, whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or as it has sometimes been put, whether on a fair review of the whole matter, it can be assumed that the legislature would have enacted what survives, without enacting the part is ultra vires at all [32].

The Three principles governing severability were considered by the Supreme Court in R.M.D. Chamarbaugwalla v. The Union of India [33].

1. In determining whether the valid parts of, statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.
2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one 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 in itself a complete code independent of the rest then it will be upheld notwithstanding that the rest has become unenforceable.
3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all 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 [34].

History of Legislation would be admissible for ascertaining the legislative intent when the question is one of severability. But Statement of Objects and Reasons is not admissible as it is not part of history of legislation. The question of severability has to be judged on the intention of legislature as expressed in the Bill passed. But the statement of the mover of the Bill is not admissible, just as a speech made on the floor of the House is not admissible. The test is not of textual severability, but of substantial severability, which permits even modification of the text in order to achieve severance, but, this can be done only when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision [35].

It was in the case of Re. Hindu Women's Right to Property Act, the Federal Court considered the question of severability [36].

8. Law

The definition of Law contained under Article 13(3) (a) is, thus, wider than the ordinary connotation of law, which refers to enacted law or legislation. It includes subordinate legislation made in exercise of powers conferred by statute [37]. It was held that Constitution of India is not a statute and it is the foundation of all laws. Expression "law" ordinarily does not include the Constitution. Expression "law" as used in Article 13 would be law other than constitution, in other words, law enacted in the exercise of legislative powers [38].

24th Constitution (Amendment) Act, 1971

Clause 4 of Article 13 was introduced in the Constitution by the Constitution (24th Amendment) Act, 1971, with effect from 5-11-71, to override the decision of Supreme Court in the case of Golak Nath v. State of Punjab [39]. that, a Constitution Amendment Act, passed according to Article 368, is a 'law' within the meaning of Article 13 and would, accordingly, be void if it contravenes a fundamental right. The question of whether a Constitution Amendment Act is a law was answered in affirmative by the Supreme Court in the case of A.K.Gopalan v. State of Madras [40].

The validity of this Amendment Act was upheld by the Supreme Court in the case of Keshavananda Bharti v. State of Kerala [41]. the apex Court observed that, "The basic features of the Constitution could not be amended by exercise of the power of amendments under Article 368."

Judicial Review

Judicial review is not a usurped power, but a part of the grand design to ensure supremacy of the Constitution. The principle of equilibrium required that judges be more than puppets of a legislature. In the constitutional scheme of things, it was imperative that some institutions exist to protect the fabric of the Constitution, to ensure that a legislature and the executive would not convince together, to break the equilibrium of powers.

(John P. Roche, Courts and Constitution, 1966, p.22)

In Black Law Dictionary (7th Edition 1999) it is stated thus:

a. A court's power to review the action of other branches or levels of Government especially the Court's power to immediate legislative and executive actions as being unconstitutional,

b. The Constitutional doctrine providing for this power,
c. A court's review of a lower court's or an administration body's factual or legal findings [42]

Judicial Review is a great weapon in the hands of the judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any action by a public authority which is inconsistent or in conflict with the basic law of the land [43] Judicial review means overseeing by the judiciary of the exercise of power by the other coordinate organs of the government with a view to ensure that they remain confined to the limits drawn upon their powers by the Constitution. It is an exercise of judicial power of the State and consequently the function of judiciary alone to interpret the written law. Thus, interpretation is at the heart of judicial review and judicial review so to say, is essential a matter of interpretation.

Judicial review in India comprises three aspects

a. Judicial review of legislative action,
b. Judicial review of judicial action,
c. Judicial review of administrative action [44].

Judicial review is believed to be an essential power for the courts of a free India, and an India with a federal constitution. The Constituent Assembly's aim, when framing the judicial provisions, was to establish clearly the foundations of the Judiciary's review power and its duty to uphold the Constitution. The Constitution was criticized in the Constituent Assembly by some members for bring a potential lawyer's paradise [45]. Dr. B.R. Ambedkar defended the provision of judicial review as absolutely necessary and rejected the above criticism. According to him, the provision of judicial review and particularly for the writ jurisdiction that gave quick relief against the abridgement of fundamental rights constituted the heart of the Constitution, the very soul of it [46].

The role of Court in this regard was explained by Justice Robert Jackson as, "We are not final because we are infallible, but we are infallible only because we are final [47]. Unlike the United States, judicial review in India was provided for expressly in the Constitution. Granville Austin in his book "The Indian Constitution – Cornerstone of a Nation" said that; "The Members of the Constituent Assembly brought to the framing of judicial provision of the Constitution, an idealism equaled only by that shown towards Fundamental Rights. Indeed, the Judiciary was seen as an extension of the Rights, for, it was the court that would give the rights force. The judiciary was to be the arm of social revolution, upholding the equality which Indians had longed for during Colonial days, but had not gained – not simply because the regime was colonial and per force repressive, but largely because the British had feared that social change would endanger their rule [48].

Judicial review in its broadest context is the self-assured right of the court to pass upon the constitutionality of legislative acts. Judicial review of the constitutionality of statues is a peculiarly American phenomenon which has been copied with varying degrees of success by other nations also [49]. It is now firmly established in India that the concept of judicial review is a basic feature of the Constitution of India [50]. Of course, in determining the constitutional validity of a statute, the Court should so interpret it as to confirm to the dynamic changes in the social background to which the legislation relates [51].

Dr. C.D. Jha in his book Judicial Review of Legislative Acts [52] has said that, "In the Constitution founded on popular sovereignty, the power of judicial review is inherent and natural. It is a matter of considerable importance to consider whether in India, judicial review could be completely annihilated or substantially curbed by Constitutional amendments. A right which is natural and inherent cannot be destroyed by Constitutional amendments. There are implied limitations on such amending power by the Constitution of India. Exercise of such wide amending powers destroys the natural rights of citizens. It appears apparently clear that the power to annihilate the right to judicial review is beyond the jurisdiction of Indian Parliament."

Conclusion

Article 13 is not a dogmatic rule allergic to logic and reason; it is flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs state policy and judicial conscience. In India, during the span of 70 years since the commencement of the Constitution, the Supreme Court has overruled many earlier decisions on the basis of constitutional dynamism and invalidated by many legislative acts and executive orders on the basis of constitutional validity. Continuity and certainty are essential ingredients of rule of law and it is only on the basis of the provisions of Article 13 that the judiciary keeps the balance between the need of certainty and continuity and desirability of growth and development of law. The judiciary which is designated as the guardian of Constitution should not be much hesitated to abandon an untenable position. The Constitution which we have given to ourselves is the fundamental law of the land. The judiciary, under the Constitution, is designed to be an intermediary body between people on one side and the executive on the other. It belongs to the judiciary to ascertain the meaning of the Constitutional provisions and the laws enacted by the legislature. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as 'one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law, or the criminal law'. For him, such a judicial system, plus uniformity of law, were 'essential to maintain the unity of the country [53]

In order to keep the executive/legislature within the limits assigned to their authority under the Constitution the interpretation of laws is the proper and peculiar province of the judiciary [54]. The two terms used in Article 13 clauses (1) and (2) – 'inconsistency' and 'contravention' has played an impactful role to determine the true nature of the legislation. Any law which [55] is illegal and offending the roots of the Constitution cannot be allowed to be perpetuated even by a constitutional amend [56] ment and neither the Parliament nor State Legislature can make such law. Article 13 is often said to be the touchstone by which validity of oppressive legislations is checked. Popularly known as the heartbeat of the Constitution, Article 13 has played a varied and

fundamental role in reshaping the constitutional jurisprudence and legal theory.

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