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Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of Law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated 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

NEW DIMENSIONS OF JUDICIAL REVIEW **OF CONSTITUTIONAL AMENDMENTS**

Authored By - Vaishnavi Soni

Abstract

Constitutional Amendments are subject to the Supreme Court's judicial review power. Judicial review is considered a fundamental prerequisite for the development of a new civilization to protect individual liberty and rights. according to the doctrine, every state organ must operate in its operational region, without interfering with or hindering the functioning of other organs. The requirement of judicial review was described in Part III of Article 13 of the Indian Constitution as a basic right. It is declared that the State or the Union shall not make any rules that deprive or limit the people's fundamental rights. The judiciary has the power to declare any law passed by the legislature to be void if it contravenes the Constitution. This study examines the many facets of judicial review, as well as criticisms and areas for improvement.

Keywords: judicial review, judiciary, constitution, executive, legislature

Research objective

- To define judicial review
- Constitutional provisions of judicial review
- Landmark cases on judicial review in India
- Criticism of judicial review
- conclusion

Introduction

Judicial review is the procedure through which a court declares any statute that violates the Constitution to be unconstitutional. This characteristic was taken from the United States Constitution. However, it took several years to correct this flaw in our constitution. In this regard, the judiciary has played a significant role. It is a sort of judicial process in which a judge considers the legality of a public body's decision or conduct. In other words, judicial reviews examine the process by which a decision was obtained rather than the merits or shortcomings of the decision itself.

The concept of Judicial Review has been adopted from the American Constitution. If the judiciary intervenes in the Indian Constitution, it has the right to nullify any law approved by the legislature. The doctrine of 'basic Structure' has allowed judicial review to be applied to constitutional amendments affecting Fundamental Rights as well. In the 1973 case of *Kesavananda Bharati*, this doctrine was developed. Article 368 gives the parliament the power to alter the constitution, but any such amendments must not take away or violate fundamental rights, and any bill passed in violation of this rule is null and void (Article 13).

History

In the *Dr. Bonham Case*¹, the term "judicial review" was first used before the court. This case is also renowned for violating the Principles of Natural Justice since there is Pecuniary Bias in this case. As Dr. Bonham has been punished for practicing medicine without a license, the fine will be split between the king and the college. Afterward, The Supreme Court of the United States of America summarized the doctrine of judicial review. The United States Constitution did not have an express provision for judicial review at the time, but the Supreme Court of the United States assumed it in the landmark decision of *Marbury vs Madison*.²

Chief Justice Marshall observed that "the constitution is either superior paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts and like other acts are alterable when the legislature shall please to alter it..... Certainly, all those who framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature repugnant to the constitution is void... It is emphatically the province and duty of the judicial department to say what the law is".³

The issue of Judicial Review in India was first examined in *Emperor v. Burah*⁴, in which the Calcutta High Court and the Privy Council agreed that Indian courts had Judicial Review power subject to specific restrictions. The Constitution of India has granted the Higher Courts and the Supreme Court of India powers to examine the constitutionality of administrative action and

¹ 77 Eng. Rep. 638

² 5 U.S. 137 (1803).

³ <https://www.latestlaws.com/articles/doctrine-of-judicial-review-in-india-a-judicial-perspective-by-fayaz-ahmed-bhat#:~:text=The%20Doctrine%20of%20Judicial%20Review,LEd>.

⁴ *Emperor v. Burah*, ILR, Calcutta, 63 (1877)

statutes. The major goals of judicial review are to protect public rights and to implement fundamental rights. If a conflict emerges between the State and the Center, Article 246 and Schedule 7 of the Constitution have established a working zone for the formulation of regulations between the two.

Classification of judicial review

1. **Review of legislative actions:** it implies the power to ensure that laws passed by the legislature are in compliance with the provision of the constitution.
2. **Review of administrative actions:** this is a tool for enforcing constitutional discipline over administrative agencies while exercising their powers.
3. **Review of judicial decisions:** it is used to correct and make any changes in the previous decisions.

Features of judicial review

1. The Supreme Court and the High Courts both can exercise Judicial Review Power.
2. Judicial Review can be conducted in respect of all Central and State laws.
3. It covers laws and not political issues.
4. Judicial Review is not automatic.
5. Judicial Review Decision gets implemented from the date of Judgement.
6. Judicial Review in India is governed by the principle: 'Procedure Established by Law'.

Importance of judicial review

1. To uphold the supremacy of the constitution
2. Prevents misuse of power by the legislative and the executive.
3. Maintains the equilibrium between the center and the state, by maintaining federal equilibrium.
4. To protect the fundamental rights of the citizens.
5. Ensures the independence of the judiciary.

Constitutional provisions of judicial review

Our Constitution has granted numerous provisions of the judicial review system in several articles. These articles are as follows:

Article 13 states that any law that is contradictory with or violates fundamental rights is null and void.

Article 32 The right to approach the Supreme Court for the enforcement of fundamental rights is guaranteed, and the Supreme Court is empowered to issue directions, orders, or writs for that purpose.

Article 131 provides for the original jurisdiction of the Supreme Court in center-state and inter-state disputes

Article 132 provides Appellate jurisdiction of the Supreme Court in constitutional cases.

Article 133 provides for the Appellate jurisdiction of the Supreme Court in civil cases.

Article 134 provides for the Appellate jurisdiction of the Supreme Court in criminal cases.

Article 134-A deals with the certificate for an appeal to the Supreme Court from the high courts

Article 135 empowers the Supreme Court to exercise the jurisdiction and powers of the federal court under any pre-constitution law.

Article 136 authorizes the Supreme Court to grant special leave to appeal from any court or Tribunal (except military tribunal and court-martial)

Article 143 empowers the president to seek the Supreme Court's opinion on any question of law or fact, as well as any pre-constitutional legalities.

Article 226 authorizes the high court to issue directions, orders, or writs for the enforcement of fundamental rights and other purposes.

Article 227 The power of supervision over all courts and tribunals within their distinct territorial legal systems is given to the high courts (Except military courts or tribunal)

Article 245 deals with the territorial scope of legislation enacted by parliament and state legislatures.

Article 246 deals on the subjects of laws enacted by parliament and state legislatures (i.e., Union List, State List, and Concurrent List).

Articles 251 & 254 ensure that in the event of a conflict between center and state laws, the central law will prevail and the state statute will be nullified.

Article 372 deals with the continuance enforcement of the pre-constitutions law.⁵

Landmark cases on judicial review in India

- **Shankari Prasad V. Union of India**⁶

The first amendment act of 1951 was challenged in court on the grounds that it restricted the 'Right to Property,' and that it could not be done as a fundamental right under Article 13(2) of the

⁵ <https://www.legalserviceindia.com/legal/article-3597-judicial-review.html>

⁶ AIR 1980 SC 1789

Constitution. The Supreme Court dismissed the contention, stating that Article 368 is perfectly general and authorizes the legislature to amend the Constitution without exception.

Following this case, the Fourth Amendment Act was enacted, which included Article 31(2A), which specified that there would be no compensation unless the land acquired was given to the state or a state corporation. It further stated that the adequacy of compensation to be determined by law is not a non-justiciable matter.

In 1964, the 17th Amendment was enacted, with retrospective effect. It included Article 31A(2)(a)(iii), which states that an estate includes any area used for agriculture or ancillary purposes, such as wasteland or forest land.

- **Sajjan Singh V. State of Rajasthan**⁷

In this case, the constitutional validity of the 17th Amendment Act of 1964 was challenged. Hon'ble court by the ratio of 3:2 rejected the contention and applied the doctrine of pith and substance and held that Article 368 gives the power to amend 13(2). The judgment made in Shankari Prasad was upheld in this case.

- **I.C. Golak Nath & Ors V. State of Punjab**⁸

The court ruled that the parliament could not amend the constitution to eliminate the rights guaranteed in Part III. As a result of this, the parliament's constitutional powers were not restricted by the 24th amendment (1971).

- **Kesavananda Bharti V. State of Kerala**⁹

In this case, the 24th and 25th Amendment Act of 1971 was challenged. A Judge Bench of 13 Judges was constituted. With the ratio of 7:6 held that:

1. The power to amend the Constitution is to be found in Article 368. It is hard to believe that it lies in residual power.
2. There is a difference between ordinary law and constitutional amendment.
3. Parliament can't destroy or amend the basic structure of the Constitution.

CJI Sikri gave the list of the Basic structure though not exhaustive;

- The supremacy of the constitution.

⁷ AIR 1965 SC 845

⁸ AIR 1967 SC 1643

⁹ AIR 1973 SC 1416

- Republic and democratic form of government.
 - Secular character of the Indian Constitution.
 - Separation of Power.
 - Federal character.
4. Court also held that “compensation” can’t be replaced with “amount”.
 5. Article 31(c)(i) was held valid but Article 31(c)(i) was declared invalid.

- **Indira Nehru Gandhi V. Raj Narain** ¹⁰

In this case, the 39th Amendment Clause 4 was challenged as it puts a bar to challenge the election of Speaker and Prime Minister. It was struck down in this case and the court declared it unconstitutional.

- **Minerva Mills V. Union of India** ¹¹

In this decision, the court observed that the mechanism of a constitutional amendment cannot be used to destroy the Constitution itself.

And they declared that judicial review was a fundamental and vital aspect of the Constitution. The Constitution would no longer be what it was if the authority of judicial review was completely removed.

- **I.R. Coelho V. State of Tamil Nadu** ¹²

This case was seen from Keshvanand Bharti case in which the cases like Chandra Kumar v. Union of India and others (1997), Waman Rao and others v. Union of India and others (1981), Minerva Mills Ltd., and others v. Union of India (1980), Indira Nehru Gandhi v. Raj Narnia (1975), where judicial review was considered as an essential and integral part of the Constitution of India.¹³

Criticism of judicial review

- Judicial Review is viewed as an undemocratic procedure by critics. It gives the court the authority to decide on the fate of laws passed by the legislature, which represent the sovereign, will of the people.

¹⁰ AIR 1975 SC 865

¹¹ AIR 1980 SC 1789

¹² AIR 2007 SC 861

¹³ https://blog.ipleaders.in/all-about-judicial-review/#Judicial_review_of_Ordinances

- The mechanism of Judicial Review in India is not precisely defined in the Indian Constitution. It rests upon the basis of several articles of the Constitution.
- When the Supreme Court strikes down a law as unconstitutional, the ruling takes effect on the date it is delivered. Only when an issue of a law's constitutionality arises in a case before the Supreme Court may it be subjected to Judicial Review.
- The Judicial Review mechanism is viewed as regressive by some commentators. They argue that the Supreme Court takes a legalistic and conservative approach when deciding whether a law is constitutional. It has the power to overturn progressive legislation passed by the legislature.
- Judicial Review is a source of inefficiency and delay. People in general, and law enforcement organizations in particular, sometimes choose to take things slowly or cross their fingers when it comes to implementing a law. They would rather wait and let the Supreme Court decide the constitutionality of the bill in a case that could come before it at any time.
- At various times, the Supreme Court has overturned its previous judgments. The Golaknath case resulted in the preceding judgments being overturned, and the Keshwananda Bharati case resulted in the Golaknath case being overturned. The same act has been declared valid, invalid, and then valid again. The element of subjectivity in the assessments is reflected in such reversals.¹⁴

Conclusion

The doctrine of judicial review is thus the application of judicial restraint to the government's legislative, executive, and judicial actions. It has acquired permanent status as a result of legal rulings made from 1973 to the present. All of the provisions in our Indian constitution emphasize the importance of the judiciary, which aids in the check and balance of the legislative and executive branches of the federal government as well as state governments. The judicial review system serves as a watchdog over our constitution, ensuring individual fundamental rights, dividing authority between the union and the states, and explicitly defining the functions of every government department. As a result, the government's acts are legitimized, and the Indian constitution is protected against government intrusion.

¹⁴ <https://www.yourarticlelibrary.com/essay/judicial-review-in-india-meaning-features-and-other-details/40369>