



ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - journal@lexresearchhub.com

VOLUME II, ISSUE III
APR - JUNE, 2021

<https://journal.lexresearchhub.com>

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Publications**

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AN ANALYSIS OF JUDICIAL REVIEW

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ABSTRACT

In this paper, we will discuss the textual, structural, and historical roots of judicial review¹. Judicial Review Refers to the Power of the Judiciary to interpret Constitution and to declare any such Law of the legislature or executive void if it finds them in conflict with the constitution of India. Judicial review has two important functions, one, of legitimizing government action and; second, the protection of the constitution against any undue encroachment by the government in power. It is the power exerted by the courts of a country to examine the actions of the legislatures, executive and administrative arms of government and to ensure that such actions conform to the provisions of the nation's constitution. The term refers to the power of a court to inquire whether a law, executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void. We'll also be discussing some landmark cases, like Marbury V. Madison that led to the evolution and refinement of this power of an independent judiciary.

INTRODUCTION

Judicial review originated from the United States. Previously, it was neither found in the Indian nor American constitution. It was not incorporated in the constitution, but when courts decided the matter of Marbury V. Madison, the American Supreme court did evolve this concept. By the power of judicial review, courts see to it that the legislature, while making the law does not go beyond the provisions of the constitution. Judiciary also keeps a check on the executive to see to it that the executive actions do not go beyond / contrary to the provisions of the constitution. As guardians of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitution of the country and the valid laws passed by congress. The high court and Supreme Court in India have the power to grant writs or issue writs. These writs mentioned in the Indian constitution are taken from the prerogative writs of the United Kingdom. These writs are available under article 32 for the Supreme Court article 226 for the high court. All writs are an effective method of enforcing the fundamental rights of people and compelling the

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=426860 (Last visited on 30/07/2021, 11: 50 AM)

authorities to fulfill the duties they are bound to perform under the constitution. There are five types of writs,

- 1) Habeas corpus
- 2) Mandamus
- 3) Certiorari
- 4) Prohibition
- 5) Quo-warranto

In democratic countries, the judiciary is always given a place of great importance. The court is a dispute resolving mechanism and it settles disputes and gives justice to cases between citizens and also between citizens and states and various organs of state. In many countries with a written constitution, for that constitution to be effective there needs to be an authoritative, independent and impartial arbitrator which restrains governmental organs from exercising powers which are not sanctioned by the constitution.

Courts in Britain interpret laws, not the constitution, but in courts in a country with a written constitution, the courts interpret the provisions of the constitution and, thus, give meaning to the cold letter of the constitution. Courts act as the Supreme interpreter and guardian of the supremacy of the constitution by keeping all these authorities—legislative, executive, administrative, judicial within the legal bounds. The judiciary has the responsibility to scrutinize all governmental actions to assess whether or not they are following the rules and laws set within the constitution. The judiciary has the power as well as the obligation to protect the people's rights from any undue and unjustified encroachment by any organ of the State. In a federal system, the judiciary settles disputes between the center and states and also between states. Federalism is a legalistic form of government and because of the distribution of power between the center and states by the constitution; an arbitrator is needed to draw a balance.

Judicial review 1) legitimizes governmental action and 2) protects the constitution from encroachment by the government. To what extent the judicial interpretation supplements the constitution depends on how creative and active the role the courts play. Courts interpret the constitution and give that info. Through direct/indirect judicial review and indirect judicial review,

courts interpret the statutory language in a manner in which they steer clear of any unconstitutionality. This is a part of the judicial strategy in deciding constitutional controversies. When a judge is faced with several alternative interpretations of a constitutional provision, he chooses one of these and performs a ‘law-making function. British courts often resort to indirect judicial review to protect civil liberties.

The constitution of Canada and Australia has no provision for judicial review yet it is an integral part of the constitutional process. During colonial rule, they had to follow British rule which was subject to judicial review and they followed it. After independence, this doctrine became a part of their legal fabric and there was no need to provide a special provision for that. This doctrine is also an important part of the American judicial system although no provision explicitly mentions it. Before 1803, the legislation of the American colonies was subject to judicial review. After 1803, in the famous case of *Marbury v Madison*, U.S. Supreme Court held that it had the power of judicial review and would use this power to check the constitutionality of the acts passed by congress.

The very essence of judicial duty is that if two laws conflict with each other, the courts must decide on the operation of each. If a law is in opposition to the constitution or if both the law and the constitution apply to a particular case, the Court must decide that case conformably to the law disregarding the constitution; or conformably to the constitution disregarding the law; the Court must determine which of these conflicting rules governs the case. Supreme courts in the U.S. have the power to say whether a law is constitutional or not. When there is a conflict between the constitution and legislative statute, courts will follow the former and declare the latter unconstitutional. When a law is in opposition to the constitution, the courts must follow the constitution and not the law. There can be no constitution without judicial review. It provides the only safeguard that protects us against unconstitutional legislation.

In Britain, this doctrine was not fully operational. During conflicts between the crown and the parliament, when the judges sided with the parliament, they accepted the theory of parliamentary sovereignty. This was then exercised in the overseas colonies. All law students are taught that Parliamentary sovereignty is absolute. But it is the judges who have the last word. If they interpret an Act to mean the opposite of what it says, it is their view which represents the law. Some have

asserted that judicial review is undemocratic as the judges who declare statutes unconstitutional are neither elected by nor are responsible to, the people.

A written constitution is meaningless without an independent organ which interprets and expounds (explain in detail) and enforces these laws. Without an authority to interpret the constitution, a written constitution would promote a lot of fighting rather than the order in society when different organs of government take conflicting action in the name of the constitution.

The legislature and executive are committed to certain policies which they wish to implement, therefore they can't be trusted with the power of constitutional interpretation as they would use it to bend the constitution to further their views and accommodate their policies. The judiciary is politically neutral and can give a non-political outlook on constitutional interpretation. The courts act as umpires in constitutional controversies. Without the judicial role of constitutional interpretation, fundamental rights would lose their value and power between center and state would become unstable.

In Britain, there is a demand for a written constitution with judicial review because judicial review promotes constitutionalism. Constitutionalism denotes a constitution not only of powers but also restraints as well. "Constitutionalism has one essential quality: it is a legal limitation on government; its opposite is despotic government, the government of will instead of law" Judicial Review is the cornerstone of constitutionalism.

MARBURY V. MADISON

This case established the principle of judicial review. It means that Supreme Court can limit the power of the president of the USA and congress by declaring legislation unconstitutional. The judicial branch is run by the Supreme Court, the legislative branch by congress and the executive branch by the president himself. The judicial review says when Congress makes a law or when the president takes action on something, the supreme court has the power to review the law/action and determine whether it's in harmony with the supreme united states constitution or not. If it's not, they have to go back to the drawing board and fix it.

In 1803, John Adams (president) wanted to run again for president. He lost to Thomas Jefferson and he was going to enter the office. Adam's secretary of state was John Marshall and Thomas's new secretary of state was Madison. The process of appointing a new president is more or less similar in all countries. A time span is given to Thomas so that he can take up the oath of the office and do other things before he takes upon as the new president. After Adams came to know he had lost before he gave the office to Thomas he tried to bring as many federalists in the system as possible. He ended up appointing 42 justices of the peace and 16 circuit judges. He brings in many people from his party to fill in a position in the govt. He does this before demitting the office. After the senate clears the names of the judges, they are given a letter of appointment informing them that they have been appointed as a judge to a specified court. It's also called a commission.

42+16 were nominated, also approved by the senate, now the question came of handing them over the commission. Adams gave the responsibility of issuing those commissions to John Marshall. He was tasked with delivering these commissions to the 42+16 that were nominated. Commissions were already prepared and signed by John Adams, but it wasn't possible to deliver them in one day. One of the 42+16 was William Marbury who was appointed as the justice of the peace. His commission was prepared but John Marshall was not able to deliver it in time before Thomas Jefferson entered the office.

As Adams exists and Thomas enters, he can't stop for all those people who have already received the commission, but he says all pending commissions should not be delivered as they have been termed as void by him. Thomas's secretary of state was James Madison. He tells Madison that all commissions signed by John Adams which are pending should not be delivered.

Marbury ends up suing the secretary of state (Marbury V. Madison). The case was filed at the supreme court of the USA. Parliament in the USA is called as the congress. Supreme Court says that the law made by Congress is unconstitutional because it goes beyond the provisions of the constitution. In this context, the original jurisdiction of the supreme court of the USA was talked about; the law made by congress and section 13 of the judiciary act was also discussed. This case didn't fall under original jurisdiction, so the question arises that how did Marbury file the case in Supreme Court? This is where the law made by congress comes into the picture. The law is called the "judiciary act" which was made in 1789. Congress had enlarged the original jurisdiction of the Supreme Court to say cases like Marbury V. Madison can also be taken up in Supreme Court under

original jurisdiction. This law gave the Supreme Court the power in its original jurisdiction to issue the writ of mandamus in cases where there is a dispute between two individuals who are not ambassadors/council/state. This law goes beyond the provisions of the constitution because it gives the supreme court of the USA the power which it does not possess according to the constitution. The implication of the law is such that it ended up expanding the original jurisdiction of the constitution.

We have to ask ourselves a question that whether a law can or can't expand the jurisdiction which is restricted by the constitution? The answer is to that question is that is it can't because of the law that will be made by the legislature; the law always has to remain within the confines of the constitution. In this case, John Marshall, who earlier was secretary of state for John Adams, became the Supreme Court judge. Before John Adams demitted office, in that 42+16 he appointed John Marshall as the chief justice. Judge John Marshall said that the laws go beyond the provisions of the constitution, therefore he struck down section 13 of the judiciary act and because of this, Marbury was given no relief because he had chosen the wrong forum. He had brought about the case based on an unconstitutional section. This case is said to be the first case in which judicial review was laid down by the Supreme Court of USA and John Marshall was credited with establishing the judicial review.

CONCEPT OF JUDICIAL REVIEW

In India, we have an integrated judiciary where there is only one Supreme Court at the apex level and below the Supreme Court, we have multiple high courts in different states and below the high court, we have another subordinate judiciary or the lower judiciary. That's why it's called an integrated judiciary. In the USA they have a disintegrated judiciary. It's called disintegrated because the states in the USA are far more autonomous. States also have a right to make their constitution. States also have their judiciary in the USA. There's no clear hierarchy. Each state would also have its supreme court. In India, we have only one federal Supreme Court.

If a matter is decided in India by a lower court, an appeal can be filed against the decision in a superior court. Once the decision is given by the higher court, an appeal can be filed against the decision of the high court can also be filed before the Supreme Court. This jurisdiction of the court

wherein it decided the appeals of the lower courts is termed as the appellant jurisdiction. The high court and Supreme Court will have appellant jurisdiction.

Cases are usually filed at the lowest court which is competent to try them. Then appeal would reach Supreme Court and in original jurisdiction, the Supreme Court possesses the original jurisdiction which is mentioned under the constitution. In original jurisdiction, there are certain disputes which are mentioned in the constitution which allows the Supreme Court to deal with them as the court of the first instance. These kinds of disputes mentioned under the constitution can be directly taken up before the Supreme Court without going to the lower courts. Original jurisdiction of the Supreme Court is given under article 131 of the constitution.

“Types of disputes that can be decided by the Supreme Court in its original jurisdiction are mentioned in the constitution”. This statement is a restriction on the original jurisdiction because the types of disputes are written. Disputes should fall under those categories mentioned in the constitution to invoke original jurisdiction. These disputes are specified. Almost all courts in the world will have their jurisdiction determined in their constitution. The Indian constitution specifically demarcates the jurisdiction of the Supreme Court, the same thing happens in the USA. The Constitution of the USA also has the original jurisdiction of the Supreme Court mentioned right in the constitution.

For the Indian constitution, giving the original jurisdiction to the Supreme Court is very limited compared to the USA. We say matters related to the federal disputes that arise, like between two states or between center and state or between center and state on one side and another state on another side. Only these types of disputes are entertained by Indian Supreme Court in its original jurisdiction. Legislature and executive should perform their function in consonance with the provisions of the constitution. Judiciary also must function in consonance with the provisions of the constitution. Judiciary cannot go beyond the provisions of the constitution. Cases related to ambassadors, ministers, councils and cases in which state is a party. These types of cases only can be taken up by the supreme court of the USA in its original jurisdiction.

ARTICLE 13

Certain articles in the Indian constitution provide for judicial review. Article 13 is said to be one of the sources of judicial review. If fundamental rights under the constitution are to be protected, then we need the judiciary to exercise its power of judicial review in the most perfect manner. This article says that the laws that will be made by the parliament should not abridge fundamental rights. If a law is found to be doing this, it will be held unconstitutional as it is infringing fundamental rights and the judicial branch will strike down that law. That's the exact definition of judicial review. Judiciary sees to it that legislature does not transgress the provisions of the constitution and executive actions are not against provisions of the constitution. The power of judicial review is present in article 13 but the exact words are not written.

Without judicial review, the fundamental rights will be brought to a mere existence without any substance. For the protection of fundamental rights from any violation, judicial review should be in existence. Parliament is entitled to legislate only on the subject matters under the union list and state legislature is entitled to legislate only on the subject matters given under the state list. This is one of the ways of limiting the power of the legislature. When one law made by parliament ends up encroaching upon the subject matter given under the state subject matter or when one legislation made by state legislature encroaches upon the subject matter given under the union list, the judiciary is supposed to tell the parliament to remain within its confines, the judiciary is also supposed to tell the state legislature that they have exceeded their limits.

ARTICLE 32 AND 226

Authority to issue writs has been given to Supreme Court under articles 32 and 226 to the high court. The writs can be issued for having certain activities done by a public authority, for the protection of fundamental rights; these can be granted by the judiciary.

Habeus Corpus is that particular writ which can be granted by the courts whenever the fundamental right of right to life and liberty is restricted. These two articles do not use the words “judicial review” but what we can gather from these provisions is that the power of judicial review is of course given to the courts. That's why courts can grant writs whenever the right of life or liberty is

curtailed. Power of judicial review could be utilized not only for the protection of fundamental rights but also for keeping a particular organ in the confines of the constitution.

KESAVANANDA BHARATI V. STATE OF KERALA

In this case, the question was regarding the constitutional amendment, this case is related to basic structure doctrine. In kesavananda Bharti's case, we are talking about the constitutional amendment made by the parliament and we are talking about the power of the judiciary to scrutinize the constitutional amendment. It sees whether the amendment is in line with the provisions of the constitution or not. It is not in line; it can be struck down by the power of judicial review. When the parliament amends the constitution, it uses its constituent power. The power to amend the constitution is called constituent power. This case talks about constitutional amendment. The Supreme Court said that the power of judicial review can be exercised not only to scrutinize the regular legislation but also to scrutinize the amendment of the constitution. Judiciary can strike down constitutional amendment if it abridges the fundamental rights. Justice H.R. Khanna added the power of judicial review to the list of basic features. Basic structure doctrine means that there are some basic/fundamental features of the constitution which are so important that the parliament should not possess the right to change them. Ex.- judicial review can never be taken away by the parliament.

INDIRA GANDHI V. RAJ NARAIN

Raj Narain filed the case challenging the elections of Indira Gandhi in Allahabad high court. Against the decision of Allahabad high court, the then prime minister had gone in an appeal before Supreme Court and the matter was pending before the Supreme Court. At that time Supreme Court was on vacation and vacation bench which was the constitution and sitting and off that bench, Justice Krishana Ayer granted a conditional stay. Matter in its totality is not yet decided. That's why the only conditional stay was given. The matter is still pending before Supreme Court and now Indira Gandhi has challenged the decision of Allahabad high court, that's the reason the name of the case is Indira Gandhi v. Rj Narain. It will be decided by the Supreme Court.

When the matter was pending before Supreme Court, Indira proclaimed a national emergency on the grounds of internal disturbances; precisely to save the prime minister'ship is why the emergency came to be proclaimed. After the emergency came to be proclaimed, we saw the situation that led to the ADM Jabalpur. She thought that Supreme Court was not with her completely because the stay was not a total stay to the statement/judgment of the Allahabad high court, it was a conditional stay. That's why she felt threatened. The decision could go either way. If the decision of the Supreme Court is the same as Allahabad high court, she will lose her prime minister ship and she will be barred from contesting the elections for 6 years.

She tried to salvage the situation by passing the controversial 39th constitutional amendment. This was passed with the idea to protect the office of PM. She could not be ousted from her position of PM. This amendment said a few things, like the election to the office of president, vice-president, PM and the speaker of Lok Sabha cannot be challenged before any court of law. This amendment also said that if at all the election to the president, vice-president, PM or the speaker of Lok Sabha is to be challenged; it can be challenged before a forum that will be established by a law made by the parliament. These amendments do not protect her from what has already happened before the Allahabad high court because they are prospective. She is not saved from the effects of Allahabad's high court decision.

39th amendment also said that the decision given by the court in any election petition before constitutional amendment will be null and void. When the amendment said that the cases of challenge regarding the office of president, vice-president, PM or the speaker of Lok Sabha, can't be done before the court of law, it meant that the power of the court to decide on these disputes was taken away. Power to proceed on disputes has been given only to the judiciary and its judiciary's responsibility to resolve these disputes judiciously before the courts. This amendment is taking away the power of judicial review from courts. This amendment was also challenged before the court. These were the issues that came to be challenged in *Indira Gandhi V. Raj Narain* and another petition by which the 39th constitutional amendment came to be challenged. Both these petitions were heard together by the Supreme Court.

We are discussing this case because we are talking about a situation where the parliament has made an amendment and because of that the power of the judiciary to decide the disputes has been taken away, even if it's limited to the election petition. Can the parliament take away the power of judicial

review of the judiciary is supposed to be decided by the Supreme Court? The Supreme Court strikes down the 39th constitutional amendment because it is contrary to the basic structure doctrine. After all, judicial review was already set to be a part of the basic structure doctrine in kesavananda Bharti's case. Also, Gandhi's case happened after kesavananda Bharti's case, so the decision of kesavananda is going to be binding in this case. In this case, the courts reinforce forcefully that the parliament can't behave in such a manner to deface the constitution and to take away the power of judicial review because that's one of the inherent powers that the court/judiciary possesses, and that's how the power of judicial review again was said to be part of basic structure.

CONCLUSION

Like the American Supreme Court, the Supreme Court of India enjoys the power of Judicial Review' and this power has been specifically recognized by the constitution. However, its authority about 'judicial review of legislation is more restricted than that of the American Supreme Court.² The framers of the Indian constitution took good care not to embody the due process of law clause in the constitution. On the contrary, the Indian constitution refers it to as a 'procedure established by law'. It can invalidate laws if they violate provisions of the constitution but not on the ground that they are bad laws.³ In other words, the Indian Judiciary including the Supreme Court is not a Third Chamber claiming the power to sit in judgment on the policy embodied in the legislation passed by the legislature.⁴

The main function of judicial review of the system is to balance the legislative and administrative constraints, and in essence, is the interests of all sectors. The purpose of judicial review from the Indian courts is to establish the constitutional principle of judicial review, as well as the expansion of judicial review. Courts need to balance different social interests, to take appropriate activism or

² <http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-And-USA.html> (Last Visited on 30/07/2021, 11:30 AM)

³ <http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-And-USA.html#:~:text=The%20framers%20of%20the%20Indian,that%20they%20are%20bad%20laws.> (Last visited on 30/07/2021, 11:32 AM)

⁴ <http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-And-USA.html#:~:text=On%20the%20contrary%2C%20the%20Indian,'procedure%20established%20by%20law'.&text=In%20other%20words%20the%20Indian.legislation%20passed%20by%20the%20legislature.> (Last visited on 30/07/2021, 11:40 AM)

restraint doctrine in the judicial review and to consider many factors like the laws of the policies and programs, the discretion granted to the target and the nature and scope of the discretionary decisions that may affect the rights and interests of the consequences.⁵

⁵ <https://www.legalserviceindia.com/legal/article-1855-constitutional-framework-for-judicial-review-and-administrative-action-in-india.html> (Last visited on 31/07/2021, 01:00 PM)