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# **ANALYSING THE PRINCIPLE OF JUDICIAL REVIEW IN RELATION TO TRANSFORMATIVE CONSTITUTIONALISM**

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## **Introduction**

The title of the Research paper is Analysing the Principle of Judicial Review in relation to transformative Constitutionalism. This paper aims to undertake and study the how in a democratic Country like India, The Constitution of India has empowered Judiciary with the power of Judicial Review to declare any law unconstitutional by Benefit of Article 13 of the Indian Constitution. Any Law which violates the fundamental rights of any citizens, or any law which is not consistent with the provisions of the Constitution of India shall be declared unconstitutional.

This research paper aims to study and analyse the relevance of Judicial review which is not specifically mentioned in the Constitution of India but can be derived from Article 13(2) of the Indian Constitution. Through this research paper, we would understand the concept of transformative Constitutionalism as an ideology which describes functioning of government, and that function should be carried out in accordance with the provisions of the Constitution.

## **Objective**

The main objective of the research paper is in detail how transformative Constitutionalism overlays way to defend fundamental rights and freedoms through the principle of Judicial review which has kept the Constitution's spirit alive. This Research paper aims to examine the idea of Transformative Constitutionalism in India and how actively with the principle of Judicial review, power has been given to Supreme court to declare the laws passed by the Parliament as void if the laws enacted are inconsistent with the Provisions of the Constitution. The courts are made independent to put down the principle of all persons being treated fairly and equally under the law, which is important for the legal system to make sensible decisions. Transformative Constitutionalism take a more realistic or practical approach to achieve constitutional goals and aims thereby ensuring that the fundamental rights and freedoms are

protected. The key important tool of Transformative Constitutionalism is Judiciary which is seen as a tool for social and political changes in the society as the courts have been given the power to enact and implement laws. The goal of transformative constitutionalism is to recreate society based on new values.

### **Research Questions**

1. To analyze if there exist a relation between Judicial Review and Transformative Constitutionalism.
2. To Analyze the principle of judicial review in transforming the society.

### **Literature Review**

This paper examines the role of judicial review in the transformation of society and how it has led to evolvement of concept of transformative Constitutionalism. The concept of transformative constitutionalism is not new. It is a long-term project of societal structures, analysis, and implementation contributed to changing a country's political and social institutions and political structures in a participatory democracy and equitable direction . In India, judicial review is provided for fundamental rights under Article 13 of the Indian constitution, and judicial review is inferred for the rest of the constitutional provisions under the writ jurisdiction of the Supreme Court as well as the high courts granted under Article 32 and 226 respectively. Further judicial review is also provided by the "Doctrine of Limited Government. In Indian courts, the principle of judicial review has emerged. To ensure that administrative decisions are made equitably, first and foremost. To protect people constitutionally guaranteed fundamental rights and to rule on matters of law-making between the centre and the states. The Supreme Court of India has the authority to enforce these fundamental rights under Article 32 of the Constitution. When citizens' fundamental rights are violated, they have the option of going straight to the Supreme Court for remedy. The sources for Literature review includes reading and analysing Articles, references, Research paper etc.

### **Judicial Review Concept**

Under Article 13 of the Constitution of India, Judiciary has been given the Supreme Power to declare any act as unconstitutional on the grounds if the acts are not consistent with the provisions of the Indian Constitution and if the act violates the fundamental rights of citizens.

The state is not permitted to make or enact any laws which affects or infringes the fundamental rights of the citizens. After the Indian Constitution was adopted, the Indian judiciary has been given the task of reviewing a number of cases. In the case of *A.K Gopalan vs State of Madras* the legality of the Preventive Detention Act was considered. Section 14 of the Preventive Detention Act was unconstitutional since it prohibited disclosing the reasons for detention before the court. When we talk about Judicial Review we mean if the fundamentals of the Constitution are being violated, the court has the power to Invalidate the laws made by the Parliament. Judicial review is important to prevent the legislature and the administration from misusing their authority. Thus, with the help of judicial review balance is maintained between government and the states. Thus, through the power of judicial review, the fundamental rights of citizens are protected. The Constitution of India has granted authority to the higher courts and the Supreme Court of India in order to analyse the legitimacy of administrative action and laws. The major goals of judicial review are to protect public rights and to enforce fundamental rights.

### **Transformative Constitutionalism**

Transformative constitutionalism can be defined as a method of using the law to achieve comprehensive social change through peaceful political means. Transformative Constitutionalism, according to Karl Klare, is a long-term project of enacting, interpreting, and enforcing massive efforts aimed at changing a country's political and social structure and managing power relationships in a democratic participation and equality. It could mean that the law is changed by passing a new law in place of an existing one in order to make a significant change; or it could mean that the law or constitution has a transformative purpose. Transformative Constitutionalism, on the other hand, takes a more pragmatic or practical approach to achieving constitutional goals and aims, ensuring the protection of fundamental rights and freedoms. Transformative Constitutionalism's most important tool is the judiciary, which is seen as a tool for social and political change in society because courts have been given the power to enact and enforce laws. Transformative constitutionalism seeks to rebuild society around new values. The basic purpose of the constitution is to enable the state to provide the conditions for a just and humane society. Transformational constitutionalism is based on social fairness. Under transformational constitutionalism, the state must exert control over society and provide social justice. This viewpoint differs from Gandhi's concept of "social justice," which states that social justice can be achieved through individual and societal reform even in

the absence of government restrictions. Transformative Constitutionalism has always been opposed to the rigidity of the Constitution. It is critical for societal transformation and the preservation of the Constitution's fundamental principles and value system. India was fighting colonialism as well as social issues like untouchability, caste prejudice, and gender discrimination, which had existed in India since ancient times. The goal of the Indian Constitution is to bring about the changes that are stated in its various clauses. The preamble expresses people's hopes for values such as equality, liberty, fraternity, and justice.

### **Judicial Review and Transformative Constitutionalism: What's the Connection?**

The introduction of PIL (Public Interest Litigation) to the Indian legal system by Chief Justice P. N. Bhagwati has also helped to propagate the idea of transformative constitutionalism. Judicial action has rushed the process of bringing civil and political rights to the political foreground, allowing the political class to address challenges through the legal system. Judicial Review has also played a significant role in the area of socio-economic rights, assisting in the political popularisation of issues affecting disadvantaged people. A technique for achieving a more egalitarian social order is transformative constitutionalism. It aids in the development of law that reflects changing social norms. It is necessary for a democracy that cares about the well-being of all members of society, even those on the margins, to function properly. Transformative constitutionalism's purpose is to defend human rights, which are the bedrock of a civilised society, as well as to abolish societal evils such discrimination based on sex, caste, colour, sexual orientation, or religion. Judicial Review is the procedure through which a court examines the exercise of authority by other government coordination organisations to ensure that they are abiding with the Constitution's power limitations.

The court can review legislative and executive activities, as well as judicial actions. It is the authority charged with determining whether or not a piece of law or a practise is legal. The ideals of the rule of law and separation of powers underpin the notion of judicial review. The separation of powers is examined and balanced through the judicial review process.

Article 13 of the Indian constitution specifically stipulates the authority of Judicial Review to be conferred on the high court and Supreme Court. The exact restrictions contained in Art 13 were only added by the framers of our constitution out of prudence and attention, as Chief

Justice Kania noted in the landmark case of *A.K.Gopalan vs. State of Madras*<sup>1</sup>. Because the constitution is paramount in a country like India, all statutory laws should be consistent with it, and it should be up to the interpreters to determine whether or not a law is constitutional. In another case, *L. Chandra vs. Union of India*, the court emphasised the need of judicial review, stating that when analysing law, it is critical to ensure that it is consistent with the constitution. The need of consistency is highlighted in this situation.<sup>2</sup>In the case of *Shankari Prasad vs. Union of India*, the amendment was challenged on the grounds that it violated Part-III of the Indian constitution and hence should be declared unlawful. According to the Supreme Court, Article 368 gives the legislative branch the power to change any part of the constitution, including fundamental rights. In this case, the court used its Judicial Review authority. As the foundations of the law were more deeply embedded, the concept of judicial review became more commonly applied by courts. The Supreme Court used its judicial review power in the case of *Ramesh Thapper vs. State of Madras*<sup>3</sup> to overturn the Madras Maintenance of Public Safety Act 1949, reasoning that any law restricting freedom of speech and expression that is not aimed at stripping away or overruling the state's security will not fall under the reservation of clause mentioned in Article 19(2) of the Indian Constitution. The Supreme Court was urged in the case of *Kesavananda Bharti* in 1972 to rule on the constitutionality of the 24th, 25th, and 29th Amendments. To exercise its judicial review power, the Supreme Court relied on the concept of basic structure.

The concept of a fundamental characteristic has now become an important power of the constitution. In light of this, judicial review could be a powerful tool in the hands of the court for establishing the Constitution's supremacy. Judicial review is a British mechanism that gives the courts the jurisdiction to oversee the use of government power. If an administrative order or action in the United States breaches the Constitution's due process clause, the Supreme Court has the authority to overturn it. Similarly, in India, there isn't a single article that supports the concept of judicial review. Articles 13, 32, 131–136, 142, 143, 226 or 246 are only a few of the numerous that can be utilised in India to get judicial review.

As a result, the Indian court has always been active in terms of constitutional execution, and it has rarely decided not to decide when asked. Instead, it refers to a phenomenon in which the judiciary deviates from its usual role as an adjudicator and takes creative approaches to policy

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<sup>1</sup> *A.K. Gopalan v. State of Madras* AIR 1950 SC 27

<sup>2</sup> *Shankari Prasad Deo v. Union of India* AIR 1951 SC 458.

<sup>3</sup> 1950 AIR 124, 1950 SCR 594.

issues that are typically handled by other government agencies. While fulfilling its role as a custodian of the Constitution, it has interpreted Fundamental Rights in light of Directive Principles, reminded the executive and legislature of their constitutional obligations, issued appropriate directions to concerned authorities, monitored the functioning of government institutions, and even filled in legislative gaps by laying down guidelines. In a number of these cases, the judiciary has either acted without being activated, i.e., *Suo motu*, or eased its activation by simplifying and expediting the substantive and procedural requirements of *locus standi*. Under the notion of constitutionalism, this is the manner by which India's judicial power, or judiciary, carries out the people's rights.

Through judicial analysis of laws and administrative acts, the Constitution has enabled the judiciary to act as a check on executive power, ensuring that the poor have access to justice and so enabling bottom-up constitutionalism. According to a bottom-up approach to the Constitution, it is more than just a text drafted by an Assembly in 1950, but a continuous dialogue between citizens and the state. The power-diffusing effect of constitutional supremacy on social values judicial review as a means of introducing progressive values and equal principles After deducing that there is a link between Judicial Review and Transformative Constitutionalism, Judicial Review does have some restrictions.

### **How Judicial Review is not connected to transformative Constitutionalism**

Undemocratic judicial review is the primary foundation of the Democratic Constitution, which is under attack. Judicial Review is defined in a way that goes against core democratic norms. S.P. Sathe sees a tension between democracy and judicial review as a result of this issue. Furthermore, such a clash is unavoidable because judicial review is intrinsically anti-majoritarian. Judges with this jurisdiction can look at laws passed by a democratically elected legislature to examine if they violate citizens' fundamental rights. Unlike politicians, judges are oblivious to the tangible facts and desires of the public. He approaches problems from a more political standpoint, which differs from reality to a greater extent. Unlike politicians, judges are not elected by those who undercut his feeling of responsibility.

### **Judicial Review's Constitutional Limits**

#### **Separation of powers and judicial review**

The scope of judicial review is restricted. The power, however, is being abused, and the Supreme Court has acknowledged its limits. In *Tata Cellular v. Union of India*, the Supreme Court stated that when invoking the judicial review power, it would exercise restraint and limit itself to the issue of lawfulness. Its primary concern should be whether a decision-making body has overstepped its bounds, committed a legal error, broken natural justice laws, or made a decision that no fair tribunal should have made or abused its power.

In Article 245, the Legislature is tasked with enacting legislation, while in Articles 13 and 32, the Judiciary is tasked with preserving constitutional rights. The primary question is whether the central government's guidelines and directions in *Vishakha vs. Rajasthan State* have the same legal force as laws. Judicial review means scrutinising and overturning legislation that violates the fundamental structure of the constitution. Article 141 of the Indian Constitution ensures the enforcement of supreme-court judgements, suggesting that the decision must be binding. The question is whether such a choice will be submitted to constitutional review and considered made if it is found to be incompatible with the constitution.

Judicial Review acts as a check and balance between the Court and the Legislature by empowering the court to review any bill passed by Parliament and declare it unconstitutional if it violates the Constitution. The power of the judiciary to assess legislation enacted by Parliament on the Constitution, which falls under the scope of Judicial Review, is known as Judicial Evaluate. Today, India adheres to the Rule of Law, with the Constitution serving as the supreme law of the land, transcending all other laws. Any statutes proven to be in violation of the Supreme Law will be deemed null and void. Since we're discussing judicial review, it's worth noting that the judiciary has some limitations when it comes to exercising its judicial review authority. As a result, we might say that judicial activism, which can lead to judicial overreach, occurs when the court oversteps its bounds and interferes with executive or legislative authority.

The judiciary's capacity to use its judicial review power is limited. Judicial activism, which can lead to judicial overreach, is when the judiciary oversteps its bounds by meddling with the executive's authority. The government's ability to function is hampered by judicial review. In the *Marbury v. Madison* case, Chief Justice Marshall ruled that the Court should not assume jurisdiction if it does not have it, but that it must do so if it does.

It is required that the scope be limited to determining whether the procedure for reaching the

decision was followed appropriately, but not the conclusion itself. The judges' opinions in any judicial case form the basis for deciding other cases. The Supreme Court and the High Courts have judicial review powers, which are not granted to lesser courts. The people's faith in the government's integrity, quality, and effectiveness can be eroded by the court's repeated interventions. Political and policy issues should not be tampered with by judicial scrutiny unless absolutely essential.

## **Conclusion**

The scope of judicial review is limited, both in terms of availability and function: rather than remaking the challenged decision or inquiring into its merits, the court's role is to conduct a review of the process by which the decision was reached in order to assess whether that decision was flawed and should be revoked.

Judicial review has prompted a debate over where the line should be set between judicial activism and judicial restraint. Judicial review refers to the courts' ability to analyse the constitutionality of government acts and declare them unconstitutional or null and void if they contradict or are inconsistent with the fundamental principles of Grundnorm, i.e., the Constitution. Judicial review has evolved in three dimensions in recent years, the first of which is to ensure justice in administrative action. The second part is to protect citizens constitutionally guaranteed fundamental rights, and the third is to decide on legislative competence concerns between the central government and the states. Judicial activism is not the same as judicial risk-taking. Judges should never be activists, despite the fact that judicial activism is sometimes a vital adjunct to democracy. <sup>4</sup>The purpose of constitutionalism is to ensure that the government's arbitrary actions do not infringe on citizens' rights.

To ensure citizen rights are maintained, some countries' constitutions uphold Parliamentary Sovereignty, whilst others have evolved and prioritised Judicial Review of rights-infringing policies. Parliamentary sovereignty maintained that the proper forum for preserving citizens' rights was the Parliament, not the courts. Courts should not be allowed to review and overturn democratically approved legislation, according to British orthodoxy, whereas the American notion of judicial supremacy allows the court to review and overturn rights-infringing legislation. The concept of American judicial supremacy extended across India and was

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<sup>4</sup> <https://www.lawctopus.com/academike/grounds-judicial-review-123/>



gradually accepted into the Indian legal system. Transformative Constitutionalism is important for society since existing laws must evolve over time. For Indians, it may be a new expression, but for people from other nations, it is not.<sup>5</sup> However, in India, there have been a number of recent cases where previous laws have been overturned because they do not provide complete justice to all Indian citizens. Transformational Constitutionalism is a process and an event that has played a critical role in moulding the nature of democracy and a constitution within it, despite its difficulty to explain or define. The Court's task is to determine the Constitution's primary purpose and theme for the benefit of society. Our Constitution, like the law of society, is a living organism. It is based on a factual and social reality that is always changing. Cultural change can sometimes be preceded by, and sometimes encouraged by, changes in the legislation. A change in the law may be the result of social reality in some cases. We can say Transformative Constitutionalism don't actually share a relation, but in order to protect the citizens of a country, Judicial review do play an active role. The main aim of Transformative Constitutionalism to attain equality by removing all forms of discrimination as they were existing in the society and focuses on the term 'positive social relationships'

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<sup>5</sup> Constitutional Law: Doctrine of Judicial Review – Lexlife India