
BORROWING A DOCTRINE: THE REINCARNATION OF AMERICAN JUDICIAL REVIEW IN INDIA

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ABSTRACT

Judicial review is the power of the judiciary to check the constitutional validity of the laws made by parliament and executive bodies of government and protect the constitution. This doctrine was originally developed by the US supreme court. Indian constitutional makers borrowed the doctrine of judicial review from the constitution of the United States of America. Although no express provision was there in the American constitution regarding judicial review, it was devised by the courts in the case of *Marbury vs. Madison*, 1803.

However, in the Indian constitution, the doctrine, even though not named as such, but has been provided expressly. The language of many constitutional provisions of India begin with clearly stating that ‘Laws would be subject to the express provisions of the constitution...’. There are many countries that provide similar power of reviewing the law made by the parliament to other bodies of the government or a different authority formed for this purpose or to the parliament itself. But this form of reviewing authority has a major drawback i.e., in case of a direct violation of a right of any person, he cannot get a direct remedy.

This paper will examine the development of the doctrine of judicial review in USA and India. But the concept of has been altered as per the needs of our country from what was followed in USA. However, since India is a developing country and one of the world’s largest democracy the concept may further be clarified in case any need arises with the changes in the society.

Keywords: constitution, judiciary, judicial review, higher law, judicial overreach

Judicial Review - An Introduction

Judicial review is the power of judiciary to determine if law passed by Congress, law enacted by state legislature, any provision of the state constitution, any public regulation having force of law are in consonance with the constitution

The court is not concerned with the policy of the legislation but only determines if it is in accordance or in contravention of the constitution. Court analyses the constitution to check the constitutionality of the law in question.

“In the case of *Marbury v. Madison* (1803), Chief Justice Marshall defined judicial review as the power of the Supreme Court to examine the constitutionality of legislative and executive acts. This doctrine became a vital aspect of the American system of checks and balances.”¹

Prof. Wade defined doctrine of Judicial review as a “Fundamental mechanism for keeping public authorities within due bounds and upholding the rule of law”².

Origin of judicial review of USA -

In USA, the Supreme Court has the power of judicial review by which it analyses not only the federal and state statutes but also the constitution of the states, treaties made by the federal government and orders issued by federal and states executive authorities. Majority members of the Philadelphia convention favoured judicial review. Alexander Hamilton wanted the courts to have powers to set aside congressional legislation. However, specific provision was not added as this power was implied in the language of Article 3 section 2 and Article 4 section 2 of the American constitution³.

Article 3 Section 2 of the US Constitution provides that the Federal courts, especially the US Supreme court, can hear legal cases involving US Constitution or federal laws and also treaties made by the US. This clearly implies that the US Supreme court has the power to interpret the constitution and other Federal laws and even the treaties made by the US Government.

¹ . *Marbury v. Madison*, 5 U.S. 137. (1808)

² . Basu, D.D., *Comparative constitutional law*, lexis nexis, 3rd edn., 2014

³ . US Constitution, 1789

This is the legal basis for judicial review as it gives power to the US Supreme court to strike down any law on the grounds that it is unconstitutional after interpreting the Constitution. Article 4 Section 2 provides that the states must treat the citizens of other states equally to that of the citizens of their own state. Judicial review is highlighted in this provision as it gives power to the US Supreme court to strike down state laws that violates the US constitution on the ground that it gives unfair treatment to citizens of other states.

These provisions were used by the American Supreme court to develop the doctrine of judicial review in the case of *Marbury v. Madison*, 1803, USA⁴, wherein the court held that any law or provision that violates the American constitution may be declared unconstitutional and ultra vires. This decision applies to both state laws and federal laws.

However, this doctrine was severely criticised in the US calling it a Non-elective super legislature as judiciary acts as a legislative body under the guard of “Due process of law”. It is also called a conservative check as the American constitution was framed in the 18th century and the Judiciary tries to uphold the 18th century law over the new laws framed in the 21st century on the basis of the new problems appearing in the society.

Nevertheless, supporters have defended judicial review saying that the power of judicial review has never been misused by the Supreme court and only uses it for checks and balances on misuse of power by the Parliament. Judicial review is not a conservative check as the Supreme court also upholds progressive measures provided they are just, reasonable and fair. Protection of individual rights is necessary through judicial review and it is not making judiciary act as a legislature as only a small number of laws have been declared ultra vires and not all, this implies the use of judicial mind in such decisions.

Judicial Review in India

India has a written constitution and judicial review is provided as a power of the court to check the validity of the law passed by the legislature based on limitations imposed by the constitution itself. Judicial review is the power of declaring any law violative or abrogating the constitution as invalid or ultra vires.

⁴ . Supra note 1

Constitution provides limitation on the power of all the organs of the government, legislature executive and judiciary, and courts are the guardians of the constitution. Constitution is the supreme law of the land and in case any conflict arises, the courts have the power to strike down such laws or acts and uphold the constitution.

Constitutional provision on Judicial review

Article 13 of the Indian constitution⁵ provides that all laws, either pre-independence or postindependence, shall be void if they are inconsistent or derogatory of the fundamental rights provided in part III of the constitution, to the extent of such inconsistency or derogation. Laws in this provision includes all laws, regulations, rules, bye-laws, usages and customs having the force of law. Such laws are held to be void by the power of writs vested in article 32 and 226⁶.

In *A.K. Gopalan v. State of Madras*⁷, Justice H.J. Kania said that “article 13 has been put as a caution in the constitution and even in its absence the constitution would prevail over the ordinary laws made by the legislature as it is the higher law”.

Doctrine of Higher law

The doctrine of Higher law provides that constitution is higher and above to the ordinary laws of the land and all other laws must conform to the constitution. If not, they shall become invalid. The origin of this doctrine lies in the natural law theory propounded by thinkers like Locke and Rousseau⁸. The Higher law, that is, the constitution is binding on the executive parliament and judiciary. This was reinforced in India by the Supreme court through the basic structure doctrine provided in the case of *Keshavnanda Bharti v. State of Kerala*⁹. This ensured that the fundamental cannot be overridden by any law passed by the parliament.

The power of the parliament to make law itself comes from the constitution and thus the constitution is supreme to the legislature and the legislature is bound by limitations put by the constitution. It may be argued that the constitution can also be amended and is therefore not higher to parliament but the power of amending the constitution also comes from the

⁵ . The constitution of India, 1947

⁶ . Ibid

⁷ . *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

⁸ . Supra note 3

⁹ . *Keshavnanda Bharti & ors. v. State of Kerala & anr.*, AIR 1973 SC 1461

constitution itself and can only be done by a strict procedure provided in Article 368¹⁰ and thus constitution is supreme to parliament.

There are certain parliamentary privileges provided in Article 194(3)¹¹ which includes freedom of speech, immunity from court proceedings for speeches/votes and internal disciplinary powers. However, in case of a gross violation of constitution, these privileges are subject to judicial review.

This was also upheld in the case of *Raja Rampal v. Lok Sabha* (2007)¹².

Limits of Judicial review

Judicial review also has its own limitations as It is against separation of powers, and Parliament represents the will of the people while the judiciary does not, this is why critics of judicial review question as to how and why can judiciary strike down laws made by elected representatives of the people.

Judicial review: USA and India

Judicial review, even though not very popular and completely favoured by legislature and executive bodies of India and USA, is still a fundamental part of the constitution of both countries.

India, with regards to judicial review, has an advantage over the USA as in India there are express provisions provided in the constitution that provide that the acts of legislature and other organs of the government are subject to constitutional provisions. Some of these articles are ‘article 245, 309, 328’¹³ etc. of the Indian constitution. Although provisions like Article 368(1)¹⁴ and 369¹⁵ give overriding power to the legislature but these when read in context of the whole constitution and with article 370(1)(b)¹⁶ and article 370A(1)(a)¹⁷ concluded that these provisions are exception to the ultimate rule that constitution is the higher law.

¹⁰ . Supra note 5

¹¹ . Ibid

¹² . *Raja Rampal v. Hon’ble speaker lok sabha*, AIR 2007 SC (SUPP) 1448

¹³ . Supra note 5

¹⁴ . Ibid

¹⁵ . Ibid

¹⁶ . Supra note 5

¹⁷ . Ibid

When a law violates constitution, court declares it to be void. It is to be noted in USA such law is to be treated as stillborn while in India only the violative part becomes invalid and dormant and once the unconstitutionality has been rectified the law may again come into existence.

Constitution uses the word 'void' only in [article 13, 20 and 254(1)]¹⁸ but this doesn't mean that other laws cannot be declared void as in many cases court has nullified laws based on [articles 301, 303, 304(b) and 268(1)]¹⁹.

Courts are the ultimate interpreter of the constitution and no authority or organ of government can exceed its power thereof.

However, there are some exceptions to judicial review which are:

- Judicial review is not a feature of a written constitutions only and applies when constitution is treated as a higher law than ordinary laws and is a legal limitation on power of government.
- There are some written constitution that give power to review laws made by legislature to legislature or third bodies, but these bodies cannot afford remedies to citizens in case, law has violated any constitutional right.

These are the situations where judicial review loses its power to protect constitution and individuals of the state.

The development and evolution of the Doctrine of Judicial Review through time in India

As a guardian of the constitution, it is the coherent duty of the judiciary to act as a protector of the rights of people, especially the minorities, disadvantaged groups or the marginalized sections of the society and for this purpose, the courts keeps the other organs of the government in check. To serve this purpose the courts have to scrutinise the legislative and executive actions of the government through power provided Article 32²⁰ for supreme court, and Article 226²¹ for high courts. These ensures the operation of the government bodies is within their constitution limits. If judicial organ of the government is not provided with this power of

¹⁸ . Ibid

¹⁹ . Ibid

²⁰ . Supra note 5

²¹ . Ibid

judicial review the other organs of government might turn authoritative. For this purpose, the constitution provides for an independent judiciary free from any political influence.²²

Judicial review is an American constitution doctrine adopted in the Indian constitution by the constitutional assembly. However, through the cases, the doctrine has been modified to suit the needs of India. This was also held in the case of *L. Chandra Kumar vs. Union of India*²³, 1997, wherein the courts held that “Definition of judicial review in American context is equally applicable to the context as understood in the Indian constitutional law, subject to a few modifications. Indian judicial review can be classified into three aspects, that is, Judicial review of legislative acts, Judicial review of judicial decisions, and Judicial review of executive or administrative acts.”

“Courts, while using this power are required to act as per constitutional morality and not popular morality, as constitution was designed for people as they were instead of as they ought to be.” This was opined by former CJI D.Y. Chandrachud in Hindustan times leadership summit, 2023. This was followed by courts in many landmark decisions such as *Joseph Shine vs. Union of India*²⁴, *Naz foundation vs. Government of NCT Delhi*²⁵, *Indian young lawyers association vs. The state of Kerala and ors.*²⁶ and many such other decisions.

To simplify, the evolution of Judicial review doctrine can be traced into four phases as further described.

Phase I: Literal or Textual Interpretation

Textualism is method of interpretation wherein the courts interpret a provision based on its direct and ordinary meaning. This method was followed by the supreme court in the initial years of independence. It was first used in the case of *A.K. Gopalan*²⁷ wherein the constitutional validity of preventive detention laws were brought in question. It was contended that such laws were abrogating [Article 19, 21 and 22 of the constitution. For this the court had to decide the meaning of “Procedure established by law”]²⁸. Court gave a direct meaning to it based on “Due

²² . Bhagwan V., Mohala V., 2022, World Constitution: A comparative study, 12th edn, sterling pub. pvt. Ltd.

²³ . *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125

²⁴ . *Joseph shine v. Union of India*, AIR 2018 SC 4898

²⁵ . *Naz Foundation v. Government of NCT delhi*, AIR 2009 Delhi 176

²⁶ . *Young Indian Lawyers Association v. state of kerala*, AIR 2019 130

²⁷ . Supra note 7

²⁸ Supra note 5

process of law”²⁹, which was followed in USA and held that as long as the law is validly passed, liberty can be contained and the Preventive detention law was upheld to be valid. The overlap between [Article 19, 21 and 22]³⁰ was not accepted by the court in this case.

The validity of constitutional amendments were questioned in the cases of Sajjan Singh vs. State of Rajasthan³¹ and Shankari Prasad Deo vs. Union of India³², wherein the court gave direct meaning to the amending powers of the legislature under the constitution and also read the constitution as a whole and held that there are no limits on this power of amendments. In Golaknath vs. state of Punjab³³ also the court emphasised on the literal interpretation of the constitution.

Phase II: Structural Interpretation

During this phase the court emphasized on the overlap in the constitutional provisions and used the structural approach to interpret the constitution. This means that of reading the provisions in isolation the constitutional were read as inter connected provisions. Furthermore, importance was given to the essence of constitution rather than the words used.

This was upheld in the case of Keshavnanda Bharti vs. State of Kerala³⁴, where the court held that parliament has powers to amend any and all provisions of the constitution, provided that the basic structure is not curtailed. This is because the basic structure is the essence of the constitution.

In the cases of Indira Nehru Gandhi vs. Raj Narain³⁵ and the case of Minerva Mills³⁶, the court held that an independent judiciary rested with judicial review power is a part of a basic structure and courts have to limit the power of different organs of government though this power so as to ensure that they do not turn authoritative. This overlap between fundamental rights was drawn in Maneka Gandhi vs. Union of India³⁷ case by using structuralistic interpretation approach and [Article 14, 19 and 21]³⁸ read together was called as the golden triangle. This

²⁹ . Supra note 3

³⁰ . Supra note 5

³¹ . Sajjan singh v. state of Rajasthan, AIR 1965 SC 845

³² . Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458

³³ . I. C. Golaknath v. State of Punjab, AIR 1967 SC 1643

³⁴ . Supra note 9

³⁵ . Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299

³⁶ . Minerva mills ltd. v. Union of India, AIR 1980 SC 1789

³⁷ . Maneka Gandhi v. Union of India, AIR 1978 SC 597

³⁸ . Supra note 5

was later interpreted to include a wide range of rights such as clean air, clean water, livelihood, free legal aid, speedy trials, etc.

Phase III: Outcome Oriented Approach or Purposive Interpretation

In this approach, the apex court shifted from a very detailed or technical study of rights to focussing more on the end result of the issue in question. Different benches started giving different interpretations and the role of courts started expanding from just the interpreter of law to –

- A social reformer,
- A protector of democracy, and
- A protector of market economy.³⁹

Directive principles of state policies were also read with fundamental rights to give effect and importance to social economic policies.

The court also stepped in to make rules in case there was a lack of legislation under Article 141⁴⁰.

One such case was that of Vishaka vs. State of Rajasthan⁴¹, wherein Supreme court gave guidelines to protect women from sexual harassment at workplace, on the basis of which later on the POSH Act, 2013⁴² was made by the parliament.

Court even strengthen the basic structure doctrine by bringing the laws under 9th schedule⁴³ within the ambit of judicial review in case they violate the basic structure doctrine.

In this phase, a wide liberal interpretation was given to issues under the expansion of fundamental rights. Focus of courts started shifting to constitutional morality, by the end of this phase, and the decisions were made on “What ought to be” and not on the basis of popular

³⁹ . International journal of legal science and innovation, 2020, VOL. 3, iss. 1; 83

⁴⁰ Supra note 5

⁴¹ Vishaka v. state of Rajasthan, AIR 1997 SC 3011

⁴² Sexual harassment of women at work place (prevention, prohibition, redressal) act, 2013

⁴³ Supra note 5

morality. This can be highlighted in the case of *NALSA vs. Union of India*, 2014⁴⁴ wherein the courts recognised transgenders as the third gender.

Phase IV: Purposive Interpretation and Contemporary Issues of Judiciary

In this phase the judiciary is defining the purpose of constitution in modern times. In this the Supreme Court acted as the protector of the basic structure and defender of judicial independence. This can be seen in the *NJAC*⁴⁵ case 2015 wherein the parliament passed the 99th constitutional amendment which replaces the collegium system with the National Judicial Appointments Commission (NJAC). The Supreme court struck down this NJAC in the case of *Supreme courts Advocates on records association vs. Union of India*⁴⁵, 2015, reaffirming the collegium system using constitutional system debates and holding the NJAC as violative of independence of judiciary which is a part of basic structure doctrine.

Public interest litigations have become a major avenue for judicial review. However, frivolous petitions and overuse raise major concerns about judiciary becoming a super legislature. Critics argue that this severely affects separation of powers.

The supreme court has also expanded progressive rights such as in the case of *Navtej singh*⁴⁶, wherein the courts decriminalised homosexuality.

But this phase has often faced criticisms as being influenced politically and less independent. Critics argue that this can be seen recently when the criminal laws were amended hurriedly and without proper debates and discussions. This was also done when many opposition MPs were suspended and these laws were passed in a one sided manner which undermined the democratic process. In spite of these issue the judiciary has not stepped in to take a stand as a protector of democracy and guardian of constitution⁴⁷.

However, supporters have defended judiciary by highlighting the cases of judicial action during COVID-19. One such case was *Re: Distribution of essential supplies and services*⁴⁸ during

⁴⁴ *NALSA v. Union of India*, AIR 2014 SC 1863

⁴⁵ *Supreme courts advocates on record association v. Union of India*, AIR 2015 SC 1522

⁴⁶ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321

⁴⁷ . *International journal for advances in social science*, 2021, vol.9 iss. 2, 87

⁴⁸ . *Re: Distribution of essential supplies and services during pandemic*, AIR 2021 SC 2356

pandemic wherein court directed centre to ensure oxygen supply and held it to be a part of Article 21⁴⁹.

Development of Judicial Review: Modifications from USA to India

Judicial review in India is constitutionally guaranteed in [Article 13, 32, 226]⁵⁰ but in USA it is a result of judicial interpretation. In USA the scope of judicial review is narrow and only applies to law passed by congress and executive actions but not on validly passed constitutional amendments. However, in India it has a wider scope and applies to administrative act, laws passed by legislature and also to constitutional amendments in case they violate the doctrine of basic structure. In India, judicial review tries to balance parliamentary democracy with federal features but in USA, the focus, even though being on constitutional supremacy, is also strongly tied to separation of powers⁵¹. Indian judicial review is both curative and preventive meaning that it can issue writs before a right is violated or even strike down laws after they are passed. But in USA, the courts can only act after the action is taken.

This highlights how the doctrine has evolved in India according to Indian Socio-Economic and Political needs and is different from what existed in USA.

This difference is also a result of the fact USA follows a presidential form of government and India follows parliamentary form of government and hence the needs and requirements of the laws are inherently different⁵².

Contemporary issue of Judicial Review

Judicial review is an ever-evolving doctrine as the judiciary will continue to develop methods of interpretation to the constitutional principles based on the needs and requirements of society. Judicial review is an essential part of constitution and constitution is a living law. Therefore, this doctrine will reincarnate again and again as the society grows and the existing policies need elaboration in accordance to the requirements of the upcoming generations.

⁴⁹ . Supra note 5

⁵⁰ . Ibid

⁵¹ . Pandey, J.N., Constitutional law, , 62nd edn., central law agency, 2025

⁵² . Supra note 51

However, the most important issue of judicial review will be judicial overreach. In a country like India where there is a major backlog of cases should so much power be given to the courts to take up more issues and take *Suo moto* actions against the executive and legislature. This might also reduce the public confidence on the Government. This issue has not yet been resolved and answered even by the judiciary itself.

Critical Appraisal

This doctrine has, however, faced many criticisms time and again but it has always ensured the delivery of justice in the time when there was a loophole in the legal system.

- Critics have argued that judicial review interferes with the working of the legislature but so was the need of the society as in many cases waiting for the legislature to act would have resulted in delay of justice. A classic example of this could be the case of *Vishaka vs. state of Rajasthan*⁵³, where Supreme Court had to form guidelines because there was no existing legislation on the issue.

Another aspect of this is judicial review of executive actions:

- During the COVID-19 pandemic a series of judicial decisions were passed that interfere with the executive actions of the government. For instance, in *Re: Problems and miseries of migrant labours*⁵⁴, 2020, court ordered the state governments to provide food, shelter and transportation to migrant workers who were suffering due to the sudden lockdown. Another similar case was that of *Court on its own motion vs. GNCT of Delhi*⁵⁵, 2020, in this court reprimanded the central government and ordered the government to ensure appropriate oxygen supply to the needy.
- These decisions were criticised and it was questioned as to what extent can judiciary interfere in executive branch of government in a crisis situation. It was also argued that it is easier to pass orders but in a developing country like India having such a high population implementation of these orders face extreme challenges. Thus, these

⁵³ . *Supra* note 41

⁵⁴ . *Re: Problems and Miseries of Migrant Labourers*, AIR 2022 SC 2157

⁵⁵ . *Court on its own motion v. Government of NCT of Delhi*, W.P.(C) 3250/2020, decided on 28 February 2020 by the Delhi High Court.

decisions seem to be a result of appeasing public anger rather than actually providing implementation ideas and solutions

Suggestions

1. Codification of judicial review doctrine: A proper written and codified law in this regard would provide clarity. It would also help to control judicial overreach. It would avoid ambiguity and inconsistency and would bring uniformity.
2. Transparency in judicial appointments: the appointment of judicial officers must be made transparent so that free will of judiciary is protected and there is no political influence. This would help prevent abuse of power.
3. Constitutional balance: The balance of powers between judiciary, legislature and executive must be clarified so that there is minimum interference between organs of government.
4. Awareness: Spreading constitutional awareness about judicial remedies also has to be increased.

Conclusion

Overtime the doctrine of judicial review has faced mixed reactions. Opponents of judicial review have viewed that judiciary is turning despotic and judicial review leads to breakdown of the doctrine of separation of powers which is also a part of the basic structure doctrine. All this leads to the question that should judiciary, a non-Elected body, be given such access powers over the elected legislature and executive organs of the government that actually represent the will of the people?

So far, the judicial decisions have not answered this question and there exists both supporters and opponents of this. In recent times, judiciary has also faced questions on the ground of selective intervention wherein it is argued that apart from health and some social issues judiciary is getting more and more politically influenced and is not taking stand on many issues such as election rallies and problems that occurred during religious rallies such as kumbh mela of 2025. This has put independence of judiciary in question.

In *Rakesh Vaishnav vs. Union of India*, the courts did not strike down the farm laws directly instead put them in suspension and formed a committee. In another case of *Santosh Nanta vs. State of Himachal Pradesh*⁵⁶, the Himachal Pradesh High Court refused to interfere in the executive decisions.

However, this could also mean that judiciary is acting cautiously so as to not interfere in the workings of the government organs. Despite judiciary being called despotic it has never exceeded its limits and has still prevented other organs of government from turning authoritative. This is how Indian judicial review also varies from the American judicial review where judicial supremacy is often dominating. This gives a unique identity to the Indian judicial review doctrine. There can be many reasons to avoid the usage of this doctrine but the most important reason that judicial review is essential and should continue is that judicial review is the way through which general public can approach the judiciary to get their rights reinforced as it will be difficult for them to approach the legislative and executive organs of the government in a direct manner.

⁵⁶ . *Santosh Nanta v. State of Himachal Pradesh*, 2023 LiveLaw (HP) 27

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