
CONSTITUTIONALISM THROUGH COURTS:

An Analysis of Judicial Review In India

PALAK YADAV | B.A PROGRAM 3RD YEAR | DESHBANDHU COLLEGE

Email Id - palakyadav2100@gmail.com

Judicial review, is in a sense, the very life-breath of the Constitution of a vibrant and working constitutional democracy. It is that which provides the enforcement of rights, protection of liberty and upholding the rule of law. As Prof. Wade points out that Judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. The Ultimate power of Judiciary to review and determine validity of a law or an order may be described as the power of "Judicial Review". In India we are following the rule of Law. It means that the constitution is the Supreme law of the land and any law is consistent there which is void. 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. Judicial review has two important functions; Of legitimizing government action and the protection of the constitution against any undue encroachment by the government.

HISTORY OF JUDICIAL REVIEW

Judicial review has its roots essentially in Common Law. We hear the earliest echoes of judicial review in Chief Justice Coke's judgement in Dr. Bonham's case (1610)- that the common law would control Acts of

Parliament and the Court could declare an enactment void if it was against common right and reason. But the power of judicial review was first acquired by the supreme court in 1803- But the power of judicial review was first acquired by the supreme court in 1803- Marshall CJ in Marbury v. Madison, U.S. expounded the Court's duty in case of conflict between an ordinary law and the Constitution in which the Constitution would prevail. The constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds goods. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision of the law of parliament. Under the constitution of India parliament is not Supreme. Its powers are limited in two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. This is what makes the court a powerful instrument of judicial review under the constitution. "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution".

JUDICIAL REVIEW AS PART OF BASIC STRUCTURE

In the celebrated case of *Keshavanda Bharathi v. State of Kerala*, the Supreme Court of India propounded the basic structure doctrine according to which it said the legislature can amend the Constitution but it should not change the basic structure of the Constitution. The Judges made no attempt to define the basic structure of the Constitution in clear terms. S.M. Sikri, C.J mentioned five basic features:

1. Supremacy of the Constitution.
2. Republican and democratic form of Government.
3. Secular character of the Constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution

He observed that these basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the Constitution.

Subsequently, in **L. Chandra Kumar v. Union of India** a larger Bench of seven Judges unequivocally declared: "that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure".

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognizing judicial review as a part of basic feature of the constitution

Courts in India have given a different meaning to the theory of Checks and Balances this also meant that it has buried the concept of separation of powers, where the judiciary will give itself an unfettered jurisdiction to review anything everything that is done by the legislature.



GROUND OF JUDICIAL REVIEW

1. Illegality
2. Irrationality
3. Procedural Impropriety
4. Proportionality

CONSTITUTIONAL PROVISIONS FOR JUDICIAL REVIEW IN INDIA

In the framework of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and delimits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review. The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. The Constitution of the Country is the paramount or greatest document of Law, according to Hans Kelsen's pure theory of law considered the "grundnorm" of the State; it means the The Constitution is the founding principle of the Law, all the other laws of the State are obtained or acquired, drawn from the Constitution.

Judicial review in India operates on the principle of "procedure established by law" as outlined in Article 21. This principle asserts that a law is only valid if it follows the constitutional process. For a law to be enforceable, it must first pass constitutional scrutiny (Constitution of India, 1950). The Constitution not only guarantees fundamental rights but also establishes the division of powers between the Union and the States and outlines the functions of each government branch, including the judiciary. Judicial review is an essential tool in protecting these provisions. Several constitutional articles such as Articles 13, 32, 131-136, 143, 226, 145, 246, and 372, explicitly support the practice of judicial review.

JUDICIAL REVIEW OF NINTH SCHEDULE

Article 31-B says that acts and regulations in 9th schedule could not be challenged in the court on the ground that they are in contravention to fundamental rights. But in the famous *IR*, In the **Coelho case**, the Supreme Court held that judicial review is the 'basic structure' of the Indian Constitution. It said that the laws placed under ninth schedule after 24 April 1973 are open to challenge to the court on the ground that they are in contravention to fundamental rights (included in articles 14, 15, 19 and 21) or they are in contradiction to the 'basic structure' of the constitution.

SPECIFIC WRITS- THE CONSTITUTIONAL REMEDIES

This title to constitutional remedies is itself an elementary right and may be implemented within the type of writs evolved in Common Law – like Habeas corpus, Mandamus, Prohibition, Certiorari and Quo warranto. Besides the Supreme Court, the High Court's set within the numerous States also are selected

as constitutional courts and Article 226 permits individuals to file similar writs before the High Courts.

SIGNIFICANCE OF JUDICIAL REVIEW

Judicial review is a cornerstone of the Indian Constitution, empowering the judiciary to monitor the actions of the legislature and executive. This authority ensures that government actions are in line with constitutional principles, thereby safeguarding citizens' rights. In addition, judicial review is crucial for upholding the rule of law and ensuring the proper functioning of the separation of powers among the three branches of government. It serves as a vital check, preserving the core values of the Constitution even amid evolving political and legal circumstances.

JUDICIAL REVIEW AND JUDICIAL ACTIVISM

In post- independence India, the inclusion of explicit provisions for 'judicial review' were necessary in order to give effect to the individual and group rights guaranteed in the text of the constitution. Dr. B.R.Ambedkar had described the provision related to the same as the 'heart of the constitution'. Article 13(2) of the constitution of India prescribes that the union or the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. Judicial Activism denotes a more active role taken by the Judiciary to dispense social justice. When we speak of Judicial Activism, we point fingers at the invented mechanisms that have no constitutional backing (e.g.: Suo moto (on its own) cases, Public Interest Litigation (PIL), new doctrines, etc.

The line between Judicial activism and Judicial Overreach is very narrow. In simple terms, when Judicial activism crosses its limits and becomes Judicial adventurism it is known as Judicial Overreach. When the judiciary oversteps the powers given to it, it may interfere with the proper functioning of the legislative or executive organs of government. What makes any action activism or overreach is based upon the perspective of individuals. But in general, striking down of NJAC bill and the 99th constitutional amendment, the order passed by the Allahabad High Court making it compulsory for all Bureaucrats to send their children to government school, misuse the power to punish for contempt of court, etc. are considered as Judicial Overreach.

EXPANSION OF JUDICIAL REVIEW THROUGH JUDICIAL ACTIVISM:

The biggest contribution of judicial review has been the emergence of the PIL which opened the doors of higher judiciary to the poor, neglected and deprived sections of Indian society. On the other hand, the concept of judicial activism is closely related to the concept of PIL. In fact, PIL is the most popular form of judicial activism. After the draconian exposition of power by the Executive and the Legislature during Emergency the expectations of the public soared high and the demands on the courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions. With the interpretation given by it in **Menaka Gandhi case** the Supreme Court brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights-jurisprudence.

This was made possible in India, because of the procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation/Public Interest Litigation. In the beginning, the application of Social Action Litigation (SAL) was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and therefore, any member of the public was permitted to maintain an application for appropriate directions. The new role of the Supreme Court has been criticised in some quarters as being violative of the doctrine of separation of powers; it is claimed that the Apex Court has, by formulating policy and issuing directions in respect of various aspects of the country's administration, transgressed into the domain of the executive and the legislature. As Justice Cardozo puts it, "A Constitution states or ought to state not rules for the passing hour but principles for an expanding future." It is with this view that innovations in the rules of standing have come into existence.

A WORD OF CAUTION:

There are many examples where the Supreme Court has decided a lot of cases in the field of social welfare. But this pleasing and positive personality of the court and evolution of the PIL created a lot of the problems also. These all judgments are best at their place but this does not mean that judicial activism is always found to be in good line. Following two judgments will tell us what harm judicial activism could cause

Ashok Hurra vs Rupa Bipin Zaveri: This shocking and astounding judgment well and truly defeats the purpose of an appeal to the Supreme Court.

Arnit Das vs. State of Bihar (2000) is a pivotal case where the Supreme Court of India determined that the date of appearance before a court rather than the date of the offense, decides a person's status as a juvenile. Later overturned, the original ruling was criticized for ignoring binding precedents and overstepping by defining law rather than applying existing law.

In a monograph "Judicial Activism and Constitutional Democracy in India" commended by Professor Sir William Wade, Q.C. As a "small book devoted to a big subject", the learned author, while recording appreciation of judicial activism, sounds a note of caution- "it is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if courts have to rely on their own knowledge or research, it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts also have no method to reverse their orders if they are found unworkable or requiring modification". Highlighting the difficulties which the courts are likely to encounter if embarking in the fields of legislation or administration, the learned author advises "the Supreme Court could have well left the decision- making to the other branches of the government after directing their attention to the problems, rather than itself entering the remedial field".

One more problem which the Supreme Court is facing is the over flow of cases in the Supreme Court through PILs. Nowadays it is a hobby of some NGOs to file writ petitions on valuable causes of course but they don't mind if it is frivolous and not worth it. One of the usual misunderstandings in judicial review of the action of legislature and executive seems to arise as if courts consider them self-superior to legislature and executive. If it would be like that then it will result in creation of a third chamber of legislation which is against the principle of constitutionalism.

CONCLUSION

The Supreme Court of India is no doubt the final interpreter of the constitution as we have studied and analysed from many cases. It is playing a role of protector and working at its best. With its intellect and time our supreme court has achieved a lot more than the bare rigid law interpreter made by the legislation. Now with its power of judicial review and judicial activism this court is doing a lot for social welfare. It has become the last resort for the weak sections of the society. But on the other hand this law making power in the hands of the judiciary is posing a threat to the state constitutionalism. India is following the constitution and its spirit is to establish constitutionalism in the country. But this power of the Supreme Court can lead to the country where the judiciary will be the head. It is synonymous with creating a third chamber of legislation, which is against the principle of constitutionalism i.e. the idea of limited government where an organ of the government can be checked on the ground of being arbitrary. So, this power requires a sense of causation while exercising it. The court should not act arbitrarily. "great powers bring great responsibilities", this quotation of some scholar can guide the court while using its powers.

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