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## JUDICIAL REVIEW IN PARLIAMENTARY FORM OF GOVERNMENT

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### ABSTRACT:

The study of judicial review in comparative constitutional law is often perplexing. At one level, the theory on judicial review has kept up with global developments, with scholars seeking to answer how judicial review can go beyond its traditionally understood role to address contemporary challenges<sup>1</sup>. At another level, the age-old debate of whether judicial review by unelected judges should exist at all in a constitutional democracy rages on.<sup>2</sup> This paradox is partly attributable to the fact that the study of judicial review has splintered into the study of judicial review of specific issues that arise in a constitution, such as the judicial review of socio-economic rights, judicial review of constitutional amendments, and judicial review of matters relating to federalism and democracy, with little attention to whether and how they all fit together to form a cohesive theory of judicial review.

Literally the notion of judicial review means the revision of the decree or sentence of an inferior court by a superior court. Judicial review has a more technical significance in public law, particularly in countries having a written constitution which are founded on the concept of limited government. Judicial review in this case means that Courts of law have the power of testing the validity of legislative as well as other governmental action with reference to the provisions of the constitution. The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. In *Marbury v. Madison*, the Supreme Court made it clear that it had the power of judicial review. Chief Justice George Marshall said, "Certainly all those who have framed the written Constitution contemplate them as forming the fundamental and paramount law of the nations, and

<sup>1</sup>See David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis L Rev 1313; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (Univ Chicago P 2018); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge UP 2013). See also Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2009); Katherine Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' [2010] Int'l J Const L 385.

<sup>2</sup>E. Delaney, 'The Federal Case for Judicial Review' [2022] Oxford Journal of Legal Studies; Giuliano Amato, Benedetta Barbisan, and Cesare Pinelli (eds), *Rule of Law vs. Majoritarian Democracy* (Bloomsbury 2021).

consequently, the theory of every such Government must be that an act of the legislature, repugnant to the Constitution is void". There is supremacy of Constitution in U.S.A. and, therefore, in case of conflict between the Constitution and the Acts passed by the legislature, the Courts follow the Constitution and declare the acts to be unconstitutional and, therefore, void. The Courts declare void the acts of the legislature and the executive, if they are found in violation of the provisions of the Constitution.

KEYWORD;- Judicial review , constitution ,court

### **Parliament and the Judiciary:**

The Constitutional Relationship The Constitution provides for a separation of powers between Parliament and the Judiciary by demarcating their roles and responsibilities. It also lays down various ways by which

- (i) The Judiciary may guard against the unconstitutional exercise of power by Parliament, and
- (ii) Parliament may legislate on or act as a check in matters related to the Judiciary.

### **Judiciary's Responsibilities and Powers**

#### **Powers:**

The Judiciary adjudicates disputes and administers justice under criminal law. In addition, the higher judiciary (Supreme Court and High Courts) acts as the custodian of the Constitution because it is responsible for its interpretation and enforcement. The higher judiciary also has the power to strike down laws of Parliament and actions of the Executive as invalid, if they violate the Constitution. This is called the power of judicial review. For example, a law may be declared as invalid if it violates the fundamental rights guaranteed by the Constitution. A law may also be declared invalid if its subject-matter is outside Parliament's area of competence (e.g. a central law on police may be invalid because police falls within the state legislatures' domain).



## Judicial Review in India


Judicial Review is the power of the judiciary to review any act or order of the legislative and executive branches and to pronounce its constitutional validity. The Indian Constitution recognizes judicial review under the reference of the American Constitution and it does checks and balances in the separation of powers. The power of the judiciary is to oversee the legislative and executives when it exceeds their authority, and it helps to preserve the supremacy of constitutional principles.

### Judicial Review:-

Judicial review refers to the doctrine because of which executive as well as legislative actions are reviewed by the judiciary. In India power is divided along the three arms of the state: Executive, Legislature, and Judiciary. The Judiciary is however vested with the power of review over the actions of the other two.

The scope of Judicial review in India is less than in the USA because the American Constitution provides for 'due process of law' whereas on another hand there is 'the procedure established by law' contained in the Constitution of India. The judicial review followed by India is a synthesis of both the American principle of judicial supremacy and the British principle of parliamentary supremacy. The Constitution of India itself provides the power of judicial review over the judiciary itself through the Supreme Court and the High Courts.

Moreover, the Supreme Court has declared the power of judicial review to be a basic structure of the Constitution. Therefore, the power of judicial review cannot be reduced or excluded by the Constitutional Amendment. Justice Syed Shah Mohammad Quadri characterized the judiciary Review into the following 3 classes:

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- Judicial review of the acts which are related to the Constitutional Amendment.
  - Judicial review of the legislation process of the Parliament and State Legislatures.
  - Judicial review on administrative actions which are taken by the Union government or State government and authorities within the State.

### Judicial Review and Constitution:-

The Judicial review is called upon for ensuring and also protection of Fundamental Rights that are guaranteed in Part III of the Constitution. The power of the Supreme Court of India enforces the Rights which is derived from Article 32 of the Constitution.

The following are the Constitutional provisions that enforce Judicial review:

- **Article 13 (2)** confirms that all laws and regulations that are made by the Union or the States conflicting with or in the discrediting of Fundamental Rights will be invalid and void.
- **Article 32** ensures the option to move the Supreme Court for the enforcement of the Fundamental Rights and enables the Supreme Court to give orders or directs or writs for that purpose.
- **Article 131** affirms the Supreme Court's original jurisdiction concerning the Centre-State and Inter-State disputes.
- **Article 132** accommodates that Supreme Court has re-appraising and appellate jurisdiction concerning Constitutional cases.
- **Article 135** enables the Supreme Court to practice the jurisdiction and powers of the Federal Court under any pre-constitutional law.
- **Article 137** confers an exclusive power to the supreme court to review any judgment articulated or order passed by it.
- **Article 143** empowers the President to seek the opinion of the Supreme Court on any matter relating to the judiciary or fact and any judicial-related doubts before the Constitution.
- **Article 226** authorizes the High Courts to give orders or directions or writs for the implementation of the Fundamental Rights and any of some other purposes.
- **Article 245** deals with the extension of the territorial scope of laws and regulations made by the Parliament and the Legislature of the States.
- **Article 372 (1)** authorizes the continuation of pre-existing provisions of the Constitution

## **Judicial Review Classification:-**

The classification of judicial review classification:

1. Reviews of Judicial Decisions- This can be seen in the example of the Bank nationalization case, the privy purse abolition case, and so forth.
2. Reviews of Legislative Actions- This type of review ensures that the law passed by that legislature is incompetent with the provision of the Constitution.
3. Reviews of Administrative Actions- This is for ensuring the enforcement of constitutional discipline over that of administrative agencies while exercising their powers.

## **JUDICIAL REVIEW AS A PROCESS :**

### **A COMPARATIVE STUDY :**

As per UK's courts and tribunals judiciary .A judiciary review is an easy effective mechanism for tracking the functioning of the legislature and government and additionally empowers the governmental machinery at a large scale .one of the main object of judicial review is to make the government accountable for their actions .The judicial review is indeed the power of the court to declare laws unconstitutional on the basis of their effect to the general public.

This study though helps in the comparative aspect of the judicial review between Indian laws and USA's laws regarding judicial review. We are going to record such differences that are helpful for the Indian society and see such techniques and provisions that Indian law framers could have used to prevent the leaks in the process of judicial review.

The study further elaborates the origin of the doctrine of judicial review, it's history and it's evolution in India and also provides for the drawbacks of the Indian judicial review process.

### **MEANING OF JUDICIAL REVIEW:**

A judicial review is a process by which the judiciary takes over the authorities of the legislative and executive in farming and altering the laws which are not suitable for the judiciary given by the constitution of India, the ability of the courts to challenge a legislative act when he thinks of it as violative in nature. In India the power of judicial review is held over and exercised by the supreme court of India and the high court.

Alexander Hamilton one of the famous jurist and the framers of the American Constitution wrote that "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact and must be regarded by the judges as a fundamental law.

Therefore it belongs to them to ascertain its meaning and also the meaning of an act passed by the legislature ."

He further said that if there was any conflicts between the two, that is the constitution and the law, the judges should prefer the constitution as it is supreme. This became the basis of judicial review.



## Importance of the Judicial Review

Judicial review is necessary to align the supremacy of the Constitution in a nation, and to safeguard the Fundamental Rights of the citizens. It is essential to preserve the independence and autonomy of the judiciary in India. This is necessary to maintain a federal balance between the Central Government and the State Governments. It is fundamental to curb the conceivable abuse of power by the legislature and the executive and act as a safeguard for the basic structure of the constitution of India.

Judicial Review is also known as the role of reviewer, and the role of Eyewitnesses. It invalidates the provisions which are made by the Parliament or State legislature when those are against the provisions of the Constitution. It is a 'basic feature' of the Constitution of India and cannot be taken away by putting a law under the 9th Schedule which violates the fundamental rights guaranteed under Articles 14, 15, 19, and 21. Also, the 'basic structure' of the Constitution cannot be declared invalid and void.

## Limitations of Judicial Review:-

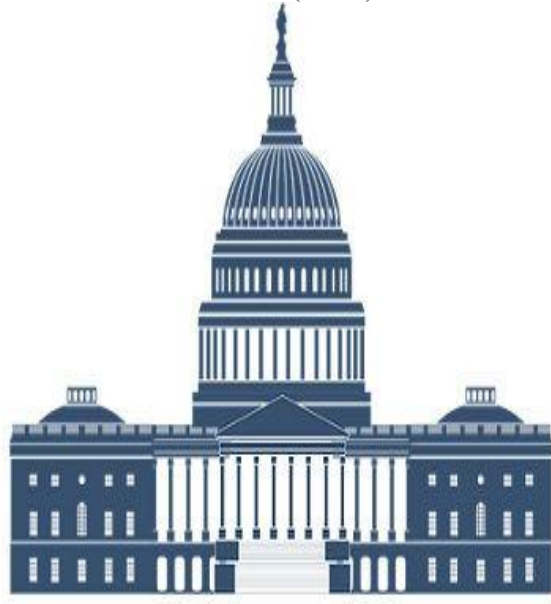
Any law already exercised by the Constitution can be superseded by the judiciary with the exclusive power of judicial review, but we have to note that the Indian Judiciary does not have unlimited powers like the USA or extremely limited powers like the UK. Judicial review restricts the working of the public authority. It has so far been created only for the Supreme Court and the High Courts, not for any subordinate courts or local courts and these courts have only major interaction with the mass public. The repeated interference by the courts in executive affairs might erode the public confidence in the integrity, quality, competence, and proficiency of the ruling governments.

In the Indian Judiciary, the legal opinions of the Judges of the higher courts, once taken in respect of any case, become the means of standard for judging in other cases, and the judgments of the lower Courts, which limits own their judgment in fresh cases. Judicial review can also cause great detriment to society as the judgment is likely to be affected by the private or egotistical or malevolent thought processes of judges. The judicial review in India looks only into the constitutionality of the laws and regulations concerning the government, not for speedy judgments, effective justice, the reality of society, etc.

## Important Judgments on Judicial Review:-

- The Supreme Court gave a key judgment in the I R Coelho case (2007), ruled that there is no immunity from judicial review for laws included in the 9th Schedule and it also held that Judicial Review is a 'basic feature' of the constitution.
- Supreme Court ruled that which of the laws placed in the Ninth Schedule on or after April 24, 1973, could be challenged in court if they violate the fundamental rights guaranteed by the Constitution of India.
- In the case of Indira Gandhi v. Raj Narayan in 1975, the Supreme Court gave a landmark judgment that judicial review should be considered a fundamental structure of the Constitution.
- In 2015, the Supreme Court announced both the 99th Constitutional Amendment, 2014, and the National Judicial Appointments Commission (NJAC) Act, 2014 as unlawful, invalid, and unconstitutional.
- The Supreme Court struck down Section 66(A) of the amended Information Technology Act, 2000 as this section was outside Article 19(2) of the Constitution which deals with freedom of speech.
- The Supreme Court has exercised the power of judicial review in various cases, for example, Golaknath Case (1967), Bank Nationalization Case (1970), Privy Purse Abolition Case (1971),

Kesavananda Bharati Case (1973), Minerva Mills Case (1980), and so on.



What is the Classification of Judicial Review?

**Answer-**

Justice Syed Shah Mohammad Quadri characterized the judiciary Review in the following 3 classes:

1. Judicial review of the acts which are related to constitutional amendments.
2. Judicial review of the legislation process of the Parliament and State Legislatures.
3. Judicial review on administrative actions which are taken by the Union government or State government and authorities within the State.

Is Judicial Review the 'Basic Feature' of the Constitution of India or not?

**Answer-**

Judicial Review is a 'basic feature' of the Constitution of India and cannot be taken away by putting a law under the 9th Schedule which violates the fundamental rights guaranteed under Articles 14, 15, 19, and 21.

What is given in Articles 131 and 132?

**Answer-**

Article 131 affirms the Supreme Court's original jurisdiction concerning the Centre-State and Inter-State disputes whereas Article 132 accommodates that Supreme Court has re-appraising and appellate jurisdiction concerning Constitutional cases.

Mention a few Important Judgments related to Judicial Review.

**Answer-**

The Supreme Court gave a key judgment in the I R Coelho case (2007), ruling that there is no immunity from judicial review for laws included in the 9th Schedule and it also held that Judicial Review is a 'basic feature' of the constitution. Also, in 2015, the Supreme Court announced both the 99th Constitutional Amendment, 2014, and the National Judicial Appointments Commission (NJAC) Act, 2014 as unlawful, invalid, and unconstitutional.

What are the criticisms of the Judicial Review?

**Answer-**

Judicial review restricts the working of the public authority. The repeated interference by the courts in executive affairs might erode the public confidence in the integrity, quality, competence, and proficiency of the ruling governments. It can also cause great detriment to society as the judgment is likely to be affected by the private or egotistical or malevolent thought processes of judges.

**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.**

While judicial review over administrative action has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the VII schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures. Hence, the scope of judicial review before Indian courts has evolved in three dimensions – firstly, to ensure fairness in administrative action, secondly, to protect the constitutionally guaranteed fundamental rights of citizens, and thirdly, to rule on questions of legislative competence between the centre and the states. The power of the Supreme Court of India to enforce these fundamental rights is derived from Article 32 of the Constitution. It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights. This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of writs evolved in common law – Habeas Corpus - to direct the release of a person detained unlawfully. Mandamus - to direct a public authority to do its duty. Quo Warranto - to direct a person to vacate an office assumed wrongfully. Prohibition - to prohibit a lower court from proceeding on a case. Certiorari - power of the higher court to remove a proceeding from a lower court and bring it before itself. With the advent of Public Interest Litigation (PIL) and dilution of the concept of locus standi [the right or capacity to bring an action or to appear in a court] in recent decades, Article 32 has been creatively interpreted to shape innovative remedies such as a 'continuing mandamus' for ensuring that executive agencies comply with judicial directions.



### Expanding Judicial Review :-

It was through the expansive interpretation of Article 21 of the Constitution in **Maneka Gandhi v Union of India (1978)**, the Court held that the “procedure established by law” envisaged in the said article had to be just, reasonable and fair to pass the test of constitutionality.

In **M Nagaraj v Union of India**, the Court declared that fundamental right in Articles 14, 19 and 21 “stands atop in constitutional value” in a fulsome recognition that “human dignity, equality and freedom were conjoined, reciprocal and similar values”. Instances of the Court’s intervention to expand the frontiers of these rights to include redressal for the killing of innocent people in false encounters and relief to the victims of custodial violence etc, has multiplied in recent times. **The Court therefore has established the foundational principles for the exercise of its judicial review jurisdiction traceable to Articles 13, 32, 136, 142 and 147 of the Constitution.** (The high court’s judicial review jurisdiction is anchored in **Article 226** of the Constitution.)

### Challenges of Judicial overreach:-

The court however in recent times has moved beyond from ensuring basic rights for citizens and has extended its review jurisdiction to what are clearly functions assigned originally and exclusively to the executive branch under the constitutional scheme.

Petitions to the Court have invoked **judicial review in "public interest"** to question major policy decisions of the government concerning policy choices, for example, in what are now known as the **2G spectrum and coal mines allocation cases**.

Challenge to proceedings of legislative assemblies and decisions of the speaker have also been entertained by the Court. Decisions of the Court voiding a constitutional amendment approved by Parliament to alter the procedure for appointment of judges, exercising review powers in what is popularly known as the **Armed Forces (Special Powers) Act (AFSPA) case** following the constitution bench decision in the **Naga People’s Movement of Human Rights v Union of India (1982)** etc has extended the Courts’ review jurisdiction to cover not only administrative decisions but to domains hitherto regarded as the exclusive preserve of legislatures.





## Parliament's Powers and Privileges

**Powers:** Parliament enacts laws, exercises oversight over the Executive, sanctions government expenditure and represents citizens. It also has the power to amend the Constitution. Note that Parliament has the power to legislate on matters related to the Judiciary such as its powers, jurisdiction, organisation and service conditions of judges. It also has the power to remove judges on grounds of proved misbehaviour or incapacity.

**Immunity from court proceedings:** To grant Parliament autonomy in its functioning, the Constitution guarantees certain protections to parliamentary proceedings and those participating in them. For example, Members of Parliament (MPs) enjoy immunity from court proceedings for anything that they say or any vote that they make in Parliament. The Constitution bars the courts from examining validity of parliamentary proceedings on grounds of irregularity of procedure. The courts also cannot hold any person liable for any material (e.g. reports and proceedings) that is published under the authority of Parliament. They also cannot question any officer of Parliament or MP regarding actions taken by them for regulating business or maintaining order in Parliament.

## Conclusion:-

India's sovereignty is based on the concept of separation of powers in the Constitution of India and due to this, India is unable to fully utilize the power of judicial review. At the same time from another perspective of view, if the courts assume full and arbitrary judicial review power, it will put a bad performance in all branches of government.

When the judiciary oversteps its bounds and interferes with the executive mandate, it is called Judicial Activism, which further can lead to encouraging judicial overreach. Here, we should understand judicial Activism is particularly not quite the same as Judicial Review. Judicial activism has no constitutional support, whereas judicial review has legal support through established constitutional articles.

In conclusion, we can say that if all the branches of government and judiciary are to function properly, each should work within its bounds while respecting the Constitution of India.

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