



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **JUDICIAL REVIEW IN INDIA: A PATH TO CONSTITUTIONALISM**

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## **Abstract**

*It is restraint or check upon the powers of all the organs of the government to maintain the true spirit of the Constitution. Following the theme of Rule of Law which means that the Constitution is the “Grundnorm of the country”<sup>1</sup> and any law that appeals against its spirit will be declared unconstitutional. This paper will attempt to trace the extent of its applicability in India along with some suggestions.*

**Keywords:** *Judicial Review, Constitutionalism, Grundnorm, Rule of Law and Natural Justice.*

## **Introduction**

Judicial review is the constitutional right provided to the Judiciary (Supreme Court and High Courts) for reviewing the Legislative, Executive, and Administrative actions performed by these organs of the government and to find out whether such actions are in accordance with the Indian Constitution.<sup>2</sup> Those Legislative and Executive actions will be declared unconstitutional which are inconsistent to the provisions of the Indian Constitution and therefore works as remedial tool utilised by the Judiciary for maintaining the spirit of Indian Constitution. It also works as reformatory measure in the society by putting the checks and balances upon the organs of the government by putting restraint upon the unlimited powers of the Legislatures of the Centre and States by turning down any Legislation which is inconsistent with the “Grundnorm of the country.”<sup>3</sup> This doctrine of Judicial Review was originated in USA and propounded for the first time by the historical judgement of *Marbury v. Madison*<sup>4</sup> by John Marshall, the Chief Justice of USA. There are not separate provisions in the Constitutions of Canada, Australia and U.S.A. for judicial review as are provided in Indian Constitution, even then it has been followed in these countries.

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<sup>1</sup> I.R. Coelho v. State of T.N., AIR 2007 SC 861.

<sup>2</sup> S.P.Sathe, *Judicial Activism in India*, (2nd. Edn.) 1.

<sup>3</sup> Supra n. 1.

<sup>4</sup> 2 L ed 60: 5 US (1 Cranch) 137 (1803)

Even Doctrine of Basic Structure was developed by the Supreme Court in the landmark judgement of *Keshavananda Bharti v. State of Kerala*<sup>5</sup> by the application of Judicial Review.<sup>5</sup> In *Raj Narain v. Indira Gandhi*<sup>6</sup>, the Supreme Court said that the Judicial Review is an integral part of the Indian Constitution and non-removable. While in *Minerva Mills Limited v. Union of India*<sup>7</sup>, the Supreme Court asserted that “*the Constitution has created an independent Judiciary which is vested with the power of Judicial Review to determine the legality of Administrative actions and the validity of Legislation. It is the sole duty of the judiciary under the Constitution to keep different organs of the state within the limits of the power conferred upon them by the Constitution by exercising power of Judicial Review as sentinel of qui vie.*”

### **Research Methodology**

This Research Paper has been based on Doctrinal Legal Research Methodology. The study has been done by utilising both primary and secondary sources of data. The researcher has utilised primary sources such as the Constitution of India, different legislations, Case Laws, official documents and reports. The researcher has considered secondary sources such as Articles from Journals, Law books and Magazines.

### **Meaning of the Judicial Review**

Judicial review is defined as a power of the Judiciary for reviewing the actions of other branches of government.<sup>8</sup> It is the power of the courts to check the validity of any legislative and executive or administrative actions of the Union and the State governments upon the axis of provisions of Indian Constitution. It imposes duty upon the courts to maintain the concept Federalism in terms of separation of power by prohibiting the crossing of the Constitutional Limits.

### **Kelsen's View on Judicial Review**

The Jurist, Hans Kelsen, stressed upon that there should be Judicial review of any Legislative Law by creating a special Tribunal, a Constitutional Court i.e. the unique body empowered to guarantee the constitutionality of any Legislation.<sup>9</sup>

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<sup>5</sup> AIR 1973 SC 1461.

<sup>6</sup> AIR 1975 SC 2299.

<sup>7</sup> AIR 1980 SC 1789.

<sup>8</sup> Black's Law Dictionary (8<sup>th</sup> Edn.) 864.

<sup>9</sup> Hans Kelsen, *Pure Theory of Law. Legality and Legitimacy*, Oxford: Oxford University Press, 2007, p. 88.

## **The Provisions of Judicial Review under Indian Constitution**

Judicial review play the role of sentinel of Indian Constitution. In post-independence India, Dr. B.R. Ambedkar, Chairman of the Drafting Committee of our Constituent Assembly had described the provision related to the same as the '*heart and soul of the Indian Constitution*'.

This power is described under different provisions of Indian Constitution viz. Article 13, 32, 226 and 227.

### **Article 13 of the Indian Constitution**

*"Laws inconsistent with or in derogation of the fundamental rights*

- (1) *All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*
- (2) *The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*
- (3) *In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.*
- (4) *Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality."*

### **Article 32 of the Indian Constitution**

*"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of The rights conferred by this Part is guaranteed.*

- (2) *The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.*
- (3) *Without prejudice to the powers conferred on the Supreme Court by clause ( 1 ) and ( 2 ), Parliament may by law empower any other court to exercise within the local limits of its*

*jurisdiction all or any of the powers exercisable by the Supreme Court under clause ( 2 ).*  
*(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”*

### **Article 226 of the Indian Constitution**

“Power of High Courts to issue certain writs

*(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*

*(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*

*(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without*

*(a) Furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and*

*(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.*

*(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.”*

## **Judicial Review as the Part of Basic Structure of the Constitution**

Judicial review is an important part of the Basic Structure of the Indian Constitution. The Doctrine of Basic Structure was propounded by the Supreme Court in *Keshvanand Bharti v. State of Kerala*<sup>10</sup>. But Judicial Review was included by the Supreme Court under Basic structure by the decision of *Indira Gandhi v. Raj Narain*<sup>11</sup>.

### **Application and Advantages of the Judicial Review in India**

#### **1. Doctrines Propounded by the Supreme Court by Using the Power of Judicial Review**

The various doctrines are developed by the Supreme Court using the power of Judicial Review provided under different provisions of the Indian Constitution viz. Doctrine of Severability, Doctrine of Eclipse, Doctrine of Colourable legislation and Doctrine of Prospective Overruling. These Doctrines work as tools in Interpretation of the Constitutional Law and other Statutory Laws in India.

##### **a. Doctrine of Pith and Substance**

This doctrine is applied to find out whether the Legislation under Judicial Review is framed by the appropriate Legislature i.e. validity of competency of Legislature by studying the true nature and the character of that Law. This doctrine flows from the Article 246 of the Indian Constitution having words viz. “with respect to” eg: *Profulla Kumar Mukerjee v. Bank of Commerce, Khulna*.<sup>12</sup>

##### **b. Doctrine of Severability**

This doctrine is developed by Supreme Court by utilising the power of Judicial review from the words of Article 13 of the Indian constitution “to the extent of contravention.” This doctrine established that the court can sieve out or sever the unconstitutional or inconsistent part of the impugned legislation from the rest of its legislation eg: *A. K. Gopalan v. State of Madras*<sup>13</sup>. If these parts are so inextricably mixed up that they cannot be detached from each other, then the entire Law will become void.

##### **c. Doctrine of Prospective Over-ruling**

This is based on the principles of Natural Justice. This doctrine states that the court is putting a new law for the future and that will have effect from future date only after the date of

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<sup>10</sup> AIR 1973 SC 1461.

<sup>11</sup> AIR 1975 SC 2299.

<sup>12</sup> AIR 1947 PC 60.

<sup>13</sup> AIR 1950 SC 27.

judgement. This doctrine came from the decision of the *Golak Nath v. State of Punjab*.<sup>14</sup>

#### d. **Doctrine of Colourable Legislation**

This doctrine is based upon the legal maxim "you cannot do indirectly, what you cannot do directly." This is taken from American Supreme Court Decision in **Bailey v. Drexel Furniture Co.**<sup>15</sup> The different colour provided to any Law while crossing the Constitutional Limits will not protect that Law from being invalid eg: *K.C.Gajpati Narayan v. State of Orissa*.<sup>16</sup>

### 2. **Judicial activism: An Essential Component Judicial Review in India**

Judicial Activism has been held to be a basic feature of the Indian Constitution. This is enforced by the Judiciary by the application of Judicial Review so as to maintaining the "Supremacy of the Grundnorm Norm of the Land."<sup>17</sup> This developed the *expanded meaning of Article 21* in context of the decision in case of *Maneka Gandhi v. Union of India*<sup>18</sup> by establishing a *new Constitutional Jurisprudence*. It opens the avenue by application of restraining of the power of Legislature substantively as well as procedurally.

### 3. **Separation of Powers and Power of Judicial Review in India**

The Judicial Review is the power utilised for maintaining the Separation of Powers in context of the Indian Constitution. It maintains the true spirit of the Indian Constitution by putting checks upon the excessive use of power by Central Legislature against State Legislature and vice-versa.

### 4. **Amending Power and Judicial Review**

The Judicial Review became an important tool for controlling the power of Amending the Indian Constitution. While reviewing different Constitutional Amendments, it become well established that Fundamental rights cannot be abrogated wholly, but these amendments should not be against the Doctrine of Basic Structure developed by *Keshvanand Bharti v. State of Kerala*<sup>19</sup>. These amendments are under the purview of Judicial Review so as to maintain the supremacy of the Indian Constitution in power tussle between Legislature and Judiciary.

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<sup>14</sup> AIR 1967 SC 1643.

<sup>15</sup> 1922 (269) US 20.

<sup>16</sup> AIR 1953 SC 375.

<sup>17</sup> I.R. Coelho v. State of T.N., AIR 2007 SC 861.

<sup>18</sup> AIR 1978 SC 597.

<sup>19</sup> AIR 1973 SC 1461.

## 5. **Judicial Review and Ninth Schedule of Indian Constitution:**

The Laws put under ninth schedule of Indian Constitution after April 24, 1973, the Date of Judgement of *Keshvanand Bharti v. State of Kerala*<sup>20</sup> are not protected and open to Judicial Review on the ground that they are in contravention to Constitutional Limitations.

## 6. **Public Interest Litigation (PIL) and Judicial Review**

The Public Interest Litigation brings application of Judicial Review as potent weapon as social action litigation. It has diluted the “Rule of Locus Standi.” It is development of Jurisprudence of Compassion. The Supreme Court developed a Dynamic Approach by allowing the PIL for allowing the litigation at the instance of “public spirited persons” for the enforcements of the rights of any other person. This is for the benefit of down-trodden people of this country where there is poverty and illiteracy present at large scale. Hence, for maintaining the Fundamental Rights of these people, it is necessary on their behalf to be represented by other people.

## 7. **Expansion of Judicial Review**

The Judicial Review based upon facts of the Case was approved first time in India by the Case of *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai*.<sup>21</sup> This opened the new avenue that along with Judicial Review of Laws, there can be Judicial Review upon the basis of facts of the any particular Case.

## 7. **Writs and Judicial Review**

The various types of the Writs applied by the Supreme Court and the High Courts helps in reviewing the actions of the Executive and Judiciary. These Writs are *Habeus Corpus, Mandamus, Prohibition and Certiorari*.

## 8. **Fundamental Rights and Judicial Review**

The Judicial review in case of policy matters is allowed only when policy decision is arbitrary, unfair or violative of fundamental rights, otherwise not allowed eg: *Kerala Bar Hotels Association v. State of Kerala*<sup>22</sup>.

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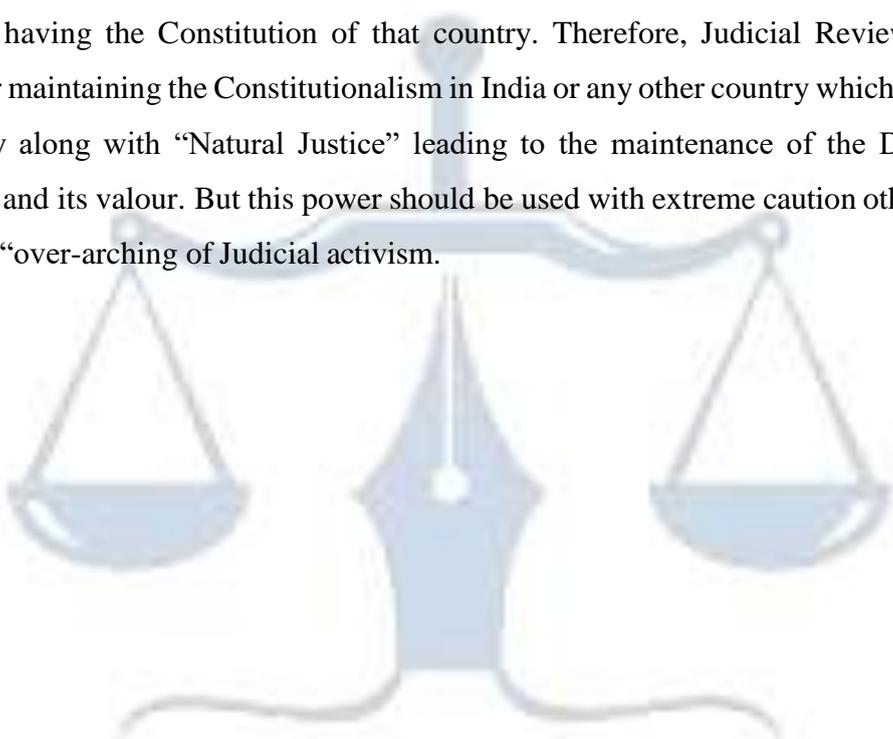
<sup>20</sup> AIR 1973 SC 1461.

<sup>21</sup> (2005) 7 SCC 627.

<sup>22</sup> AIR 2016 SC 163.

### **Conclusion**

It is concluded from this research Paper that the power (concept) of Judicial Review is within the ambit of the Doctrine of the Basic Structure of the Indian Constitution and it cannot be abrogated by any Amendment in the Indian Constitution. It is putting the checks and balances the working of the Legislative, Executive and Judicial actions of the government whether these are Constitutional Amendments or Legislative Laws or Executive Actions. Hence, it is move towards Constitutionalism which is essential for the working of any Constitution anywhere in the World otherwise the value of Constitution will be lost out and it will lead to Dictatorship even after having the Constitution of that country. Therefore, Judicial Review is a potent weapon for maintaining the Constitutionalism in India or any other country which will establish Democracy along with “Natural Justice” leading to the maintenance of the Dignity of the human life and its valour. But this power should be used with extreme caution otherwise it will lead to the “over-arching of Judicial activism.



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