



**JUDICIAL REVIEW IN INDIAN CONTEXT: THE DEEP ROOTED CONFLICT BETWEEN THE
JUDICIARY AND PARLIAMENT WITH REFERENCE TO THE KESAVANANDA BHARTI
CASE**

SUBMITTED BY-

**ARPANA PANDEY (AUTHOR)
POST- GRADUATE in POLITICAL SCIENCE**

**(DEPARTMENT OF POLITICAL SCIENCE)
FROM- UNIVERSITY OF LUCKNOW**

**ANUSHREE PANDEY (CO- AUTHOR)
B.A.LL.B., (3rd YEAR)
(SCHOOL OF LEGAL STUDIES)
FROM- BABU BANARASI DAS UNIVERSITY**

The Constitution is a seamless web of democracy constituted by the strands of individual liberty and social revolutionary goals, expressed as fundamental rights and directive principles of state policy. - Granville Austin

1. INTRODUCTION

The trajectory of Indian legal framework has witnessed many crescendo and diminuendo in the early years of Independence, and rightly so, the dynamics of the Judicial, Legislative and Executive wings of governance have found a deeper and more profound stance in their duties: and the degree to which these elements of governance can be flexible in exercising power. It is rightly conferred by the higher minds in philosophy, the truth emerges only through struggles and therefore, it is natural to have a well established relationship amongst the three branches of the government.

The spirit of National unison, integrity, the search for self-sufficiency: all resides in the Constitution of India. The Constitution of India is the manifestation of hopes and dreams that our forefathers saw for India as a legally sufficient state. The speeches of Pt. Jawaharlal Nehru, Dr. B.R. Ambedkar and Dr. Sarvepalli Radhakrishnan: Tryst with Destiny¹, Grammar of Anarchy² and The Dawn of freedom³ have all signified to the happiness and aspirations, that our forefathers foresaw in the expectations with which they started the Drafting Committee. The researcher wishes to emphasise on this source of all Law, the Grundnorm⁴, the single most revered text on Law that is the Constitution of India. The law of the land gives explicit directions to exercise power which is bestowed upon Legal Institutions. The researcher aspires to bring to the spotlight many such Constitutional phenomenon in the research.

The researchers celebrates the introduction to the topic of Legal review as it is going to be the major aspect of this research. Judicial review is the soul of the duty of Judiciary in playing the role of the supreme guardian against the absolutism of power. The absolutism in power here is the worst case scenario wherein the law makers find themselves indulging in Arbitrariness. The checks and balances of the Judiciary, act as an overwatch to the actions of Legislative and Executive branches: this duty helps in safeguarding the interests of the public and helps to uphold the structural integrity of the Constitutional provisions. The Judicial Review, essentially, is the power of the courts of a country to examine the actions of the legislative and executive branches of the government and to determine whether such actions are in conformity with the provisions and the spirit of the Constitution of the Country. Law of the land gives power to the Judiciary to check and examine such provisions made by the Legislature and render them null and void with any speck of inconsistency to the law of the Land.

¹ Speech delivered on 14th August 1947 by Pandit Jawaharlal Nehru.

² Speech Delivered on 25th November 1949 by Dr. B.R. Ambedkar

³ Speech delivered on 14th August 1947 by Dr. Sarvepalli Radhakrishnan

⁴ Hans Pure theory of Law suggests that the Grundnorm is a higher legal normative which supports and validates all other legal normative that are subordinate in nature.

1.1 Judicial Review

In the famous words of Aristotle, "It is more proper that Law should govern than any one of the citizen." These words are consciously intended to support the fact that Law in itself can never do injustice to the subjects of that particular Law and hence, Constitution is so highly regarded in the Nation. History has witnessed many instances when the Law has been misused to serve personal or communal motives and if not, then the fear of such misuse has always kept thinkers perturbed. To keep the workings in conjunction to the law, Judicial Review has been metamorphosed during the various stages of legal maturity of a Nation.

Judicial Review literally means the revision of the decree or sentence of an inferior court by superior court. The Judicial Review is an interpretative process of the Judiciary. In Public Law, Judicial review has more significance because it acts as a regulatory body and quality check to the process of codification of Laws. Judicial Review fights against the Tyranny of majority i.e. the power of majority may not always be righteous. It may also not safeguard the interest of the minority and hence, any law should stand the test of principles of justice, equity and good conscience. To assure such an evaluation, Judicial review finds a lot of substance as a feature of the Judiciary.

1.2 Historical Significance

Judicial Review finds its principles deeply rooted in the history of Legal discourse of the world. The theory is validated by the Theories of Separation of Power⁵ and Rule of Law. The theories of Rule of Law and Separation of Power suggest that the Law should always be upheld and should regulate the workings of a State⁶ and that the vessels through which the power is exercised should rest in more than one person or institution. The objectives talked in these two principles are the ends that are met directly and effectively by Judicial Review. The major propagator of the Judicial Review is a celebrated Jurist and the fourth chief Justice of United States of America named John Marshall.⁷ In the case of ***Marbury v. Madison***, the Court came to the conclusion that the Supreme Court of the United States had the power to Invalidate laws made by the Congress. There was no Legal document or evidence to support the claim but it wasn't opposed by Legislature that had no strong disagreement during that time.

1.3 Judicial Review in India

Judicial Review In India is enabled through Articles 32, 136, 226 and 227 of the Constitution of India. Indian Judicial system has faced many challenges in the early years of Independence. The pace of development of the country and it's governing Law was happening was same and so, many times Judiciary faced challenges while swinging in unchartered territory when it came to tug of war of power between the Judiciary and the Legislature. Then came the years of the Emergency which contributed many landmark cases making the Legal system face more challenges.

⁵ Based on Montesquieu's theory of Separation Of Power

⁶ Legal Organism

⁷ John James Marshall was the fourth Chief justice of United States. His works have been highly regarded in the Constitutional law. He was also the justice for the case of Marbury v. Madison(1803)

2. JUDICIAL REVIEW: CONSTITUTIONAL AMENDMENTS

An analysis of Kesavananda Bharti is incomplete without a brief discussion of the cases which led up to the Supreme Court's judgments in 1973.

There are some landmark cases before 1973 due to which the conflict between the judiciary and parliament became more clear and visible.

These cases are- **Shankari Prasad case**⁸, **Sajjan Singh case**⁹, **Golaknath case**¹⁰, **Kesavananda Bharti case**¹¹, **Minerva Mills case**.¹²

Advent of Judicial Review in India through Landmark Cases

Pre-Kesavananda Bharti case

The dispute arose right after the first amendment act inserting article 31A, 31B and 9th schedule. Its constitutional validity was upheld in **Shankari Prasad Singh Deo v. Union of India and State of Bihar**; it was held that Article 13(2) does not affect amendments to the constitution made under **Article 368** because such amendments are made in the exercise of constituent power. In a major breakthrough, in **Golak Nath and ors v. State of Punjab**, a bench of 11 judges considered the correctness of the view that had been taken in Shankari Prasad and Sajjan Singh case. By majority of six to five, these decisions were overruled. It was held that the constitutional amendments is 'law' within the meaning of Article 13 of the constitution and, therefore if it takes away or abridges the rights conferred by Part III thereof, it is void. It was declared that the Parliament will have no power from the date of decisions (27th February, 1967) to amend any of the provisions of Part III of the constitution so as to take away or abridge the fundamental rights enshrined therein.

Kesavananda Bharti v. State of Kerala

Soon after Golak Nath case the constitution (24th Amendment), Act 1971, the Constitution (25th Amendment) Act 1971, the Constitution, (26th Amendment) Act 1971, and the Constitution (29th Amendment) Act were passed. These amendments were challenged in **Kesavananda Bharti Case**. The conflict between Parliament and Judiciary was going on and it was at its peak point during this case. In this case, the constitutionality of the 29th amendment was challenged which amended the 9th schedule to the constitution therein too Kerala Amendment Acts in furtherance of land reforms. First time in Indian judiciary 13 judges bench was constituted in this case, on 24th April 1973, judgment was passed by the majority of seven judges, including Chief Justice S.M. Sikri. By a majority of seven to six,

⁸ Shankari Prasad Deo v. Union of India, AIR 1951 SC 458

⁹ Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845

¹⁰ Golak Nath v. State of Punjab, AIR 1967 SC 1643

¹¹ Kesavananda Bharti v. State of Kerala (1973) 4 SCC 225

¹² Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625

Golaknath's case was overruled. The majority opinion held that though the amending power of the Parliament extends to all the articles, Article 368 did not enable the Parliament to alter the basic structure or framework of constitution. There are implied or inherent limitations on the power of amendment under Article 368. In this case justice H.R. Khanna led down the principal of basic structure doctrine for the constitution

Parliamentary Reaction after the Kesavananda case

Forty-second Amendment 1976-

After the landmark Kesavananda Bharti case the Indira Gandhi government introduced the 42nd amendment of the Indian Constitution which induced to reduce the power of Supreme Court and High Court to pronounce upon the constitutional validity of laws. This amendment sometimes called mini constitution or the constitution of Indira.

After this landmark case C.J. Sikri retired on 25th April 1973, one day after the judgment and as per the tradition, next chief justice should be the most senior judge in Supreme Court but government was not happy with the verdict, so neglected three seniors, and on 26th April appointed Justice A.N. Roy as Chief Justice.

Post-Kesavananda Bharti case

In the case of **Indira Gandhi v. Raj Narain**¹³, sub clause (4) and (5) of article 329A, that tried to keep the election matters outside the purview of the courts, were stuck down by the court as they were found to be violative of the basic structure of the constitution. It was assumed that even after a statute is included in the 9th schedule, its provision would be open to challenge on the ground that they took away or abrogated all or any of the fundamental rights and therefore damaged or destroyed a basic structure. The view that the legislation included in the schedule is subject to the test of basic structure, expressed by Justice Matthew Indira Gandhi case found the support of a unanimous court in **Waman Rao v. Union of India**. The court identified Article 32 as part of the basic structure. The citing **Minerva Mills** where the court by a majority of four to one stuck down clauses (4) and (5) of Article 368 which provided for exclusion of judicial review and unlimited amendment power to the parliament respectively. Judicial review held to be a basic structure of the constitution. Similar views were reiterated in **L. Chandra Kumar v. Union of India**¹⁴. In **S.R. Bommai v. Union of India**¹⁵. It was again reiterated that the judicial review is a basic feature of the constitution and that the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation.

¹³ The State of Uttar Pradesh v. Raj Narain (1975 AIR 865, 1975 SCR (3) 333)

¹⁴ (1997) 3 SCC 261

¹⁵ (1994) 3 SCC 1

Supreme Court judgment in I.R. Coelho case (2007)

In a major turn around in 2007, the Supreme Court in **I. R. Coelho v. State of Tamil Nadu**¹⁶ ruled that there can be no unrestricted immunity for laws mentioned in the ninth schedule. Yogesh Kumar Sabharwal was the Chief Justice of India at that time.

The court held that subjection of ninth schedule to judicial review was restricted to the regulation which were included in the ninth schedule after 24 April 1973. So all acts, regulation and laws included in ninth schedule after 24 April 1973 are capable to challenge in court if they violated fundamental rights guaranteed under Article 14, 19, and 21 or the basic structure of the constitution.

3. RESEARCHER's INFERENCES

3.1 OBJECTIVE

The objective are mentioned below-

- **To inquire into the nature and scope of the judicial review.**
- **To examine the functioning of the doctrine of judicial review and the existing conflict between the Parliament and Judiciary due to the same.**
- **To see how judicial review has maintained the supremacy of the Constitution by limiting the acts of legislation which are ultra vires**
- **To come up with the recommendations for making the system of judicial review in India more effective**

3.2 HYPOTHESIS

Hypothesis formed through the study-

- The country like India and U.S.A. which operate under the federal system of government has a wider scope of judicial review.
- From various Supreme Court decision and constitutional amendments one finds a bit little difficult to identify the factors responsible for the conflict between the parliament and the judiciary from 1951 onwards.
- The doctrine of basic structure is not supported by any specific provisions of Constitution of India. It is yet to be decided whether this doctrine is consistent with the spirit and philosophy of the Constitution of India. Also there appears to be a ample scope for reconsideration and change in the doctrine.

¹⁶ AIR 2007 SC 861

3.3 METHODOLOGY

Hypothetic deductive method is used to analyse the research topic. i.e., **JUDICIAL REVIEW IN INDIAN CONTEXT: THE DEEP ROOTED CONFLICT BETWEEN THE JUDICIARY AND PARLIAMENT WITH REFERENCE TO THE KESHAVANANDA BHARTI CASE**

The research is primarily analytical and it is library based. The primary data is collected from the debates of the Parliament on the amendments, the judgements of Supreme Court on the amendments and various enacted laws and of executive orders.

The secondary data consists of various interpretation made in commentaries on the Indian Constitution, the books, articles and research papers published in different journals.

The purpose of research is to critically analyse the problem of implementation of Judicial Review in India due to the rooted conflict between parliament and judiciary and the probable reasons for the existing conflict. It also considers the role played by the political class in this area. An attempt is made to analyse the comments of experts on various judgements of Supreme Court.

Primary source – Statutory Materials, Government Documents and Reports.
Secondary source- Text Books, Periodical writings, Indian law journals

4. CONCLUSION

The Researchers aim to humbly portray a picture of the legacy that the Indian Legal and the Justice system has left behind to demonstrate the finer and much more comprehensible stand of the nature of Law In India. Also, the researcher wishes to comply with the jurisprudential aspect of the Constitutional law and examine the validity of the concepts mentioned in the cases

for a better understanding of the underlying principles. The existence of Basic Structure Doctrine and the remnants of the precedents that support it and the influence of judicial review in emergence of Constitutional Supremacy will also be discussed in research.

The negative impact of Judicial review will contribute to a larger perspective and understanding of the general principles and nature of such a duty in the hands of judiciary. It'll also be the focus of the study to examine the notion of many political thinkers impregnated with fears of Judicial activism becoming a threat to the balance of Power.

The prowess of the judicial minds of the country in dealing with the controversial situations of cases and the impact of the actions taken by embarking on a journey to a long road of dilemma between national interest, legal soundness and morality is worth marvelling and it deserves to have be worth noting during the examination and research of principles of Judicial review. The research will also evaluate the importance of precedents and the jurisprudential aspect of Ratio Decidendi and Obitor Dicta in making the precedents as an active element of Judicial review.

The factual representation are all important to validate the research but it is worth noting that researchers humbly acknowledge the facts of Law as an instrument which helps in search of finding the answers to questions that the researcher wishes to discover by way of this research. The common law and civil law abiding nations have different scope for Judicial review and the researcher wishes to examine the impact of that in federal system of governance like United States of America and quasi-federal systems like Canada and India. The Researchers also wants to understand the universal query of nature and scope of Judicial review. The researcher wishes to shed a light on the tussles between Judiciary and Legislature in India and in the process, listing the key features of the separation of power and how it helps in making democracy as a harmonious system governance. The researcher also wants to bring forth certain recommendations and inferences that could potentially make judicial review more effective. The inferences will also indicate to certain errors that had many issues in set precedents which had to be removed later making the process of defining a rigid stand of courts slower.

This research focuses on Jurisprudential concepts, landmark cases, Constitutional Law, Historical Background and references to other Nations and their system of governance taking the route of comparative study to advocate Judicial review as a matter of substance rather than being an underhand device solely for the of maintaining the power equilibrium.

5. REFERENCES

5.1 BIBLIOGRAPHY

5.1.1 Articles

- Venkatesh Nayak, 'The Basic Structure of Indian Constitution', Commonwealth Human Right Initiative, 2012
- Milan Dalal, 'India's New Constitutionalism: Two cases that have reshaped Indian Law', Boston College International and Comparative Law Review, vol. 31 (2008)

5.1.2 Books

- Indian Polity (5th edition) by M. Laxmikant
- Introduction to the Constitution of India by D.D. Basu
- Granville Austin, Working A Democratic- A History of Indian Experience (1999), Paper Back Edition, Oxford Uni. Press, New Delhi, 2003
- Chales Groves Haines, The American Doctrine on Judicial Supremacy
- Edward S. Corwin, The Doctrine of Judicial Review
- Zia Mody, 10 Judgements that changed India

5.2 WEBLIOGRAPHY

- https://www.princeton.edu/~kewhitt/judicial_review.pdf
- <http://shodhganga.inflibnet.ac.in/handle/10603/132599>
- <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2092&context=flr>