



## Judicial Review in India: A critical review

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**Abstract:** *In democratic countries, the constitution is declared as the highest and superior law of the country and is mentioned in the constitution to protect the rights of the people. All the another laws of the land derive authority from the Constitution. Law plays an important role in the society. So the concept of law changes time to time. Laws are enacted by legislature and implemented by the executives, and before implementation it is checked by judiciary through the using their power of judicial review. The validity of laws is to be checked according to the Constitution. That is why today various countries have proudly accepted the judicial review in the constitution of their nation.*

**Introduction-** Judicial review is a supreme power of Indian Supreme Court, so judicial review is the essence of supremacy of law. Judicial review is the power of the court to review the actions of legislative, executive and also review the actions of judiciary, it is the power to look over the validity of law or any action whether it is valid or not. This is a concept of Rule of Law. Judicial Review is the mechanism by which it maintain the separation of powers. Separation of power has rooted the scope of Judicial Review. It is the good weapon within the hands of the court to carry unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the fundamental of the land. Indian constitution has created an independent judiciary which is vested with the ability of judicial review to see

the legality of any validity of law and any executive action.

There are three dimensions of judicial review like judicial review of legislative actions, judicial review of judicial pronouncements as well as constitutional amendments and judicial review of administrative actions. The validity of other laws is to be checked according to the Constitution. If the law infringe the rights of any person or against the principle enshrined in the Constitution, then the law is to be declared unconstitutional.

Judicial Review Judicial review is defined as 'the power of the court to see whether the acts of legislature and executive are according to the Constitution or the Constitutional values'. It means the constitution is the supreme law of the land and any law

inconsistent therewith is void through judicial review. This is the power exerted by the courts of a country to examine the actions of the legislatures, executives and administrative arms of the government and to ensure that such actions conform to the provisions of the constitution. Supreme Court is not only a court but it is a constitutional council which continuously move.

It interpret the constitution from time to time. It declares administrative and executive functions as illegal and judicial decisions and reviewing and observing decisions is a special metaphysical task. It means any law passed by parliament or passed by the administrative the Supreme Court may declare it valid or invalid through judicial review.

It is clear from the above facts that any legislation passed by parliament or the legislature of the states, if the law against the spirit of the constitution, then Supreme Court can declare the unconstitutional or void through the power of judicial review. Why should the Supreme Court be given the right to judicial review? A few year ago alexander Hamilton gave the answer in wonderful words "explaining the law is the proper and specific area of the court. Actually the constitution is a fundamental law and this should be considered by the judges, so it is the duty of the judges that in the constitution explain the meaning of the law which made by the administrator (legislature)"

The Supreme Court has been vested with the ability of judicial review. It means the Supreme Court may review its own judgment order. Judicial review is defined because the competence of a court of law to declare the constitutionality or otherwise of a legislative enactment. Being the guardian of the fundamental rights and arbiter of the constitutional conflicts between the union and the sates with respect to the division of powers between them, the Supreme Court enjoys the competence to exercise the ability of reviewing legislative enactments both of parliament and also the state's legislatures.

Justice Syed Shah Mohamed Quadri has classified the judicial review into the following categories:-

- \* Judicial review of constitutional amendments.
- \* Judicial review of legislation of the parliament and state legislatures and subordinate legislations.
- \* Judicial review of executive action of the union and state and authorities under the state.

**Evolution-** However, parliamentary integrity in the British system of governance (parliamentary sovereignty) adopting a system like judicial review is not adopted but the source of the origin of this theory is Britain system. In England, there has always been the supremacy of the Parliament. The judiciary wasn't alleged to review the acts of the Parliament, because the Parliament is supreme to all.

Judicial review remained restricted to the executive actions.

The Judiciary was concerned in keeping the action of the executive in line with the Constitutional values, though without written in Britain. In Britain, Parliament prevents the scope of Judicial Review to Primary legislation (legislation enacted by Parliament) except in few cases related to Human Rights and individual freedom, therefore Primary legislation is outside the purview of judicial review. But, as regards to Secondary legislation (rules, regulation, and act of Ministries) are subject to Judicial Review. Court can review the actions of administrative and executive actions in Britain. Judicial Review in Britain is basically on procedural grounds which is largely related to Administrative actions.

The Judiciary though expanding the scope of negligence through the case like *Rylands v. Fletcher* 1868 (principle of strict liability) and *Donoghue v. Stevenson* 1932 (manufacturer of goods owe a duty towards an ultimate consumer with whom there is no contractual relation), maintained the myth that the judges do not create laws. The concept of the judicial review was carried by Britain to its colonies also. That is why the presence of the concept was always there within the Indian system. Similar, was the situation in the U.S.A. Being the colony of England, it inherited the common law system. The common law system, which provided the basis for the establishment of the concept of the

judicial review in U.S.A. It was for the first time in the year 1803 that the U.S Supreme Court in *Marbury v. Madison* (1803) declared that the legislative actions also under the purview of the judicial review.

The Constitution of the U.S.A. does not provide any provision for the exercise of the ability of the review by the judiciary. It is argued that through the case of *Marbury* the Court assumed the ability of judicial review in itself.

#### **Necessity of judicial review-**

The system of judicial review is very important for Indian democracy. It is extremely beneficial for the entire state of India by federal and state constitution. The division of power between government is based on judicial review only defence is possible. To curb the power of governance and protect civil rights and freedoms. The work can also be done on the basis of judicial review. Judicial review is the system of review serves as a balance of the constitution. And the officers of Supreme Court and high court is working as a defender on the basis of judicial review. Lack of power of judicial review it is possible threatens the existence of central and state. Division of power in federal states between central and state governments it happens. It is but natural that between a state or some states and center on a subject in case of any dispute arising, the Supreme Court has to settle the dispute likewise, there is no power to declare the laws of the center and states illegal.

So the existence of centers and units would have been endangered. Thus it is only fair that judicial power of reviewing ended the disputes by demolishing states and centers within the borders. Has succeeded in making the center and states safe. Supreme Court is not only a court, but it is a constitutional council of India which is working without any break. It interprets of constitution time to time, and declare the functions as legitimate or illegal of administrative and executive.

Important task of apex court is reviewing and observing of judicial decisions and other judgments, it means any law passed by parliament and state legislature apex court may use their power judicial review and declare null and void if this law infringe the fundamental rights of people. It is clear that, judiciary controls the legislature cynicism and haste which is necessary to protect the constitution.

It is possible that threatens may pose to the existence of central and states in the lack of judicial review. The Supreme Court, through judicial review, not only reviews the laws made by parliament or the state legislatures, but also reviews the orders passed by the executive that there is no such order which is contrary to the constitution and its spirit if such if found, he may terminate it by declaring it unconstitutional.

Therefore, it can be said that the Supreme Court is a pioneer of

government and it has contributed significantly in the development of Indian governance. Justice Mukherjee said regarding the need for judicial review the constitution of India is written, although many principles of British parliamentary system have been adopted in it, but the principle of parliamentary sovereignty has not been recognized in relation to law making. In this regard, the US constitution and other constitutions based on it have been followed. On being representatives of political institutions, people consider the restrictions placed on the legislature and executive governed by the constitution as essential to protect public and personal rights. These restrictions act as a barrier to the majority's autocracy. All this is possible only when the judiciary has the right to review all the administration, executive and judiciary functions that violate or encroach or impose the rights of the individual.

Constitutional democracy prescribes boundaries of the scope of individuals, communities and government of different levels of government through constitution, the power of judicial review to keep them all within their respective jurisdictions and resolve boundary disputes between any two jurisdictions. It is necessary to be with the Supreme Court. In this way, various countries inspired by the ideal manner and they have adopted this principle of judicial review in the constitution of their country.



Provisions related to judicial review in the constitution: In the field of system of judicial review theory in the governance system of our country, the supremacy of the constitution, sovereignty of parliament and judicial independence have been beautifully coordinated. In the words of D.D Basu "The Indian constitution has wonderfully adopted the trail between the principle of supremacy of the US judiciary and therefore the principles of parliamentary sovereignty of England. In the constitution of India, both the parliament and supreme court are supreme in their respective fields".

The principle of judicial review in the Indian constitution is mentioned in the provisions of the constitution somewhere it is found nevertheless in the current state of the fundamental elements of the principle of judicial inspection the reason was the automatic development of this theory. Especially the three inevitable judicial review conditions:

1. Written and rigid constitution.
2. Division of power between the center and the states.
3. System of fundamental rights.

The Indian constitution fulfils all these conditions, so even in the absence of clear constitutional provisions, the supreme court has used it in many decisions by adopting the principle of judicial review and declared the functions and statutes of the parliament and executive unconstitutional that the provisions of the constitution were

against. In India, Judicial Review may be a power of court to line up an efficient system of check and balance between legislature and executive.

Many of the provisions of the Indian constitution provide a substantive basis for the right to judicial review from which it can be indirectly conducted that the constitution makers have been reluctant to delegate the powers of judicial review to the Supreme Court. It has been explained in various articles of the Indian constitution as follows:-

\* Art. 13 declare that all laws are inconsistent with or in derogation of the fundamental rights shall be null and void most important doctrines of judicial review like Doctrine of Severability, Doctrine of Eclipse. It also provides for the "judicial review" of all the legislations in India in past as well as future.

\* Art. 32 guarantees the right to move the Supreme Court for the enforcement of the fundamental rights and empowers the Supreme Court to issue directions or orders or writs for that purpose, in this way, where our constitution confers the right to protect and interpret the entire constitution including fundamental rights, on the other hand, amending any part of the constitution including fundamental rights, make the right to legislate by the parliament. It is clear from this that both the legislature and judiciary bodies are independent in their own territory and no jurisdiction can be infringed by each

other.

\* According to article 122(1) and 212(1), the process of law and recognition of the proceedings of parliament and state legislature cannot be tested by the court on the basis of unreasonable irregularity, Court cannot interfere in their area.

\* Art.131 provides for the original jurisdiction of the Supreme Court in center-state and inter-state disputes. Art. 132 provides for the appellate jurisdiction of the supreme court in constitutional cases. According to article 131 and 132 of the constitution, in cases where the constitution has been interpreted the question of the matter lies and appealed in relation to the laws made by parliament and state legislatures. It can be clear that the Supreme Court has the final right to decide on constitutional matters.

\* Art. 133 provides for the appellate jurisdiction of the supreme court in civil cases.

\* Art. 134 provides for the appellate jurisdiction for the supreme court in criminal cases.

\* Art. 134-A deals with the certificate for appeal to the supreme court from the high courts.

\* Art. 135 empowers the Supreme Court to exercise the jurisdiction and power of the federal court under any pre constitution law.

\* Art 136 authorizes the Supreme Court to grant a special leave appeal from any court or tribunal except military

tribunal and court martial.

\* Art. 143 authorizes the president to seek the opinion of the supreme court on any question of law or fact and on any pre-constitution legal matters.

\* Art. 226 empowers the high courts to issue directions or orders or writs for the enforcement of the fundamental rights and for any other purpose.

\* Art. 227 vests in the high courts the power of superintendence over all courts and tribunals with their respective territorial jurisdictions (except military courts or tribunals).

\* Art. 245 provides that the territorial extent of laws made by parliament and by the legislature of states.

\* Art. 246 deals with the subject matter of laws made by parliament and by the legislatures of the states (union list, state list and concurrent list).

\* Art. 251 and 254 deals with case of a conflict between the central law and state law, the central law prevails over the state law and the state law shall be void. And Art. 372 provides that the continuance in force of the pre-constitution laws.

The Supreme Court used the power of judicial review in various cases, as follows:-

\* In the Golaknath case (1967),

\* The bank nationalization case (1970),

\* The privy purses abolition case (1971),

\* The Kesavananda Bharti case (1973),

\* The Minerva mills case (1980).

**Conclusion-** Thus the governance system of our country has a unique blend of sovereignty of parliament in the field of legislative and judicial independence in the field of judicial review. Parliament is sovereign in the field of law making, including constitutional amendments, but its sovereignty is there until the law made by it is challenged in the court. If the parliament makes any law against the basic spirit of the constitution and the fundamental rights of the citizens, the judiciary, being the protector of the constitution, can declare that law as null and void, but the highness and independence of the judiciary on parliament legislation is also where even the parliament should not include that law in the 9th schedule of the constitution. Not only this, if a parliamentary law is declared unconstitutional by the court on the basis of an error, in such a situation the parliament can retain its sovereignty by neutralizing the judicial decision by removing the said error from its law with retrospective effect. And by exercising the powers conferred in article 145, the parliament can also change the jurisdiction of the court.

But due to the power of judicial review, the Supreme Court acquires the authority to quash all the violations of the constitution by the administrative and executive. This serves to protect the constitution. Judicial review also interprets the constitution, which is also the final interpretation that everyone has to accept. This makes the Supreme Court as the defender and final interpreter of the constitution, hence the principle of judicial review has been accepted in the Indian constitution.

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