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“JUDICIAL REVIEW AND LEGISLATIVE INTENT: A CONSTITUTIONAL PERSPECTIVE”

AUTHORED BY - HARSHPREET KAUR

1. INTRODUCTION

“The Constitution of a nation is often referred to as a *“living document”* due to its dynamic nature and ability to evolve alongside societal changes. It is not merely a legal framework but also a socio-economic charter designed to fulfill the aspirations of the people and guide the country toward achieving its foundational goals. The Indian Constitution, in particular, was crafted by visionary leaders who were undisputed architects of the nation's destiny. It was conceived as a comprehensive and enduring document, intended to govern the country and safeguard the rights and freedoms of its people for generations.”

“In establishing the various organs of government, the framers of the Constitution entrusted the power to interpret this foundational document to the judiciary, specifically the Supreme Court of India. The apex court, over time, has played a pivotal role in ensuring the proper functioning of the constitutional framework. In its early years, the judiciary interpreted the Constitution's provisions in a manner reflective of the evolving needs and aspirations of the people. The underlying principle guiding all actors in this constitutional framework has been the maintenance of the rule of law. Whenever the legislative or executive branches sought to overstep their constitutional mandates or encroach upon individual freedoms, the judiciary did not hesitate to intervene, asserting its authority to preserve the balance among the three organs of the government.”

“At the same time, the judiciary has also recognized situations where national interests necessitate certain limitations on individual rights. In such cases, it has employed interpretative tools to balance competing priorities. Over time, the judiciary has become more proactive, scrutinizing governmental actions against the fundamental principles enshrined in the Constitution. This proactive stance has led to the rise of judicial activism, which has sparked considerable debate in contemporary India. Critics, particularly traditionalists, argue that the Supreme Court is overstepping its constitutional boundaries by using judicial review as a tool

to assert its authority. They contend that the judiciary must adhere strictly to the original design and intent of the Constitution's framers.”

“In recent years, the Supreme Court of India has issued several landmark rulings addressing socio-economic issues and governmental negligence, particularly concerning the welfare of ordinary citizens. These rulings have reinforced the judiciary’s role in reminding the executive of its duties to the populace. However, this increasing assertiveness has led to criticism and concern at various levels, with fears that the judiciary may be encroaching upon its constitutionally defined role of interpreting the law in line with the original constitutional text.”

At the heart of this debate lies a fundamental question: Should the judiciary and legislature base their interpretation and application of the Constitution on the "original intent" of its framers, or should they incorporate new ideas and interpretations that emerge over time to address the changing needs of society? This question underpins the ongoing discourse on the relevance and value of the "original intent" theory in a rapidly evolving society.

“In addressing these issues, it is essential to explore the relationship between a Constitution and the concept of Constitutionalism.¹ While a country may possess a Constitution, it does not necessarily mean it embraces Constitutionalism—a principle that ensures the protection of basic individual freedoms, dignity, and personality through the rule of law. Therefore, understanding the nuances of terms such as “Constitution”, “Constitutional Law”, and “Constitutionalism” is vital. Moreover, history serves as a critical tool in addressing present-day challenges, as it offers valuable insights into the rise, fall, and transformation of nations over time.”

1.1 MEANING AND DEFINITION OF CONSTITUTION AND CONSTITUTIONALISM

The Constitution serves as the cornerstone of a nation’s liberty, forming the structural framework within which the forces of law and governance operate to safeguard peace and prosperity for its citizens. As the protector of individual rights and privileges, it commands respect for its provisions and adherence to its principles by all.

¹ Hegel's Political Writings Translate by Knox, T (1964) Pg. 244.

DEFINITION OF “CONSTITUTION”

“Throughout history, philosophers and jurists have articulated various definitions of the term “*Constitution*.” Broadly, it has been described as the foundational charter that establishes a government. It represents the collective will of the people, functioning as their ultimate legal authority. The Constitution, being the supreme law, articulates specific rights, legal principles, and procedural standards. It serves as the voice of the people, embodying their collective authority and providing the framework for all actions executed in accordance with its provisions. As a higher form of law, the Constitution not only governs legislative actions but also ensures their legitimacy.”

According to **K.C. Wheare**, “*The Constitution, in a sense, enumerates legal rules & principles which govern the government of that country & which are the fundamental law of the land. It is indeed 'the resultant of a parallelogram of forces political, economic & social - which operates at the time of its adoption.'*”²

However, According to **Justice P. Jaganmohan Reddy** called “*Constitution*”, “*a collection of principles according to which relations between powers of the government and, the rights of the governed are adjusted.*”³

Subsequently **Wade & Phillips** quotes Constitution as “*A Constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of the Government of a state and declare the principles governing the operation of those organs.*”⁴

Whereas according to **Thomas Paine**, “*A Constitution is thing antecedent to the Government and a government is only a creature of the Constitution. The Constitution is not the act of its government but of the people constituting the government.*”⁵

² Modern Constitutions Wheare, K.C (1966) p 98.

³ Quoted in "A Constitution; what it is and what it signifies" by P. Jagmohan Reddy in Essays on Constitutional Law Ed. by V. Venktaramanaiah (1986) P145.

⁴ Constitutional Law by Wade & Phillips (Seventh Ed) P.1. In Dicey's views the word "Constitution" means & includes "all rules which directly or indirectly affect the distribution or the exercise of sovereign power in the State" See the Law of the Constitution by Dicey, A.V. 1959 P.23.

⁵ Thomas Paine was a great advocate of written Constitutions. He categorically said that where a Constitution "Cannot be produced in a visible form, there is none". See Select Constitutions by Kapoor, A.C. (1993) P2.

On the other hand, **Bryce** states that “*The Constitution of a state or nation consists of those of its rules or laws which determine the form of the government and the respective rights & duties of the citizens towards the government.*”⁶

From these definitions, it is evident that the modern understanding of “*Constitution*” encompasses a codified set of legal principles and rules.

These principles not only define the relationship between the different branches of government but also delineate the rights and obligations of both the state and its citizens.

PURPOSE AND ESSENTIAL FEATURES OF A CONSTITUTION

“A Constitution is designed not merely to establish, organize, and allocate governmental power but also to ensure that such power is exercised in a legitimate and accountable manner. To achieve these objectives, a “Constitution” must satisfy certain essential criteria, including:

- a) **Clarity:** It should be precise and definitive.
- b) **Comprehensiveness:** It must cover all fundamental aspects of governance.
- c) **Brevity:** While detailed, it should remain concise.
- d) **Flexibility:** It should allow for adaptability to changing circumstances.
- e) **Declaration of Rights:** It must guarantee individual rights and freedoms.
- f) **Judicial Independence:** It should establish an impartial judiciary to ensure fair administration of justice.”

“Owing to its overarching authority, the Constitution is regarded as a superior form of statutory law.⁷ It is broadly categorized into two types: (a) *Evolved Constitutions*, which develop gradually over time; and (b) *Enacted Constitutions*, which are created through deliberate drafting and formal adoption.”

“CONSTITUTIONAL LAW: SCOPE AND NATURE”

“*Constitutional Law*” refers to the legal framework arising from the Constitution. It is a branch of public law that governs the political structure of a state and delineates the powers of its government. Additionally, it imposes both substantive and procedural limitations on the exercise of governmental authority to ensure accountability and justice.

⁶ Supranote 03 Venktaramanaiah Pg. 145.

⁷ The Making of India's Constitution by Khanna, H.R (1981) at p. 3.

“Constitutional Law” is the law of the Constitution. It is a branch of Public Law which determines the Political Organization of a State and its powers, while also setting certain substantive and procedural limitations on the exercise of governing power.

According to **Salmond**, “*Constitutional Law is the body of those legal rules which determine one Constitution of the state. It is both a matter of fact and of law. It comprises not only of legal rules but also of Constitutional practices which are logically prior to Constitutional Law.*”⁸

For **Samuel Weaver** “*Constitutional Law consists of the organic and fundamental norms. It is the law of the establishment of the Constitution, its construction, interpretation and change.*” Infact, “Constitutional Law” is the “*Grund norm of the laws of one nation, embodying a higher validity emanating from the Political Sovereign and its validity is supreme, meta legal, where the validity of other laws is determined in the light of the Constitutional law.*”⁹

“However, much like the term “*Constitution,*” the concept of “*Constitutional Law*” is not amenable to an exact definition. In its broadest sense, it encompasses the study and interpretation of Constitutions, focusing on their formation, evolution, and application.”

Nevertheless, **Edward Meese** has drawn a sharp distinction between the “*Constitution*” and “*Constitutional Law*”, stating; “*If the Constitution is the unadorned text, then Constitutional law is simply what the Supreme Court says about the Constitution in its decisions resolving the case and controversies that come before it.*”¹⁰

“This intricate branch of jurisprudence remains vital in shaping the structure of governance while safeguarding the fundamental principles of justice and liberty.”

CONSTITUTIONALISM

“Constitutionalism thrives on several factors, including the freedoms of expression and association, an enlightened public opinion, a responsible opposition, and high standards of purity and integrity in public life. The Constitution itself can be seen as a framework, with its

⁸ The Making of India's Constitution by Khanna, H.R (1981) at p. 3.

⁹ Constitutional Law and its Administration by Weaver, Samuel p3.

¹⁰ Constitutional Faith by Levinson, Sanford (1988) P39. Meese made this distinction while delivering a speech at the Tulane Law School.

essence and vitality infused by the people who establish and operate the government. Adherence to Constitutionalism is essential to successfully navigate the complexities and challenges inherent in the journey of democracy. It is only by embracing the principles of Constitutionalism that we can safeguard fundamental individual freedoms and uphold human dignity and personality.”

“Therefore, a Constitution must be imbued with the spirit of Constitutionalism, which fundamentally opposes arbitrary power and reinforces the enduring virtues of democratic traditions.”

“To achieve this, Constitutionalism must be adaptable and accommodating, rather than excessively rigid or overly legalistic. If it becomes detached from the dynamic forces of societal change, it risks degenerating into a sterile formalism that fails to serve its purpose of channelling and moderating such changes effectively.”

According to **Kelly and Belz**, “*Constitutionalism is the theory and practice of conducting politics in accordance with a Constitution. Its main requirement is legalism, the belief that right conduct consists in the following rules*”.¹¹

Infact, the concept of Constitutionalism is akin to the science of politics alike. In the words of **P. Rajeshwara Rao** “*Constitutionalism implies a Government under law through law and in conformity with law. It, like Hinduism, is a movement and not a position; a process and not a result, a growing tradition and not a fixed revelation.*”¹²

“A significant post-World War II development has been the proliferation and growth of Constitutionalism, marked by the adoption of written Constitutions in numerous countries, including India and the United States. Within Western civilization, Constitutionalism is revered as a concept that establishes a political framework where the rule of law prevails over the rule of individuals. It ensures that political authority is exercised in accordance with established laws, binding everyone, irrespective of their position, to act within legal boundaries devoid of personal whims or arbitrariness.”

¹¹ The American Constitution: Its Origin and Development by Kelly, Harbinson & Belz (1983) P (XV); (Also see Democratic Government and Politics by Carry & Hodgets P.85.

¹² "The Outlook of Constitutionalism" by Rao, P. Rajeshwara S.C.J. (1953) Vol XVI PP 91, 97.

“To fully appreciate this concept of “higher law” or, in political terms, “Constitutionalism,” it is imperative to delve into the historical context that shaped the emergence of the Indian Constitution. Understanding the objectives envisioned by the framers of the Constitution provides valuable insights into the essence of Constitutionalism in India.”

1.2 “HISTORICAL BACKGROUND OF INDIAN CONSTITUTION AND OBJECTIVES BEFORE ITS FRAMERS”

“The Indian Constitution, as a hallmark of democratic governance, stands as one of the most comprehensive and meticulously drafted Constitutions in the world. Its creation was deeply influenced by India’s historical experiences, struggles for independence, and the aspirations of its people to establish a just and equitable society. The framers of the Constitution aimed to balance diverse needs upholding individual freedoms, ensuring socio-economic justice, and fostering national unity. This essay delves into the historical underpinnings of the Indian Constitution and the objectives envisioned by its framers, laying the foundation for understanding its dynamic interplay with judicial review and legislative intent.”

“The origins of the Indian Constitution can be traced to colonial rule, which profoundly shaped its structure and principles. The British introduced several legislative frameworks in India, such as the Regulating Act of 1773, the Government of India Act of 1858, and the Indian Councils Acts of 1861 and 1892. These statutes centralized authority, curtailed Indian participation in governance, and institutionalized British dominance. However, they also set the stage for constitutional governance by introducing limited representation and rule of law. The watershed moment in India’s constitutional journey came with the Government of India Act, 1919, which introduced dyarchy in provinces, and the Government of India Act, 1935, which laid the groundwork for federal governance. These Acts provided a framework for the eventual creation of an independent democratic Constitution.¹³”

“Parallel to legislative developments, India’s freedom struggle, led by luminaries like Mahatma Gandhi, Jawaharlal Nehru, and Dr. B.R. Ambedkar, emphasized self- rule, individual rights, and social reform. The demand for a Constitution drafted by Indians, as opposed to one imposed by the colonial regime, gained momentum with the Nehru Report of 1928 and the Karachi Resolution of 1931, which articulated fundamental rights and socio-

¹³ Basu, D.D., Introduction to the Constitution of India (LexisNexis, 23rd ed., 2018).

economic justice.¹⁴”

“Post-independence, the Constituent Assembly, comprising representatives from diverse regions, communities, and ideologies, began drafting the Constitution on December 9, 1946. Influenced by global models, particularly the U.S. Constitution’s emphasis on judicial review and the U.K.’s parliamentary supremacy, the framers sought to create a Constitution that reflected India’s unique socio-political realities.”

“The objectives of the Constitution’s framers were explicitly outlined in the **Objective Resolution**, moved by Jawaharlal Nehru in the Constituent Assembly on December 13, 1946.¹⁵ This resolution emphasized sovereignty, justice, equality, liberty, and fraternity, principles that were later enshrined in the Preamble of the Constitution.”

“The framers aspired to create a document that would:

1. Establish India as a sovereign, socialist, secular, and democratic republic.
2. Guarantee fundamental rights to every citizen, ensuring individual liberty and equality.
3. Promote social and economic justice to bridge the vast inequalities within society.
4. Ensure the unity and integrity of the nation while respecting its pluralistic fabric.
5. Lay the foundation for a government accountable to the people, with a clear separation of powers among the legislature, executive, and judiciary.”

“Before delving into the functioning of our Constitution, it is imperative to first examine the key features of both democratic Constitutions. A comprehensive understanding of these characteristics becomes essential, particularly within the framework of the theory of original intent. This approach helps to evaluate how the courts and legislatures in both democracies have factored in these fundamental principles while interpreting legal provisions or formulating laws.”

1.3 “IMPORTANT FEATURES OF THE INDIAN CONSTITUTION”

“The vision that inspired the framers of the Indian Constitution bore remarkable resemblance to that of the architects of the American Constitution. Both envisioned a society where human intellect and spirit could thrive freely, unshackled by constraints, encouraging unlimited

¹⁴ Austin, Granville, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966).

¹⁵ Nehru, Jawaharlal, *Objective Resolution Speech, Constituent Assembly Debates*, December 13, 1946.

inquiry and allowing individuals the freedom to explore uncharted territories and question deeply ingrained beliefs and principles.¹⁶ The foundational principles of the Indian Constitution aim to establish a welfare state, reflecting the salient characteristics of a federal structure.”

“The key features of Indian democracy include:

- a) The lengthiest written Constitution in the world;
- b) The establishment of a Sovereign, Socialist, Secular, Democratic Republic;
- c) Adoption of a Parliamentary form of government;
- d) Recognition and protection of Fundamental Rights;
- e) Inclusion of Directive Principles of State Policy;
- f) Enactment of Fundamental Duties;
- g) Judicial review and an independent judiciary;
- h) A federal system with a unitary bias;
- i) Adult suffrage ensuring popular sovereignty;
- j) A unique blend of rigidity and flexibility in constitutional amendments.”

“The framers of the Indian Constitution sought to incorporate the best provisions from constitutions worldwide, which led to its comprehensive and elaborate nature.¹⁷ Given their familiarity with the Parliamentary system, most members of the Constituent Assembly favored this form of government, as it prevents the concentration of power in one entity and ensures that the ultimate authority rests with the people. To safeguard basic rights and freedoms, the Constitution provides an extensive declaration of human rights, with the added feature of making Fundamental Rights justiciable.¹⁸”

“In furtherance of the goal of creating a welfare state and achieving socio-economic objectives, the Constitution also includes non-justiciable rights in the form of Directive Principles of State Policy. Recognizing the necessity of judicial oversight for protecting fundamental rights, judicial review, coupled with an independent judiciary, has been established as a cornerstone

¹⁶ Quoted From Noorani, A.G. Our Bill of Rights And the courts Pg. 17.

¹⁷ Originally it had 395 articles & eight schedule. Today it has 444 articles, 26 parts & 12 schedules after the Constitution 74th (Amend.) Act, 1992.

¹⁸ Explaining the reason for not opting for American presidential type of Government, Dr. Ambedkar said in the Assembly that “.... the daily assessment of responsibility which is not available under the American system is far more effective than the periodic assessment.” & further the draft Constitution in recommending the parliamentary system of executive, had preferred more responsibility to stability. CAD Vol.VIII PP 32 - 33.

of the Indian legal framework.”

“The framers of Indian Constitution, understood the unique challenges faced by India that differed from other federations in history, adopted a federal structure with a unitary tilt. As a democracy rooted in active participation, the Constitution grants the right to vote to all above 18 years.”

“To ensure adaptability to changing times, the framers chose a balanced approach to constitutional amendments, incorporating elements of both rigidity and flexibility. This adaptability allows the Constitution to evolve without losing its essence. For instance, the words "Socialist" and "Secular" were added to the Preamble through the 42nd Constitutional Amendment Act, 1976, and Chapter IVA introducing Fundamental Duties was also inserted. This flexibility ensures the Indian Constitution remains dynamic, capable of growth and reform without compromising its core principles.¹⁹”

“The framers of the Indian Constitution were inspired to incorporate the best features from various constitutions worldwide. This ambition resulted in the creation of an extensive and detailed constitutional framework. Given their familiarity with the parliamentary form of governance, the Constituent Assembly members overwhelmingly favoured it, recognizing its merit in curbing autocracy by ensuring that real power resides with the people.”

“The study underscores that the framers of the Indian Constitution envisioned a democratic framework aimed at promoting the welfare of its citizens. The extent to which the aspirations of these architects have been realized can be assessed by examining the functioning of the Constitution over time. It also raises questions about how faithfully succeeding generations have adhered to the original document, the values, and the principles that guided its creation.”

“It is crucial to remember that a Constitution inherently relies on the assumption that every subsequent generation will uphold the faith and commitment to the ideals that shaped its provisions. In the absence of this fundamental allegiance, the effective operation of the Constitution is likely to face significant challenges. Furthermore, a Constitution is more than a written document; it embodies a way of life that requires active observance and practice.”

¹⁹ The Making of India's Constitution by Khanna, H.R (1981) at pg. 3.

“Thus, the Indian Constitution is a dynamic document, capable of evolving without losing its foundational essence, embodying the aspirations of its framers while accommodating the needs of future generations.”

2. “THE POWER OF JUDICIAL REVIEW”

“In democratic systems governed by written constitutions, the powers and functions of various branches of government are explicitly outlined in the foundational legal document. This framework is designed to ensure that no branch exceeds its prescribed authority or encroaches upon the jurisdiction of another. To address instances where boundaries are crossed, the Constitution entrusts the judiciary with the responsibility of adjudicating such disputes. This judicial authority to examine and prevent the overreach of power forms the foundation of the concept of judicial review. It is through judicial review that courts assert their role as the interpreters of constitutional provisions, resolving disputes concerning constitutional questions.”

““Judicial review primarily resides with the apex court of the country, often the Supreme Court, which serves as the final authority on matters of constitutional interpretation. This function underscores the critical role of the judiciary in maintaining the balance of power and safeguarding the supremacy of the Constitution.”

“Broadly understood, judicial review refers to the judiciary’s authority to assess the constitutionality of legislative or executive actions, especially when the issue of constitutionality arises in the course of adjudicating legal disputes. It empowers courts to ensure that the acts of government comply with constitutional mandates, thus upholding the rule of law. Through this mechanism, the judiciary acts as the guardian of constitutional integrity, ensuring that democratic principles and the separation of powers are preserved within the governance framework.²⁰”

2.1 “CONCEPT, MEANING AND ORIGIN OF JUDICIAL REVIEW”

“Judicial review refers to the process by which the judiciary evaluates the actions of the legislative, executive, and administrative branches of government to ensure compliance with constitutional provisions. Any actions found to be inconsistent with the constitution are

²⁰ Quoted by V. Nageswara Rao and G.B.Reddy, “Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead,”(1997) 39 JILI. 411-423

deemed unconstitutional and rendered null and void. This authority of courts to assess and invalidate government actions that contravene constitutional principles is termed as judicial review.”

“The concept of judicial review originated in the United States legal system, where it is premised on the existence of a written constitution that can only be altered through formal amendments. Although legislation is presumed to be valid, courts possess the authority to nullify any statute that violates constitutional or statutory principles.”

“While the roots of judicial review can be traced to the United Kingdom, a country without a written constitution, it gained firm establishment in the United States under its written federal constitution. The doctrine, however, has reached its pinnacle under the Indian Constitution, where it has been recognized as a fundamental feature. In the landmark case of *Minerva Mills Ltd. v. Union of India*²¹, Justice Bhagwati emphasized the judiciary's role in safeguarding constitutional values and ensuring adherence to constitutional limitations. He stated that the essence of the rule of law lies in subjecting the actions of all branches of government—whether legislative, executive, or other authorities—to the constraints of the Constitution and the law. Judicial review, he noted, is a vital component of India’s constitutional framework. Without this power, the government of laws would collapse, and the rule of law would become an illusory concept. Justice Bhagwati further opined that among all features of the Indian Constitution, the power of judicial review is central to preserving democracy and upholding the rule of law. He unequivocally declared it an integral and immutable part of the Constitution’s basic structure.”

Dr. A.S. Anand²² defined judicial review as “*that which is not exclusively used in constitutional law, literally it means the reviser of the decree of an inferior Court by a superior Court.*”

“Justice Deshpande has highlighted that the term "Judicial Review" is employed in both a narrow and broad sense. When interpreted narrowly, judicial review is confined to assessing the constitutionality or legality of a contested decision without delving into its substantive merits. On the other hand, in its broader interpretation, judicial review entails a comprehensive

²¹ AIR, 1980 SC 1789

²² Dr. A.S. Anand, “Judicial Review -its content its reach”, AIR 2000, J&A p. 161.

re-examination of all issues already adjudicated by a lower court or tribunal, subject to the authority of a higher court within the judicial hierarchy. This broader scope, often referred to as a “vertical review,” involves a superior judicial body reassessing the decisions of a subordinate body. Justice Deshpande aptly describes judicial review as a mechanism that asserts the supremacy of the rule of law in regulating state actions.²³”

2.2 “JUDICIAL REVIEW-BASIC STRUCTURE OF THE CONSTITUTION”

“The doctrine of judicial review reached its zenith in the landmark judgment of *Kesavananda Bharati v. State of Kerala*,²⁴ where the Supreme Court held that although Article 368 grants Parliament the authority to amend any provision of the Constitution, including the Fundamental Rights, this power is not unlimited. The Court emphasized that Parliament cannot amend the Constitution in a manner that would alter or destroy its basic structure.”

“Interestingly, while the judges in *Kesavananda Bharati* identified several features constituting the basic structure of the Constitution, judicial review was not explicitly recognized as one of them in that case. However, this position evolved in subsequent judgments. In *Minerva Mills v. Union of India*, the Supreme Court firmly established judicial review as an integral component of the Constitution’s basic structure. Chief Justice Chandrachud, speaking for himself and other judges, observed that the Constitution entrusts Parliament with a limited amending power, and this limitation is itself a basic feature. Consequently, Parliament cannot use its amending authority to transform its limited power into an absolute one. He stated that a holder of limited power cannot, by exercising that power, expand it into something unlimited.”

The concept of judicial review in India was first recognized in the case of *Emperor v. Burah*²⁵. In this landmark judgment, both the Calcutta High Court and the Privy Council acknowledged that Indian courts possessed the authority to exercise judicial review, albeit within certain defined boundaries. This principle was subsequently reaffirmed in other cases adjudicated prior to the enactment of the Government of India Act, 1935.

“The Indian Constitution is based on a delicate balance of powers among the Executive,

²³ Judicial Review of Legislation by Deshpande, V.S (1977) Pg. 13-15.

²⁴ (1973) 4 SCC 219

²⁵ (1877) ILR, Calcutta, 63.

Legislature, and Judiciary. The judiciary is tasked with determining the constitutionality of laws. If courts were entirely stripped of their authority to review legislation, fundamental rights would lose their practical utility, reducing them to mere formalities. Rights without enforceable remedies would become meaningless. Without judicial review, a controlled Constitution could potentially devolve into an uncontrolled one.”

In *S.P. Sampath Kumar v. Union of India*,²⁶ Chief Justice Bhagwati highlighted that judicial review is an essential and immutable feature of the Constitution. He categorically stated that no law, even one passed through the constituent power of Parliament, can abolish or curtail this power. Similarly, in *Subhesh Sharma v. Union of India*,²⁷ the Supreme Court reaffirmed that judicial review is a foundational element of the Constitution and a cornerstone of India's constitutional policy.”

“In *L. Chandra Kumar v. Union of India*,²⁸ the Supreme Court ruled that judicial review, as conferred upon the High Courts under Articles 226 and 227 and upon the Supreme Court under Article 32, is an essential and inseparable aspect of the Constitution’s basic structure. This power enables the judiciary to assess the constitutional validity of legislative actions. Therefore, no constitutional amendment can exclude or negate the authority of the Supreme Court and High Courts to perform judicial review.”

“These principles are particularly relevant when evaluating scenarios where provisions like Part III of the Constitution, encompassing Articles 14, 19, 20, 21, and 32, are excluded without reasonable justification. The evolving jurisprudence on judicial review underscores its importance in determining whether constitutional amendments or legislative actions violate fundamental rights or disturb the balance between conflicting interests. The judiciary must ensure that this balance is maintained and reasonable.”

“Equality, the rule of law, judicial review, and the separation of powers are intricately linked and form integral components of the Constitution’s basic structure. Furthermore, these principles would be rendered ineffective if the legislative, executive, and judicial functions were concentrated in one entity. Consequently, the judiciary is entrusted with the critical duty

²⁶ (1987) SCC 124

²⁷ AIR 1991 SC 631 at 646.

²⁸ AIR 1997 SC 1125, at 1149-50.

of ensuring that the limits imposed by the Constitution are not transgressed.”

“To enforce fundamental rights effectively, the Constitution vests the Supreme Court and High Courts with the power of judicial review. This mechanism ensures that the objectives enshrined in Part III and other constitutional provisions are given practical meaning. Judicial review, as a result, remains indispensable to upholding constitutional governance in India.”

2.3 “IMPACT OF PARLIAMENTARY SUPREMACY ON POWER OF JUDICIAL REVIEW”

“The concept of parliamentary supremacy and judicial review has long been at the centre of constitutional discourse in India. The interplay between these two principles significantly shapes the structure of governance and the balance of power among the branches of the state. While parliamentary supremacy reflects the sovereignty of the legislature to make and amend laws, judicial review safeguards the Constitution by ensuring that legislative actions do not violate fundamental rights or constitutional provisions.”

“Judicial review in India derives its authority from several provisions of the Constitution. Article 13(2) explicitly states that any law inconsistent with or violating fundamental rights shall be void. Similarly, Articles 32 and 226 empower the Supreme Court and High Courts, respectively, to strike down unconstitutional laws. These provisions affirm the judiciary’s role as the guardian of constitutional values.”

“The tension between parliamentary supremacy and judicial review was first evident in cases concerning constitutional amendments. In *Shankari Prasad v. Union of India*²⁹, the Supreme Court held that Parliament’s power to amend the Constitution under Article 368 extended even to fundamental rights. This position was reaffirmed in *Sajjan Singh v. State of Rajasthan*³⁰. However, this view was overturned in *I.C. Golaknath v. State of Punjab*³¹, where the Court ruled that Parliament could not amend fundamental rights.”

“This conflict culminated in the landmark *Kesavananda Bharati v. State of Kerala* (1973), where the Supreme Court introduced the "basic structure doctrine." The Court held that while

²⁹ AIR 1951 SC 458.

³⁰ AIR 1965 SC 845.

³¹ AIR 1967 SC 1643.

Parliament has the power to amend the Constitution, it cannot alter its basic structure. This doctrine, though not explicitly mentioned in the Constitution, became a pivotal tool for judicial review to check parliamentary overreach. Subsequently, in *Minerva Mills Ltd. v. Union of India* (1980), the Court struck down clauses of the 42nd Amendment, emphasizing that judicial review is part of the Constitution's basic structure.”

“Judicial review has also been a critical tool to scrutinize legislative actions that may contravene constitutional mandates. The judiciary has invalidated numerous laws for violating fundamental rights, such as the landmark decisions in *Maneka Gandhi v. Union of India* (1978), which expanded the scope of personal liberty, and *Navtej Singh Johar v. Union of India*³², which decriminalized Section 377 of the IPC.””

“The tension between parliamentary supremacy and judicial review persists. While Parliament asserts its supremacy through legislative and constitutional amendments, the judiciary continues to exercise its review powers to safeguard constitutional principles. This interplay ensures that neither branch oversteps its constitutional boundaries, preserving the doctrine of separation of powers.”

“The impact of parliamentary supremacy on judicial review underscores the dynamic nature of India’s constitutional framework. Through the development of doctrines such as the basic structure and the vigilant exercise of judicial review, the judiciary ensures that parliamentary supremacy operates within the constitutional framework, maintaining the balance essential for a robust democracy.””

2.4 “LIMITATIONS/RESTRAINTS AND GROUNDS OF JUDICIAL REVIEW””

“The power of courts to declare statutes unconstitutional is not premised on elevating the judiciary above the legislature or the executive but is instead rooted in maintaining a robust system of checks and balances. This system ensures that errors committed by one branch are corrected by the others. The judiciary’s role is not to challenge or oppose the majority’s political or legislative policies but to interpret and uphold legislative provisions within the framework of the Constitution. Courts are tasked with harmonizing statutory intent with constitutional principles, rather than imposing their own preferences.”

³² AIR 2018 SC 4321.

“While courts possess extensive powers of judicial review to examine the constitutionality of statutory and constitutional provisions, these powers must be exercised with utmost restraint and judicial prudence. Courts should not overstep their boundaries under the guise of judicial review or encroach into areas reserved for legislative or executive policymaking.”

“In the case of *J.P. Bansal v. State of Rajasthan*³³, the Supreme Court emphasized the importance of this restraint. It held that while interpreting the Constitution, courts have a degree of freedom not available when interpreting statutes. Judges must avoid the temptation to alter or amend statutory provisions simply because the practical application of a statute appears to have adverse consequences. If the language of the law is clear, unambiguous, and leaves no room for doubt about legislative intent, courts must refrain from judicial innovation. Judges are not lawmakers and must resist crossing the fine line that separates adjudication from legislation. This line must be respected to preserve the integrity of the judiciary and uphold the principle of separation of powers.”

“In exercising judicial review, courts are also cautioned against resolving theoretical disputes or controversies where no judicially manageable standards exist. They should abstain from interfering in executive policy decisions unless those policies are unconstitutional, violate statutory provisions, or are driven by malafide intentions. Policy decisions, particularly fiscal ones, fall within the exclusive domain of the executive, and judicial interference in these matters should be minimal.”

“The judiciary must also avoid creating rights that have no legal foundation or issuing orders that cannot be enforced or are inconsistent with established legal principles. Such actions risk undermining the credibility of the judiciary and eroding public confidence in its impartiality. If courts overreach their mandate, the institution may lose its stature and fail to command the trust of the society it serves.”

“Rooted in the doctrine of the separation of powers, this mechanism ensures that the actions of public authorities conform to constitutional principles. However, judicial review is not an unfettered power and operates within defined limitations and grounds to prevent arbitrary judicial intervention. The key grounds for judicial review in India include **Jurisdictional Error, Irrationality, Procedural Impropriety, Proportionality, and Legitimate**

³³ Appeal (Civil) 5982 of 2001

Expectation.”

JURISDICTIONAL ERROR

“Jurisdictional error arises when a public authority exceeds the powers conferred upon it by law or fails to exercise its authority within lawful boundaries. The Supreme Court of India has consistently recognized this as a ground for judicial review. In *Anisminic Ltd. v. Foreign Compensation Commission*³⁴, the concept of jurisdictional error was broadly defined, emphasizing that even errors of law could render a decision invalid if they fall outside the scope of the authority's jurisdiction. In India, *A.R. Antulay v. R.S. Nayak*³⁵ highlighted jurisdictional overreach as a ground for invalidating judicial and administrative decisions. Courts exercise caution, however, ensuring that their review is confined to jurisdictional questions and does not stray into merits unless there is manifest illegality.”

“IRRATIONALITY

Irrationality as a ground for judicial review is derived from the Wednesbury principle, established in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*³⁶. A decision is deemed irrational if it is so unreasonable that no sensible person, acting with proper consideration of the facts, could have arrived at it. In India, *State of U.P. v. Johri Mal*³⁷ applied this principle to strike down decisions that lacked any reasonable nexus with their objectives. The judiciary has underscored that while it does not substitute its view for that of the authority, it intervenes where the decision is patently arbitrary or unreasonable.”

“PROCEDURAL IMPROPRIETY

Procedural impropriety refers to a failure to follow due process, including violations of principles of natural justice such as the right to a fair hearing (*audi alteram partem*) or bias in decision-making (*nemo iudex in causa sua*). The landmark case *Maneka Gandhi v. Union of India*³⁸ expanded the scope of procedural fairness, holding that procedure must be “fair, just, and reasonable” under Article 21 of the Constitution. Similarly, in *Ridge v. Baldwin*³⁹, procedural impropriety was a ground for quashing administrative actions that violated the

³⁴ [1969] 2 AC 147.

³⁵ AIR 1988 SC 1531.

³⁶ [1948] 1 KB 223.

³⁷ AIR 2004 SC 3800.

³⁸ AIR 1978 SC 597.

³⁹ [1964] AC 40.

principles of natural justice.”

“PROPORTIONALITY

Proportionality ensures that administrative actions are balanced and do not impose excessive burdens on the rights of individuals. The doctrine was elaborated in *Om Kumar v. Union of India*⁴⁰, where the Supreme Court emphasized that administrative measures should not disproportionately affect fundamental rights. Proportionality requires courts to assess whether the means adopted are necessary and bear a rational nexus to the intended objective.”

“LEGITIMATE EXPECTATION

The doctrine of legitimate expectation protects the expectations of individuals arising from consistent conduct or promises made by public authorities. In *Council of Civil Service Unions v. Minister for the Civil Service*⁴¹, legitimate expectation was first recognized as a ground for judicial review. Indian jurisprudence, in cases such as *Navjyoti Coop. Group Housing Society v. Union of India*⁴², has upheld this principle, requiring authorities to act fairly and honor legitimate promises unless overriding public interest dictates otherwise.”

“Judicial review serves as a potent instrument to curtail any unconstitutional exercise of authority by the legislature and the executive. Over time, its scope has expanded to incorporate the principles of social and economic justice. While the legislative and executive branches are subject to judicial scrutiny, the judiciary itself operates under the self-imposed discipline of judicial restraint. Courts are not to intervene merely because an alternate view is possible. Intervention is warranted only when the decision is tainted by illegality, irrationality, procedural impropriety, or disproportionality. However, the mere invocation of these grounds is insufficient; each allegation must be substantiated with concrete evidence.”

“To minimize grievances and reduce the need for judicial intervention, administrative authorities must exercise proper care and diligence while making decisions. This approach will not only alleviate the burden on the judiciary but also foster a sense of trust, security, and satisfaction among citizens. Such an environment is vital for good governance and serves as the cornerstone of a welfare state.”

⁴⁰ AIR 2000 SC 3689.

⁴¹ [1985] AC 374.

⁴² AIR 1993 SC 155.

3. “SEPARTION OF POWERS AND ROLE OF JUDICIARY”

“The principle of separation of powers governs the relationship among the three primary organs of the government: the legislature, the executive, and the judiciary⁴³. This doctrine advocates for a clear demarcation of functions among these organs, emphasizing that no single entity or individual should exercise all three powers of governance. French philosopher Montesquieu, who extensively studied this principle, argued that concentrating power in one person or group could lead to tyranny. He proposed the distribution of power among the legislature, executive, and judiciary to ensure decentralization and prevent arbitrary governance. The doctrine mandates that each organ operate independently and refrain from encroaching upon the functions of the others. The concept also underscores the importance of an active judiciary functioning within the constitutional framework, maintaining the balance necessary for harmonious governance. However, judicial overreach often raises concerns about adherence to this doctrine.”

3.1 BACKGROUND, MEANING AND IMPORTANCE OF SEPARATION OF POWER

“Since ancient times, political theorists have sought mechanisms to safeguard against the misuse of governmental power. One key solution has been advocating for the rule of law, where governance is based on established laws rather than the whims of individuals. Constitutionalism—a system that limits governmental powers—has inspired thinkers to propose diverse models addressing these issues over the years.”

“The Indian Constitution, unlike some others, does not rigidly adhere to the separation of powers. Instead, it follows a pragmatic approach aimed at ensuring accountability rather than strict compartmentalization. This position was elaborated by the Supreme Court in ***Ram Jawaya Kapur v. State of Punjab***⁴⁴, where Justice Mukherjee observed that while the Constitution does not prescribe absolute separation, it ensures a clear distinction among the functions of different governmental branches. He emphasized that one organ should not assume the functions constitutionally assigned to another. A similar sentiment was echoed in ***Kartar Singh v. State of Punjab***⁴⁵, where Justice Ramaswamy highlighted that sovereign powers under the Constitution are divided among the legislature (law-making), the executive

⁴³ C.K.Takwani, Lectures on Administrative Law (2008) p.31.

⁴⁴ AIR 1955 SC 549.

⁴⁵ AIR 1967 SC 1643; (1967) 2 SCR 762.

(law implementation), and the judiciary (law interpretation), all operating within constitutional boundaries.”

“The Indian constitutional scheme presents a sophisticated blend of legislative, executive, and judicial functions, reflecting a balanced adaptation of the separation of powers. While the Constitution does not explicitly mandate strict adherence to the doctrine, it integrates its principles in a flexible and purposive manner to prevent the concentration of unfettered powers in any one entity. This functional separation operates as a system of checks and balances rather than a rigid segregation. Furthermore, the Supreme Court has recognized this doctrine as part of the Constitution's basic structure.”

“However, questions persist regarding whether the three organs can interfere with one another’s functions in instances of inaction or failure. While the theoretical framework laid down by the judiciary opposes such encroachments, practical deviations-often seen in judicial interventions in legislative or executive domains-highlight this unresolved challenge. In *Asif Hameed v. State of Jammu and Kashmir*⁴⁶, the Court clarified that while the Constitution does not rigidly enforce the separation of powers, it meticulously delineates the roles of each organ. The judiciary, has the authority to ensure that the legislature and executive function within constitutional boundaries, thereby acting as the "sentinel of democracy."”

“In India, the doctrine of separation is applied to functions rather than powers. For instance, Cabinet ministers exercise both legislative and executive functions, as their actions are intertwined with legislative decisions. Article 74(1) of the Constitution strengthens this dynamic by mandating that the President act based on the aid and advice of the Council of Ministers. The executive thus derives its authority and legitimacy from the legislature, a principle reaffirmed in *Ram Jawaya Kapur v. State of Punjab*.”

“Regarding the amending powers of Parliament under Article 368, the Supreme Court, in the landmark *Keshavananda Bharati v. State of Kerala* case, held that while Parliament has the authority to amend the Constitution, this power is constrained by the Constitution's basic structure. Any amendment that undermines these fundamental features would be deemed unconstitutional. This ruling further reinforces the idea that even the legislature is bound by constitutional principles and cannot exercise unrestricted authority. This nuanced approach to

⁴⁶ AIR 1989 SC 1899.

the separation of powers under the Indian Constitution ensures a functional overlap while maintaining the essential checks and balances necessary for a democratic setup.”

3.2 “JUDICIAL ACTIVISM VIS-À-VIS JUDICIAL OVERREACH”

“The line between judicial activism and judicial overreach is a thin one...A takeover of the functions of another organ may become a case of over-reach”

- Dr.Manmohan Singh

“The role of the judiciary in contemporary times has undergone a significant transformation, moving from its conventional function of dispute resolution to a more participatory and proactive role in response to the evolving needs of society. Beyond its primary task of adjudicating disputes, the judiciary also performs several critical constitutional functions, including interpreting the Constitution and other laws, safeguarding citizens' fundamental rights, and acting as a guardian to monitor and prevent constitutional violations by other branches of government.⁴⁷”

“Under the constitutional framework, the judiciary is vested with extensive powers to fulfill these responsibilities. These powers encompass issuing writs, hearing petitions under special leave, and other innovative mechanisms that have expanded the judiciary's scope. For instance, the evolution of Public Interest Litigation (PIL) from a mere theoretical concept to a robust procedural tool highlights this progression⁴⁸. However, the expansion of judicial powers and their application in diverse areas have sparked debates about the judiciary's growing influence. This shift has placed the judiciary in a prominent position, often impacting the dynamics of national governance. Its enhanced role now permits interventions in areas that were traditionally beyond its reach.”

“An examination of the Supreme Court's approach over the past five decades reveals a fluctuating trajectory influenced by factors such as the political climate and the strength of other state organs. While some judicial pronouncements have promoted public welfare by protecting individual freedoms and ensuring accountability of the legislature and executive,

⁴⁷ “The range of judicial review recognized in the superior judiciary of India is perhaps the widest and most extensive known in the world of law. See Pathak CJ. In *Union of India v. Raghubir Singh* (1989) 2 SCC 754 at 766.”

⁴⁸ P.P.Craig & S.L.Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India* 9 Oxford Journal of legal Studies 356 (1989).”

others have faced criticism for overstepping constitutional boundaries and encroaching upon domains reserved for other branches of government.”

“The judiciary’s transition from a moderate institution to one with an "activist" and, at times, "super-activist" stance has faced criticism from various quarters. Instances of judicial activism crossing into judicial overreach have raised concerns about the intentional expansion of judicial authority under the pretense of activism. This phenomenon, often termed "Judicial Overreach," has emerged as a contentious issue, particularly when compared to the earlier philosophy of "Judicial Activism.””

“It is widely acknowledged that despite continuous legislative efforts, the volume of law may never fully address the ever-changing demands of modern society. The legislative gap may arise due to oversight, lack of awareness, or indifference. In such situations, courts sometimes engage in judicial law-making, thereby stepping into the legislative domain. This practice, while addressing societal needs, also raises concerns about the separation of powers.”

“The Constitution has delineated clear boundaries for the Legislature and Judiciary to preserve their respective autonomy. Articles 121 and 211 prohibit legislative discussions on the conduct of judges, while Articles 122 and 212 prevent courts from questioning the internal proceedings of legislatures. Similarly, Articles 105(2) and 194(2) grant legislators immunity from judicial interference concerning their speech and voting rights within legislative proceedings.”

“Judiciary's expanding role has occasionally invited criticism from both the executive and legislative branches for allegedly overstepping its constitutional limits. In the *Aravali Golf Club*⁴⁹ case, the Supreme Court acknowledged instances where the judiciary had exceeded its mandate, encroaching upon the executive's domain. The bench, comprising Justices A.K. Mathur and Markandey Katju, warned against unchecked judicial activism, cautioning that persistent overreach might provoke political interventions to curtail judicial powers or independence.

Notable examples of judicial overreach illustrate instances where the judiciary has ventured into policy-making, an area constitutionally reserved for the executive and legislature. While

⁴⁹ 2008 1 SCC 683.

judicial review is essential for evaluating the constitutionality of laws and executive decisions, it sometimes creates friction between the judiciary and the other branches of government. Such tension, although natural and occasionally necessary, underscores the importance of maintaining a delicate balance between the three pillars of democracy.”

CONCLUSION

The evolution of the judiciary's role in India reflects its pivotal position in upholding constitutional values, balancing powers among state organs, and addressing societal needs. While the judiciary has admirably safeguarded fundamental rights and acted as a check on executive and legislative overreach, its growing assertiveness has also raised concerns of judicial overreach. Instances of judicial activism transforming into an intrusion into the executive or legislative domain highlight the delicate balance required to maintain the separation of powers enshrined in the Constitution.

Judicial review, as a cornerstone of constitutional governance, ensures that all state actions align with constitutional mandates. However, the judiciary must exercise restraint, adhering to the principles of judicial propriety and constitutional spirit. Unwarranted encroachments risk undermining the democratic framework and eroding public trust in the judiciary. The constitutional boundaries established under provisions like Articles 121, 211, 122, and 212 must be respected to preserve institutional integrity and the doctrine of separation of powers.

The tension between judicial activism and overreach underscores the judiciary's responsibility to act within its constitutional mandate. While judicial interventions have often bridged legislative gaps and upheld justice, excessive involvement in policy matters can disrupt the delicate equilibrium between governance and accountability. The Aravali Golf Club case serves as a pertinent reminder of the perils of unchecked judicial activism, cautioning against overstepping constitutional limits.

Ultimately, the judiciary's transformative journey must be guided by a commitment to constitutionalism and the rule of law. By upholding its role as a guardian of constitutional values without venturing into domains reserved for other branches, the judiciary can foster a harmonious balance between authority and accountability. This balance is essential for sustaining a vibrant democracy where governance is conducted within the framework of the Constitution.