

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

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# **COMPARATIVE STUDY OF JUDICIAL REVIEW AND SEPARATION OF POWERS**

AUTHORED BY - SAKSHI SHARMA & YATI YADAV<sup>1</sup>

## **ABSTRACT**

This research paper focuses on the relationship and minor differences between judicial review and separation of powers, making it a comparative study of the two. The Supreme Court's intervention in the recent Jharkhand case raised questions regarding the precise scope and character of the legislative and judicial branches of government. Any discussion of this subject would be inadequate without examining the notion of separation of powers, which seeks to define the scope of jurisdiction each branch of government possesses concerning the others. This experiment is carried out as part of the Jharkhand case. The paper serves two purposes.

The study begins with an examination of the idea of separation of powers in order to fully appreciate its significance and practical implementation. The second goal is to explore the theory in the context of the Jharkhand case to explain how the previously mentioned theoretical notions may be used practically. In short, the study seeks to establish whether the Supreme Court's involvement in the Jharkhand case is justified by the principle of separation of powers.

## **HYPOTHESIS**

Separation of powers: -

- Aristotle's Politics, written in the 4th century B.C., identified three branches of government: the Judiciary, Public Officials, and the General Assembly. The idea of separation of powers states that no branch of government may usurp another's jurisdiction.

The following are some of the most fundamental aspects of separation of powers:

- (i) A written constitution with supremacy over all institutions established under it.
- (ii) Power allocation among the three equal-status organs of the state.
- (iii) Legislative authority cannot be delegated to anybody.

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- Blackstone viewed judicial legislation as the best aspect of common law, whereas Bentham saw it as an appropriation of the legislative role.
- Montesquieu established the notion of separation of powers to safeguard human liberty and prevent governmental consolidation. If the judge behaves like a legislator, he or she may abuse their authority and become the oppressor.
- According to Lord Acton, "absolute power corrupts absolutely."
- During the American Constitution negotiations, Yates, a member of the Constituent Assembly, questioned judges' independence from the law.
- Alexander Hamilton argued that while both the legislature and the court represent the state's citizens, the people have more authority than either. People's intentions will take precedence over measures taken by the legislative and judicial institutions.
- President Franklin D. Roosevelt We shall pack the court with justices who will act as judges rather than legislators.

#### **In Indian Constitution:-**

- Article 50 states that the Judiciary and Executive should be maintained separate.
- According to Article 53(1), the President of India exercises executive responsibility over the Union of India.
- Article 121 prohibits Parliament from discussing the activities of judges. Similarly, the court will not scrutinize Parliamentary proceedings under Article 122.
- Articles 211 and 212 apply to State Legislatures and High Courts, respectively.
- According to Article 361 of the Indian Constitution, the governors and president are not subject to court proceedings.
- According to Article 50, the judiciary and executive branches must be maintained distinct.

According to Article 53(1), the President of India exercises executive responsibility over the Union of India.

- Article 74(2) limits the Court's ability to investigate whether the Council of Ministers provided advice to the President.

One of the most basic aspects of the Indian Constitution is the separation of powers, which it guarantees.

Parliament cannot change the core aspects of the Constitution, which are the independence of the judiciary and the authority of judicial review, because doing so would affect the essence of the documents.

**Judicial Legislation:-**

The fundamental process for legislation in a democracy is to present the bill to the legislature for consideration, even if the judge determines that it is required to eradicate significant social malpractice that is adversely affecting people's lives.

The Legislature cannot foresee every possible problem. The Constitution is a permanent document, in contrast to government orders, which are subject to revision, amendment, surrender, or replacement.

The judge must therefore interpret the clause while taking the authors' intentions of the Constitution into consideration. In addition to preventing autocratic leadership, the separation of powers is meant to act as a check and balance on the actions of other organs.

Although the House of Lords disagreed in *Laker Airways* (1977), arguing that a judge's role is restricted to that of a referee, the Supreme Court has the authority to create laws, as stated in *State of Punjab v. Nand Kishore* (1995) SCC 614.

In *Vishnu Dutt Sharma v. Manju Sharma*, AIR 2009 SC 2254, the Supreme Court held that a reading of Section 13 of the Hindu Marriage Act, 1955, shows that the legislature has not created any foundation for issuing a divorce decree that would cause the marriage to irretrievably dissolve. The Court is unable to incorporate such a justification in Section 13 of the Act since the legislature has the authority to amend it.

In the 2003 *Prakash Hinduja* case, the Supreme Court ruled that if the State provides a directive that is equal to the law and the State ignores it, the State cannot be prosecuted in contempt of court. This is due to the fact that the Court's order lacked the jurisdiction and power to make a direction that was on par with the laws. Therefore, the courts ought to exercise caution in this regard and resist the urge to enact judicial law. "Judicial legislation" is an oxymoronic word. Applications of the judicial process to the administrative process have been made. The Reserve Bank of India (RBI), Telecom Regulatory of India, and other regulatory bodies are products of the legislature and have both legislative and judicial jurisdiction since administrative law was developed to meet the demands of administrative agencies in the complex modern society. Due to the necessity of economic regulation, the conventional distribution of powers had to be abandoned.

The Authority has the power to establish private rights and obligations as the Agencies must make decisions and create laws and regulations that have legal effect. The legislative delegated authority to the administrative agency, which then created the rules and regulations. In administrative adjudication, the authority that makes a factual decision becomes a "quasi-judge," and it mimics the legal system. Judges do not make decisions; members of the administration do. The separation of powers paradigm is undermined by the notion that economic powers must be guided by the "public interest". Part of the reason the Agencies were established was to provide "cheap" and "inexpensive" professional justice. Timely justice is delivered in a way that is both "user-friendly" and "affordable."

In actuality, the courts have not acknowledged the theory's full force. As a result, the notion offers insulation rather than legal separation.

## **LITERATURE REVIEW**

### **Judicial Review:-**

The Constitution is the supreme law. Hans Kelsen calls it the State's "grandmom." All other laws in the country are derived from the Constitution. According to the jurist H.L.A. Hart, the Constitution is the standard by which all other laws are measured. According to the Constitution, additional laws must have their validity assessed. If a law violates any of the core tenets of the Constitution, it is considered unconstitutional. The same standard also applies to executive actions. Furthermore, CEOs are prohibited from making choices that contradict core principles or ideals that are vital to the identity of the Constitution. The judiciary bears the responsibility of confirming the constitutionality of laws and actions. This procedure is referred to as "judicial review." Consequently, judicial review is defined as "the power of the court to determine whether the acts of legislature and executive are consistent with the Constitution or the Constitutional values."

Underpinning the concept of judicial review is the supremacy of the country's Constitution. As the guardian of the Constitution, the Judiciary is empowered to prevent actions that are against the Constitution. The judiciary has the power to use judicial review to reverse any decision that breaches the Constitution. The concept is contained in Article 13 of the Constitution of India. According to the article, any legislation that is passed must meet the requirements outlined in the Indian Constitution. It also renders any existing laws that disagree with it void to the extent of the dispute. Giving the judiciary the power to carry out judicial review, then. The Indian Constitution's Articles 32 and 226 uphold the fundamental rights outlined in Part III.

The Court's assurance of fundamental rights is meaningless and irrelevant unless it has the power to protect them from capricious infringement. The power of judicial review was used in this situation. The judicial review process allows the court to assess actions that pose a risk of unjustly denying fundamental rights.

Judicial review authority is one of the core components of the Constitution.

State of Kerala v. Kesavananda Bharti (1973) 4 SCC; Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299; Raja Rampal v. Hon'ble Speaker, Lok Sabha (2007) 3 SCC 184).

### **HISTORICAL BACKGROUND**

In England, the power has always been with the Parliament. It was not intended for the judiciary to assess the Parliament's acts because the Parliament is paramount. Judicial scrutiny applied only to executive acts. Despite not being mentioned specifically in the British Constitution, the court was in charge of making sure that the executive branch acted in accordance with its values. Even though the judiciary expanded the definition of negligence in cases like **Rylands v. Fletcher 1868 UKHL 1** (the principle of strict liability) **and Donoghue v. Stevenson 1932 UKHL 100** (a manufacturer of goods owes a duty towards an ultimate consumer with whom there is no contractual relation), the notion that judges do not make laws was maintained.

Judicial review was another concept that Britain brought to its colonies. The concept has therefore always been present in the Indian legal system. In the United States of America, the situation was comparable. It was given the common law system because it was a British colony. The American concept of judicial review was developed based on the common law system.

In **Marbury v. Madison (1803), the U.S.** Supreme Court made it clear for the first time that legislative actions are subject to judicial review. The use of review authority by the judiciary is not mentioned in the U.S. Constitution. In the Marbury ruling, it is argued that the Court assumed independent judicial review jurisdiction. Even though the writers of the Indian Constitution supported parliamentary rule, they decided to use judicial review in light of the lessons acquired from both countries.

In **Golaknath v. State of Punjab AIR 1967 SC 1643**, the Court decided that the Parliament could not amend the Constitution to eliminate the Part III rights. Consequently, the 24th

amendment (1971) to the Constitution declared that the Parliament has unrestricted power to alter the document.

**Kesavanand Bharati v. State of Kerala AIR 1973 SC 1461** was the case in which the disagreement started. The court acknowledged that Parliament has the authority to amend the Constitution, but cautioned against the fundamental structural idea. When considering constitutional amendments, the Court pointed out that the core principles of the document must be taken into account. The Court further stated in **Minerva Mills v. Union of India AIR 1980 SC 1789** that constitutional change cannot nullify the Constitution itself. Occasionally, the Supreme Court of India has upheld the principles enshrined in our Constitution by using its judicial review authority.

### **CONCLUSION**

Further, there are many judicial reviews described by the laws that are namely: -

- Judicial review of Administrative Action
- Judicial review of Policy Decisions
- Judicial Review of Economic Policy
- Judicial review of Price Fixation
- Judicial review of decisions based on expert opinions
- Judicial review of subordinate legislation
- Judicial review in Contractual cases
- Judicial review in Disciplinary Proceedings
- Judicial review of the Quantum of punishment
- Judicial review of LPG
- Judicial review of order passed under Clemency level
- SUO MOTO Judicial review