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# **REIMAGINING DEMOCRACY: THE COUNTER MAJORITARIAN JUSTIFICATION OF JUDICIAL REVIEW IN INDIA**

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## **ABSTRACT**

The power of judicial review in India has long generated debate over its compatibility with democratic governance. This seminar paper examines the counter-majoritarian justification of judicial review within the framework of the Constitution of India. While democracy is premised on majority rule, constitutionalism imposes substantive limits on legislative and executive authority to protect fundamental rights and preserve the basic structure of the Constitution. Through landmark decisions such as *Kesavananda Bharati v. State of Kerala* and *Minerva Mills v. Union of India*, the Supreme Court of India has asserted its role as the guardian of constitutional morality against transient political majorities. The paper critically evaluates whether judicial review strengthens democracy by safeguarding minority rights and ensuring accountability, or whether it undermines popular sovereignty. By analysing constitutional theory, judicial precedents, and contemporary debates, this study reimagines judicial review not as anti-democratic, but as an essential instrument for sustaining substantive democracy in India.

**Keywords:** Judicial Review, Constitution, Judicial Precedent, Law

## **INTRODUCTION**

The doctrine of constitutional supremacy forms the bedrock of judicial review in India. Unlike the British system of parliamentary sovereignty, India adopts a written Constitution that stands above all organs of the State. The Constitution of India establishes a limited government, where legislative, executive, and judicial authorities derive their powers from and remain bound by constitutional provisions. This supremacy ensures that no law or executive action can override constitutional mandates.

The Supreme Court has consistently affirmed this principle. In *Kesavananda Bharati v. State of Kerala*, the Court held that Parliament's amending power under Article 368 is not absolute and cannot alter the "basic structure" of the Constitution. This landmark decision entrenched constitutional supremacy by placing substantive limits on parliamentary authority. Similarly, in *Minerva Mills v. Union of India*, the Court reaffirmed that limited amending power itself forms part of the basic structure.

The supremacy of the Constitution ensures that democratic governance operates within constitutional boundaries. Judicial review thus becomes an instrument to preserve constitutional identity against transient political majorities. By enforcing constitutional limitations, the judiciary protects fundamental rights, federalism, secularism, and separation of powers. Therefore, constitutional supremacy is not merely symbolic but operational, providing the normative justification for judicial intervention when State actions transgress constitutional limits. Article 13 of the Constitution of India explicitly incorporates the doctrine of judicial review by declaring that laws inconsistent with Fundamental Rights shall be void. Article 13(2) prohibits the State from making any law that abridges or takes away rights conferred under Part III. This provision gives constitutional recognition to judicial review as an enforceable mechanism rather than an implied doctrine.

In *State of Madras v. Champakam Dorairajan*, the Supreme Court struck down a communal government order for violating Article 29(2), affirming that Fundamental Rights prevail over conflicting laws. Later, in *I.C. Golaknath v. State of Punjab*, the Court initially held that constitutional amendments affecting Fundamental Rights would be void under Article 13, although this position was modified in *Kesavananda Bharati*. Article 13 thus operationalizes constitutional supremacy by providing courts with the authority to invalidate unconstitutional legislation. It ensures that parliamentary majorities cannot erode essential liberties. The provision embodies the counter-majoritarian function of the judiciary by safeguarding individual rights against legislative encroachment. Consequently, Article 13 forms the textual foundation of judicial review in India's constitutional framework. Articles 32 and 226 of the Constitution of India constitute the procedural backbone of judicial review. Article 32 guarantees the right to move the Supreme Court for enforcement of Fundamental Rights, a remedy described by Dr. B.R. Ambedkar as the "heart and soul" of the Constitution. Article 226 empowers High Courts to issue writs not only for Fundamental Rights but "for any other purpose," thereby granting wider jurisdiction. In *Romesh Thappar v. State of Madras*, the

Supreme Court emphasized that Article 32 provides immediate constitutional remedies against State action violating free speech. Similarly, in *L. Chandra Kumar v. Union of India*, the Court held that the power of judicial review under Articles 32 and 226 forms part of the basic structure and cannot be excluded. Through writs such as habeas corpus, mandamus, prohibition, certiorari, and quo warranto, courts ensure accountability of public authorities. These provisions transform judicial review from a theoretical principle into an accessible remedy for citizens. By empowering individuals to challenge unconstitutional actions, Articles 32 and 226 reinforce the constitutional promise of limited government and substantive democracy.

**Article 368 and the Amending Power of Parliament:** Article 368 of the Constitution of India confers upon Parliament the power to amend the Constitution and prescribes the procedure for such amendments.<sup>32</sup> The provision balances rigidity and flexibility, allowing constitutional evolution while safeguarding core principles. Initially, the Supreme Court in *Shankari Prasad v. Union of India*<sup>33</sup> and *Sajjan Singh v. State of Rajasthan*<sup>34</sup> upheld Parliament's wide amending power, even over Fundamental Rights. This position changed in *Kesavananda Bharati v. State of Kerala*, where the Court held that Parliament's amending power is limited and cannot alter the "basic structure" of the Constitution. The doctrine was reaffirmed in *Minerva Mills v. Union of India*, which declared that limited amending power itself forms part of the basic structure. Thus, Article 368 does not grant absolute authority but operates within judicially enforceable constitutional limits.

**Doctrine of Separation of Powers:** The doctrine of separation of powers is structurally embedded in the Constitution of India, though not explicitly stated in a single provision. The Constitution distributes authority among the Legislature, Executive, and Judiciary to prevent concentration of power. In *Ram Jawaya Kapur v. State of Punjab*, the Supreme Court observed that India follows a functional, not rigid, separation of powers. The doctrine gained stronger constitutional recognition in *Indira Nehru Gandhi v. Raj Narain*, where the Court held that separation of powers forms part of the constitutional scheme. Later, *I.R. Coelho v. State of Tamil Nadu* reaffirmed that judicial review maintains institutional balance. Judicial review thus acts as a constitutional check to prevent encroachment by one organ upon another.

**Judicial Review as Part of the Basic Structure:** Judicial review is expressly provided under Articles 13, 32, and 226 of the Constitution of India and serves as a cornerstone of

constitutional governance. In *Kesavananda Bharati v. State of Kerala*, the Supreme Court declared that judicial review forms part of the Constitution's basic structure. This principle was firmly reiterated in *Minerva Mills v. Union of India*, where the Court emphasized limited government. Further, in *L. Chandra Kumar v. Union of India*, the Court held that the power of judicial review vested in High Courts and the Supreme Court cannot be excluded even by constitutional amendment. Judicial review thus operates as a guardian of constitutional supremacy and democratic values.

### EVOLUTION OF THE COUNTER-MAJORITARIAN ROLE

The decision in *I.C. Golaknath v. State of Punjab* marked a significant turning point in the evolution of judicial review in India and laid the foundation for the counter-majoritarian role of the judiciary. The case addressed whether Parliament possessed the authority under Article 368 of the Constitution to amend Fundamental Rights. In a narrow 6:5 majority, the Supreme Court held that Parliament could not amend Fundamental Rights, asserting that such rights were "transcendental" and beyond legislative reach. The Court interpreted constitutional amendments as "law" under Article 13, thereby subjecting them to judicial review. This ruling effectively placed substantive limitations on Parliament's amending power, signaling a shift toward judicial supremacy in constitutional interpretation. The judgment is crucial in the context of counter-majoritarianism because it established the judiciary as a protector of individual rights against the will of the elected majority. By restricting Parliament's authority, the Court acted as a check on majoritarian impulses that could potentially undermine civil liberties.

However, the ruling also attracted criticism for disrupting the balance between democratic governance and judicial intervention. Critics argued that unelected judges were overstepping their mandate by curtailing the powers of a democratically elected legislature. This tension highlighted the inherent dilemma of judicial review in a democracy whether safeguarding rights justifies limiting majority rule. Although later partially overruled, *Golaknath* played a foundational role in asserting judicial power and shaping the doctrine of constitutional supremacy. It set the stage for future landmark rulings that would further define the judiciary's counter-majoritarian function in India.

## KESAVANANDA BHARATI AND THE BASIC STRUCTURE DOCTRINE

The landmark judgment in *Kesavananda Bharati v. State of Kerala* represents the most significant development in India's constitutional jurisprudence and firmly entrenches the counter-majoritarian role of judicial review. The case arose from challenges to constitutional amendments that sought to curtail property rights and expand Parliament's authority. In a historic 13-judge bench decision, the Supreme Court held that while Parliament has wide powers to amend the Constitution under Article 368, it cannot alter its "basic structure." This doctrine introduced an implied limitation on the amending power, ensuring that essential features such as the rule of law, separation of powers, judicial review, and fundamental rights remain inviolable.

The Basic Structure Doctrine is a classic example of counter-majoritarianism. It empowers the judiciary to invalidate constitutional amendments passed by a parliamentary majority if they damage the core identity of the Constitution. Thus, even the will of the majority, expressed through constitutional amendments, is subject to judicial scrutiny. This decision struck a balance between parliamentary sovereignty and constitutional supremacy. Unlike *Golaknath*, the Court did not completely bar amendments to Fundamental Rights but ensured that such amendments do not destroy the Constitution's foundational principles.

While widely celebrated for preserving democratic values and preventing authoritarianism, the doctrine has also faced criticism for its vagueness and the lack of a precise definition of "basic structure." Nonetheless, it remains a cornerstone of Indian constitutional law and a powerful tool through which the judiciary exercises its counter-majoritarian function.

**Indira Gandhi Case and Electoral Democracy:** The case of *Indira Nehru Gandhi v. Raj Narain* further reinforced the counter-majoritarian role of the judiciary, particularly in the context of electoral democracy. The dispute arose after the Allahabad High Court invalidated Prime Minister Indira Gandhi's election on grounds of electoral malpractice. In response, Parliament enacted the 39th Constitutional Amendment, which sought to immunize the election of the Prime Minister and Speaker from judicial review. This move was widely seen as an attempt by the executive to override judicial authority and protect political power.

The Supreme Court struck down the amendment, holding that it violated the Basic Structure of the Constitution. The Court emphasized that free and fair elections, equality before the law, and judicial review are integral to democracy and cannot be abrogated even by constitutional amendment. This judgment is a clear manifestation of the counter-majoritarian principle. The judiciary intervened against a parliamentary action backed by a strong political majority, thereby safeguarding democratic norms and institutional integrity. It demonstrated that the rule of law prevails over political expediency.

The case also highlighted the judiciary's role during times of constitutional crisis, particularly during the Emergency period, when democratic institutions were under severe strain. By invalidating the amendment, the Court reaffirmed its duty to act as a guardian of the Constitution.

**Minerva Mills and Limited Amending Power:** The judgment in *Minerva Mills v. Union of India* is a crucial milestone in reinforcing the counter-majoritarian role of the judiciary and clarifying the scope of Parliament's amending power. The case challenged sections 4 and 55 of the 42nd Constitutional Amendment Act, 1976, which sought to expand Parliament's power under Article 368 and exclude judicial review of constitutional amendments. The Supreme Court struck down these provisions, holding that they violated the Basic Structure of the Constitution. The Court emphasized that limited amending power itself is a basic feature, thereby preventing Parliament from acquiring unlimited authority to alter the Constitution. This reaffirmed the principle established in *Kesavananda Bharati* and strengthened judicial oversight over constitutional amendments. Importantly, the Court highlighted the harmony between Fundamental Rights and Directive Principles of State Policy, stating that giving absolute primacy to one over the other would damage the Constitution's balance. This interpretation reinforced the judiciary's role in maintaining constitutional equilibrium against majoritarian excesses. From a counter-majoritarian perspective, *Minerva Mills* demonstrates the judiciary's willingness to invalidate constitutional amendments enacted by an overwhelming parliamentary majority. It underscores that even during periods of strong executive dominance, constitutional limits cannot be overridden. The judgment has been widely praised for preserving constitutionalism and preventing authoritarian tendencies. However, critics argue that it further entrenches judicial supremacy by allowing courts to determine the scope of Parliament's powers. Nevertheless, the decision remains a cornerstone in defining the doctrine of limited government and the judiciary's role as a guardian of

constitutional integrity.

**Contemporary Developments in Judicial Review:** In recent years, the counter-majoritarian role of the judiciary in India has continued to evolve through landmark judgments that address complex constitutional questions. Notable among these are Justice K.S. Puttaswamy v. Union of India and Supreme Court Advocates-on-Record Association v. Union of India, which illustrate the judiciary's active role in safeguarding constitutional values. In *Puttaswamy*, the Supreme Court recognized the right to privacy as a fundamental right under Article 21, significantly expanding the scope of individual liberties. This judgment demonstrated the judiciary's role in protecting rights even in the absence of explicit constitutional provisions. Similarly, in the NJAC case, the Court struck down the 99th Constitutional Amendment and the National Judicial Appointments Commission Act, reaffirming the independence of the judiciary as part of the Basic Structure. This decision highlighted the tension between democratic accountability and judicial autonomy. Another significant development includes the Court's intervention in matters such as electoral transparency, freedom of expression, and executive accountability. Through Public Interest Litigation (PIL), the judiciary has broadened access to justice and strengthened its counter-majoritarian function. However, contemporary judicial review has also faced criticism for alleged judicial overreach and activism. Critics argue that frequent judicial intervention in policy matters may undermine democratic decision-making. Despite these concerns, the judiciary continues to play a vital role in ensuring that governance remains within constitutional limits.

## JUDICIAL REVIEW AND DEMOCRATIC LEGITIMACY

**Understanding the Counter-Majoritarian Difficulty:** The concept of the counter-majoritarian difficulty lies at the heart of debates surrounding judicial review in democratic systems. Coined by Alexander Bickel, the term refers to the tension that arises when unelected judges invalidate laws enacted by democratically elected representatives. This raises concerns about the legitimacy of judicial intervention in a system premised on majority rule. In the Indian context, this difficulty is particularly nuanced due to the written Constitution and the explicit provision for judicial review under Articles 13, 32, and 226. Unlike parliamentary sovereignty in the United Kingdom, India follows constitutional supremacy, where all organs of the State are bound by the Constitution. Thus, the judiciary derives its legitimacy not from electoral representation but from its role as the interpreter and guardian of the Constitution. The counter-majoritarian difficulty does not necessarily imply a democratic deficit. Instead, it

highlights the need to balance majority rule with constitutional limitations. Judicial review acts as a mechanism to prevent the tyranny of the majority, ensuring that legislative actions do not infringe upon fundamental rights or basic constitutional values.

Indian constitutional jurisprudence, particularly through decisions like *Kesavananda Bharati v. State of Kerala*, demonstrates how the judiciary has navigated this tension by evolving doctrines such as the Basic Structure. These doctrines allow courts to intervene only when core constitutional principles are threatened. While critics argue that judicial review undermines democratic decision-making, proponents contend that it strengthens democracy by upholding constitutional morality. Therefore, the counter-majoritarian difficulty is not a flaw but an essential feature of constitutional governance that ensures the rule of law prevails over transient majorities.

**Judicial Review as Protection of Fundamental Rights:** Judicial review serves as a vital instrument for the protection of fundamental rights, reinforcing its legitimacy within a democratic framework. The Indian Constitution explicitly empowers the judiciary to enforce Fundamental Rights through Articles 32 and 226, making it a central feature of constitutional governance. The Supreme Court, through landmark decisions such as *Maneka Gandhi v. Union of India*, has expanded the scope of Article 21 by interpreting the “right to life and personal liberty” in a broad and dynamic manner. This case marked a shift from a narrow procedural interpretation to a substantive due process approach, ensuring that laws affecting personal liberty must be just, fair, and reasonable.

Judicial review has also played a critical role in protecting civil liberties against arbitrary state action. Through Public Interest Litigation (PIL), the judiciary has made access to justice more inclusive, particularly for marginalized sections of society. This has strengthened the democratic fabric by ensuring that rights are not merely theoretical but effectively enforceable. From a counter-majoritarian perspective, judicial review acts as a safeguard against legislative and executive excesses. It ensures that the majority cannot infringe upon the basic rights of individuals, thereby maintaining the balance between authority and liberty. However, concerns have been raised regarding judicial overreach, with critics arguing that excessive intervention in policy matters may undermine democratic governance. Despite these concerns, the role of judicial review in protecting fundamental rights remains indispensable. It legitimizes the judiciary’s counter-majoritarian function by aligning it with the core values of justice, equality,

and human dignity.

**Safeguarding Minority Interests:** One of the most compelling justifications for judicial review in a democracy is its role in safeguarding minority interests. In a majoritarian system, there is always a risk that the rights of minorities whether religious, cultural, or social—may be overlooked or suppressed by the dominant majority. Judicial review acts as a crucial check against such tendencies. The Indian Constitution itself recognizes the importance of minority protection through provisions such as Articles 29 and 30, which guarantee cultural and educational rights to minorities. The judiciary has actively enforced these provisions, ensuring that minority communities can preserve their identity and autonomy. In cases like *St. Xavier's College v. State of Gujarat*, the Supreme Court upheld the rights of minority institutions against excessive state regulation. Such decisions highlight the judiciary's role in maintaining pluralism and diversity, which are essential components of Indian democracy.

Judicial review also extends to protecting marginalized groups, including Scheduled Castes, Scheduled Tribes, and other disadvantaged communities. Through progressive interpretations of equality under Articles 14, 15, and 16, the courts have promoted substantive equality rather than mere formal equality. From a counter-majoritarian standpoint, the protection of minority rights justifies judicial intervention even when it contradicts popular opinion. It ensures that democracy does not devolve into majoritarian tyranny but remains inclusive and just. Nevertheless, the judiciary must exercise this power with caution to avoid overstepping its constitutional mandate. Despite these challenges, the protection of minority interests remains a fundamental aspect of judicial review, reinforcing its democratic legitimacy and moral authority.

## **CRITICAL ANALYSIS AND CONTEMPORARY CHALLENGE**

**Tension between Parliamentary Sovereignty and Constitutional Supremacy:** The Indian constitutional framework reflects a delicate balance between parliamentary sovereignty and constitutional supremacy. Unlike the British model, where Parliament is supreme, India adopts a written Constitution that limits legislative power through judicial review. This tension has been a recurring theme in constitutional jurisprudence, particularly in cases such as *Kesavananda Bharati v. State of Kerala*. The Supreme Court, through the Basic Structure Doctrine, asserted that Parliament's amending power is not absolute and cannot alter the fundamental identity of the Constitution. This doctrine ensures that constitutional supremacy

prevails over transient political majorities.

However, critics argue that such judicial limitations undermine democratic will by restricting elected representatives. On the other hand, proponents contend that unchecked parliamentary power may lead to authoritarianism. Thus, the tension is not a conflict but a necessary feature of constitutional democracy, ensuring that governance operates within defined limits while preserving democratic values.

**Judicial Review in Socio-Economic Policy Matters:** Judicial review in socio-economic policy matters has expanded significantly in India, particularly through Public Interest Litigation (PIL). Courts have intervened in areas such as environmental protection, education, and welfare policies. In cases like *Olga Tellis v. Bombay Municipal Corporation*, the Supreme Court recognized the right to livelihood as part of Article 21, demonstrating its proactive role in addressing socio-economic issues. While such interventions have promoted social justice, they also raise concerns about judicial competence and legitimacy in policy-making. Critics argue that courts lack the expertise and democratic mandate to decide complex economic matters. However, proponents view judicial intervention as necessary in cases of executive inaction or policy failure. Thus, judicial review in socio-economic matters reflects a balancing act between ensuring welfare and respecting institutional boundaries.

## CONCLUSION AND SUGGESTIONS

**Summary of Findings:** This study has examined the evolution and justification of judicial review in India through the lens of the counter-majoritarian principle. It highlights how the judiciary, through landmark decisions such as *Kesavananda Bharati v. State of Kerala* and *Minerva Mills v. Union of India*, has established itself as the guardian of the Constitution. The research demonstrates that judicial review is not merely a legal mechanism but a constitutional necessity to maintain the balance between power and liberty. The study also identifies key challenges, including concerns over judicial overreach, lack of accountability, and transparency issues. Despite these criticisms, judicial review continues to play a vital role in protecting fundamental rights and maintaining constitutional supremacy.

Overall, the findings suggest that the counter-majoritarian role of the judiciary strengthens democracy by ensuring that governance remains within constitutional limits and respects the rule of law.

**Reassessing the Counter-Majoritarian Justification:** The counter-majoritarian justification of judicial review often raises concerns about democratic legitimacy, as unelected judges have the authority to invalidate laws enacted by elected representatives. However, this study argues that such a role is essential in a constitutional democracy like India, where the Constitution is supreme. Judicial intervention, particularly in cases involving fundamental rights and constitutional principles, ensures that majority rule does not become oppressive. The evolution of doctrines such as the Basic Structure demonstrates that the judiciary acts not against democracy but in its protection. While the counter-majoritarian difficulty remains a theoretical concern, it is mitigated by the judiciary's role as an interpreter of constitutional values. Therefore, rather than undermining democracy, judicial review enhances its quality by promoting accountability, fairness, and adherence to constitutional norms.

**Judicial Review and the Future of Indian Democracy:** Judicial review will continue to play a crucial role in shaping the future of Indian democracy. As governance becomes more complex, the need for constitutional oversight will increase. The judiciary's role in addressing emerging issues such as digital privacy, environmental protection, and social justice highlights its evolving significance. Decisions like *Justice K.S. Puttaswamy v. Union of India* demonstrate how the judiciary adapts constitutional principles to contemporary challenges. At the same time, the courts must remain mindful of their institutional limits to avoid encroaching upon the functions of other branches. The future of Indian democracy depends on maintaining a balance between judicial intervention and democratic governance. A strong yet restrained judiciary can ensure that constitutional values are preserved while respecting the will of the people.

**Need for Balanced Judicial Intervention:** Balanced judicial intervention is essential for maintaining the legitimacy of judicial review in a democratic system. While the judiciary must actively protect fundamental rights and constitutional principles, it must also exercise restraint in matters of policy and governance. Excessive judicial activism may lead to accusations of overreach, whereas excessive restraint may result in the failure to protect constitutional values. Therefore, the judiciary must adopt a principled approach, intervening only when there is a clear violation of rights or constitutional provisions. Striking this balance ensures that the judiciary neither dominates nor abdicates its role within the constitutional framework. It also promotes harmony among the three organs of the State, thereby strengthening democratic governance and public confidence in the legal system.

## Institutional Reforms and Safeguards

To enhance the effectiveness and legitimacy of judicial review, certain institutional reforms are necessary. One of the key areas requiring attention is the transparency and accountability of the judicial appointment process, particularly in light of debates surrounding the collegium system highlighted in *Supreme Court Advocates-on-Record Association v. Union of India*. Reforms aimed at improving transparency in judicial functioning, such as publishing detailed reasons for appointments and decisions, can strengthen public trust. Additionally, mechanisms for judicial accountability must be strengthened without compromising independence. Institutional safeguards, including clearer procedural guidelines and enhanced judicial training, can also contribute to better decision-making. These reforms will help maintain the credibility of the judiciary while ensuring that it continues to function as an effective guardian of the Constitution.

In conclusion, judicial review in India represents a vital mechanism for preserving constitutional democracy. The counter-majoritarian role of the judiciary, though often debated, is essential in ensuring that the exercise of power remains subject to constitutional limitations. The judiciary's ability to strike down unconstitutional laws and protect fundamental rights reinforces the rule of law and prevents the concentration of power. However, this power must be exercised with caution, responsibility, and respect for democratic principles. Ultimately, the success of judicial review depends on achieving a balance between independence and accountability, activism and restraint, and constitutional supremacy and democratic governance. By maintaining this balance, the judiciary can continue to uphold the ideals of justice, equality, and liberty, ensuring a resilient and inclusive democratic framework for the future.

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