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# **“EVOLUTION OF JUDICIAL REVIEW IN INDIA”**

AUTHORED BY - ADV. RAJSEE. M. KHEDKAR

## **ABSTRACT :-**

Judicial review, a fundamental aspect of constitutional governance, has undergone significant evolution globally, exhibiting distinct trajectories across India, the United Kingdom (UK), and the United States of America (USA). This abstract explores the historical progression and contemporary trends of judicial review in these respective jurisdictions, emphasizing their unique characteristics and offering comparative insights.

In India, the development of judicial review can be traced to the adoption of the Constitution in 1950. The judiciary, particularly the Supreme Court, has played a pivotal role in broadening the scope of judicial review through landmark rulings such as *Kesavananda Bharati v. State of Kerala* (1973), which established the doctrine of basic structure. Over time, Indian courts have increasingly intervened in executive and legislative matters, safeguarding fundamental rights and ensuring governmental accountability. Recent trends suggest a growing assertiveness of the judiciary in scrutinizing governmental actions, notably in areas such as environmental protection, social justice, and governance reforms.

In contrast, the UK has traditionally upheld the principle of parliamentary sovereignty, thereby limiting the extent of judicial review. However, the enactment of the Human Rights Act 1998 marked a significant shift by incorporating the European Convention on Human Rights into domestic law, granting UK courts the authority to review legislative acts for compliance with human rights standards. Despite this development, the UK maintains a parliamentary-centric governance approach, with courts exercising restraint in challenging legislative decisions, prioritizing deference to democratic processes.

Conversely, the USA boasts a longstanding tradition of robust judicial review, stemming from the landmark case of *Marbury v. Madison* (1803). The US Supreme Court has wielded considerable authority in interpreting the Constitution and scrutinizing governmental actions for adherence to constitutional norms. Notably, the concept of judicial activism has shaped the American judicial landscape, with courts actively engaging in social and political issues such as civil rights, affirmative action, and environmental regulation.

While each jurisdiction exhibits a distinct approach to judicial review, common themes emerge, including the protection of fundamental rights, the maintenance of checks and balances, and the judiciary's role in upholding constitutional values. The comparative analysis highlights the diverse paths of judicial review evolution, underscoring the interplay between legal traditions, constitutional frameworks, and societal dynamics in shaping the modern growth of judicial authority.

## INTRODUCTION:

The formation of the Indian federation, primarily through the partition of a centralized unitary state following independence from British rule in 1947, operates under a parliamentary-federal constitution delineating the roles and functions of both the union and constituent states within the federation. The constitutional courts of India, namely the Supreme Court and state high courts, play a crucial role in shaping and evolving Indian federalism. Endowed with the power of judicial review, they base their decisions on citizens' fundamental rights, the federal distribution of powers outlined in the Constitution, and the limited separation of powers consistent with the parliamentary system adopted by both union and state governments. Furthermore, extraneous factors such as the creation of numerous new states since the inception of the Constitution in 1950 and the emergence of several regional parties have significantly influenced the dynamics of the federal system, potentially leading to intergovernmental jurisdictional conflicts ripe for adjudication.

While judicial review primarily promotes nationwide policies and actions, reinforcing the parliamentary nature of the Constitution, federalism adjudication has often preserved the autonomy of state legislatures and governments, despite the absence of an explicit theory of strong states' rights in the constitutional text. Particularly since the establishment of the doctrine of the unamendability of the basic structure of the Constitution in the landmark case of *Keshavananda Bharati v. State of Kerala (1973)*, the Supreme Court has expanded its jurisdiction of judicial review beyond legislative and executive acts to include constitutional amendments, arguably making it one of the most influential constitutional courts globally.

The ascendancy of constitutional courts has been further facilitated by the relative decline in the power of Parliament and the executive branch of the union government, attributed to the proliferation of divided governments resulting from India's cultural, regional, and social

diversities, along with the rise of a state-based multiparty system since the early 1990s. As a counter-majoritarian institution within the highly centralized parliamentary federal constitution, the constitutional courts have played a crucial role in establishing a system of constitutional supremacy, thereby fostering a balance between majoritarian democracy and consensual federal governance.

The evolution of India's constitutional courts post-Nehru era has seen a shift from strict legalism and restraint towards judicial activism. Their adjudications reflect a nuanced and often non-partisan assessment of constitutional provisions, responsive to changing societal contexts. Nevertheless, the extent to which the trend may be influenced by political shifts, such as the Bharatiya Janata Party's (BJP) assumption of power in the 2014 election, remains uncertain. Overall, the Indian Supreme Court continues to grapple with developing neutral constitutional principles to safeguard against the conflation of partisan politics with constitutionally valid federal interests in a pluralistic democracy.

### **Summary of Marbury case :-**

*The Marbury v. Madison case of 1803* is a landmark decision in United States legal history that established the principle of Judicial Review. The case involved William Marbury, who had been appointed as a justice of the peace by outgoing President John Adams in the final hours of his presidency. However, Marbury's commission was not delivered before the new president, Thomas Jefferson, took office. Jefferson's Secretary of State, James Madison, refused to deliver Marbury's commission.

Marbury petitioned the Supreme Court for a writ of mandamus, seeking to compel Madison to deliver the commission. Chief Justice John Marshall, writing for the Court, determined that Marbury was entitled to his commission but held that the provision of the Judiciary Act of 1789 granting the Supreme Court the power to issue writs of mandamus exceeded the Court's constitutional authority. Marshall reasoned that the Constitution, as the supreme law of the land, must be upheld, and any law contrary to it is void.

In this landmark decision, the Supreme Court declared for the first time that it had the authority to review acts of Congress and the President and to declare them unconstitutional if they violated the Constitution. This power of judicial review has since become a fundamental principle of American constitutional law, ensuring the supremacy of the Constitution and the separation of

powers among the branches of government. The Marbury case affirmed the judiciary's role as the ultimate interpreter of the Constitution and significantly strengthened its position in the federal government.

## **Judicial review – India**

The judicial system in India occupies a significant place as it enquires the validity of laws, their interpretation and implementation framed by the legislature. Besides, settlement of mutual disputes and the disputes arising out of the clashes between Centre and the States and amongst the States also fall under the jurisdiction of the judiciary. It also protects the rights and liberties of the citizens. Justice, that is fair and just to all without any discrimination is expected from judiciary. Moreover, efficiency of the government largely depends on the impartial, independent and positive justice.

When the legislature enacts laws resulting in the infringement of the freedom and security of the individuals and the executive stops performing its duties like enforcement of law, the only way out is the judiciary. Judiciary is compelled to take over in some measure the duties of the executive to ensure justice to the citizens.

In a democratic polity, good government is indispensable for any state and the three organs of the government constitute three pillars of good and effective governance and lack of harmony amongst them can lead to administrative chaos. In such a situation, independent and fearless judiciary forms the core of democracy. In the Constitutional scheme, the judicial system works as an active catalyst to secure justice for every citizen.

Though the Indian judiciary has been honest and independent in the performance of its duties as regard to the executive control and influence. However, under the changing socio-economic-political situations in India people have higher expectations from the judiciary. In the event of poverty and illiteracy, its challenging task is to ensure justice to all. The entire system of governance is based on the principle of equal justice for all. It is now widely accepted that the nature of judiciary has become social and economic.

The Supreme Court of India was technocratic at first, but as a result of its liberal interpretation of the law, it progressively gained authority and stature. Beginning with the judicial review in *A.K. Gopalan v. Madras*<sup>1</sup>, it was argued that this authority was inherent in the written constitution itself. Article 13 states that no law passed by the state may restrict or deny someone's fundamental

rights. Citing this article, the Supreme Court expressed its opinion as follows:

The Constitution's incorporation of Articles 13(1) and 13(2) seems to have been done with much deliberation. If any legislative act violates any of the Fundamental Rights, even in their absence. In the event that an enactment goes beyond the bounds, the Court retains the authority to declare it invalid.

Stated differently, the court assumed the duty of providing a judicious interpretation of the Constitution and a judicial review of legislative actions. Judicial activism is a natural byproduct of judicial review and can be caused by number of things. The judiciary must become more proactive in interpreting the laws as the political landscape becomes more complex and new challenges arise. In situations where laws are lacking (such as foreign adoptions of children, cybercrimes, etc.), the court must expand the application of existing laws to decide cases that come before it.

According to S.P Sathe,

There are two judicial review models. One is a technocratic model in which judges only carry out their technocratic duties, declaring a statute unconstitutional if it exceeds the legislative branch's authority. In the second model, a court uses a dynamic interpretation approach to keep a constitution current by reading its provisions broadly and in the context of the principles that underpin it.

Judicial activism can be positive or negative. It is positive when it engages itself to make power relations between different sections of people more equitable. On the other hand, if it is status quo and conservative, it is negative. Upendra Baxi uses the terms 'reactionary' and 'progressive'. According to him, 'much of Nehruvian era activism on issues of land reform and right to property, and the pro-emergency activism typified in S.K. Shukla<sup>2</sup>, manifests reactionary judicial activism. Progressive judicial activism commences with Golak Nath<sup>3</sup> and Kesavananda<sup>4</sup> and culminates in a wholly different genre of social action activism.

Sathe states that "Judicial activism acts to breach separation of powers, which raises social costs and upsets transactional efficiency." Restructuring the dysfunctional institutions is the better course of action if either the legislature or the executive have devolved into rotten boroughs with outmoded administrations and unrepresentative legislatures.

## **POLITICAL IMPLICATION OF JUDICIAL ACTIVISM:-**

Because of the complexity and pluralization of the political system during the past many years, the Supreme Court has transitioned from a positivist to an active perspective. The political repercussions. The judiciary has invalidated several constitutional changes and executive actions in certain instances. The Golaknath case, in which the Supreme Court struck down the authority to modify the Constitution by eliminating property from the list of essential rights by a majority vote of six to five, is one of the court's most significant and seminal rulings.

public has, for the most part, welcomed the increasing activism. It has, nevertheless, had The "argument of fear," which holds that the amending power's engine would quickly exceed the Constitution if brakes are not used, was also a factor in the decision. The Bill of Rights was the appropriate place to stop the amending power when it came time to apply the brakes.<sup>5</sup>

On the other hand, the Golaknath case's verdict was overturned by a thirteen-judge court in the Kesavananda Bharati case, claiming it had been decided incorrectly. However, it also found that Article 368 of the Constitution prohibited the Parliament from passing any laws that would undermine the fundamental elements or framework of the document. The Minerva Mills case also raised the issue of fundamental aspects of the Constitution.

Although the nationalization of the mills constituted a property issue, Nani Palkhiwala, the defense attorney, maintained that Parliament had the authority to modify the Constitution. On May 9, 1980, the Supreme Court issued the first orders in the Minerva Mills case, six months after the hearings concluded. Below is a summary of a few of these rulings:

Since Section 4 of the 42nd Amendment completely excludes any challenge to legislation that apply Directive Principles at the expense of Articles 14 and 19, it eliminates the fundamental elements of the Constitution and puts Parliament's amending power to naught. Additionally, it was decided that Section 55 was outside of Parliament's amending authority because it "removes all limitations on the Parliament's power to amend the Constitution and confers powers upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure."

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<sup>1</sup> A.K. Gopalan v. State of Madras , AIR 1950 SC 27,34

<sup>2</sup> A. D.M. Jabalpur v. Shiv Kant Shukla , AIR 1976 SC 1207

<sup>3</sup> Golak Nath v. State of Punjab, 2 SCR (1967) 763

<sup>4</sup> Kesavananda Bhamti v. State of Kerala, AIR 1973 SC 1461

Regarding section 3, Justice Bhagwati found in a different ruling in the same case that the revised article 31C was constitutionally legitimate since it was within Parliament's amending jurisdiction and did not harm or destroy the fundamental structure. Article 31C was changed, extending its scope to include all of the directive principles listed in part IV of the Constitution. A statute "enacted to give effect to a Directive Principle was not invalid because it infringes a Fundamental Right," according to the justice. This was the case because, although rights are valuable, the majority of the population is made up of impoverished, oppressed, and economically backward sections for whom they hold little significance.

The question of "whether the provisions of the 42nd Amendment, which deprived the Fundamental Rights of their supremacy, are ultra vires of the amending power of the Parliament?" was specifically examined in the *Minerva Mills* case. Another argument put forth was that Article 31C, which forbade challenges to legislation enacted in accordance with directive principles, was unconstitutional and unsuitable since it gave Parliament unrestricted amending power, which included altering the fundamental elements of the Constitution. The petitioner's representative in this action against the Government of India, N. Palkhivala, referred to the ideology behind article 31C as "the very quintessence of authoritarianism."

The *Minerva Mills* case is noteworthy because it upheld India's constitutionalism's fundamental tenet that is, the Supreme Court while also upholding the basic structural theory.

After these cases, the question of how an unelected entity, the court, could decide what should be in the Constitution and override an elected Parliament that was supposed to represent the will of the people as a whole emerged. The following argument was made by Justices Hegde and Mukherjea in the *Keshavananda Bharati*<sup>6</sup> judgment, which provided part of the answer:

If the people are granted the authority to modify the Constitution, it may be interpreted as having more content than if that authority is granted to a body established by the Constitution. It is not necessary for the two Houses of Parliament to have two thirds of their members reflect the majority of the population in this nation. Aside from this, our Constitution was written based on consensus rather than majority votes, meaning that even a small percentage of voters can choose more than two-thirds of the members of either House of Parliament. It ensures that minorities are

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<sup>5</sup> Upendra Baxi, *The Indian Supreme Court and Politics* 18-19 (1980)

<sup>6</sup> (1973) 4 SCC at 481

protected. The protections afforded to minorities may lose all meaning if the views of the majority are considered to be final. Consequently, it is intolerable for the Union and the States to argue that two-thirds of the members in each of the two Houses of Parliament are always entitled to speak for the entire citizenry.

This argument challenges the notion that the will of the people is represented by the parliamentary majority. In India, even in the absence of a majority of votes, a party or coalition of parties can obtain a parliamentary majority and form the government. The contention is that after extensive debate and discussion, the Constituent Assembly established certain fundamental provisions of the Constitution, which should not be altered by a coalition of this kind.

The aforementioned query was answered in favor of the judiciary by the internal emergency declared by Indira Gandhi in 1975, following her removal from office by the Allahabad High Court due to an electoral offense. The 39th Constitution Amendment Bill was passed in part to overturn this decision and in part to give the Parliament more authority. In the case of *Indira Gandhi v. Raj Narain*<sup>7</sup>, this amendment was contested on the grounds that it altered the fundamental framework of the Constitution. Although Indira Gandhi's election was affirmed on the merits, the Supreme Court invalidated the amendment on the grounds that it was incompatible with the fundamental provisions of the Constitution. The legitimacy of the court's activity was further enhanced by this ruling.

Other cases highlighting the significance of the fundamental structure of the Constitution and placing limitations on the presidential authority to dismiss state governments include the *State of Rajasthan v. Union of India*<sup>8</sup> and the seminal *S.R. Bommai v. Union of India*<sup>9</sup> cases. In the former, the Supreme Court upheld the dismissal, under Article 356 of the Constitution, of three state governments by the Janata government, which assumed power in 1977. Conversely, in the latter case, the Supreme Court delineated the circumstances under which state governments could be dismissed and stipulated the procedure mandating that proclamations issued by the President must receive approval from both houses of Parliament within two months; failure to do so may result in the reinstatement of the dismissed governments. Through this ruling, the court curbed the frequent misuse of Article 356 in the dismissal of state governments, as noted by Marwah, indicating that this authority had been excessively exercised by the central government in

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<sup>7</sup> AIR SC 1590

<sup>8</sup> AIR 1977 SC 1361

<sup>9</sup> AIR 1994 SC 1918.

numerous instances Since the Supreme Court's ruling in the Bommai case, central governments have exercised caution in recommending the dismissal of state governments. Apart from the judicial oversight provided under Article 356, there have been instances of political checks attributable to the transformation of the party system. For instance, in October 1999, the union government proposed President's rule in BJP-ruled Uttar Pradesh to President K.R. Narayanan. However, the President urged the government to reconsider its recommendation. Subsequently, the government withdrew its proposal, influenced by the aforementioned judgment. Similarly, when the Rabri Devi-led government in Bihar was dismissed by the BJP-led central government in 1999, the Congress Party-controlled Rajya Sabha declined to endorse the presidential proclamation, leading to the reinstatement of the ministry.

A similar scenario arose following the Uttar Pradesh assembly election results in February 2002 when no single party or coalition secured a clear majority. The Governor of Uttar Pradesh recommended invoking Article 356 to impose President's rule while keeping the legislative assembly in suspended animation, as established in the Bommai case. The President accepted the recommendation. However, the Bharatiya Janata Party (BJP) and the Bahujan Samaj Party (BSP) reached an agreement and submitted a letter to the Governor pledging support to each other in the legislative assembly. Consequently, the Governor invited the BJP-BSP coalition to form the government, with BSP leader Mayawati appointed as the chief minister.

The Bommai case, decided in 1994, has significantly contributed to restoring the autonomous functioning of the parliamentary system at the state level and reshaping the interpretation and application of Article 356 of the Constitution.

## **POST EMERGENCY JUDICIAL ACTIVISM:-**

As per Rajeev Dhawan, "the higher judiciary has emerged as a crucial player in asserting its independent status, compelling other governing bodies to undertake their assigned duties." The Nehru years saw a first in the evolution of the judiciary, which had been an institution of state during the colonial era and was responsible for interpreting the meaning of legislation.

The judiciary started its transition to become an autonomous institution of governance in the 1980s, during the post-emergency phase, but this was not the biggest change. By significantly extending its jurisdiction to include PIL, the Supreme Court gave journalists and social activists access to legal defense against judicial abuse by other governing bodies.

The nature of judicial activism appears to have changed significantly following the 1977 electoral setback of the Congress government, which included Indira Gandhi as prime minister. According to Sathe:

By liberally interpreting the constitutional articles pertaining to the right to equality and the right to personal liberty, the Court capitalized on the chance to increase the rights of the populace.

The Indian Supreme Court began interpreting the bill of rights as a whole, departing from its previous approach of interpreting each item of the Constitution independently. It provided the terms "life," "personal liberty," and "procedure established by law" found in Article 21 of the Constitution broad definitions. By adopting such a broad view, it acknowledged the rights of detainees awaiting trial. The legality of the death penalty provisions in the penal code was reexamined, along with the rights of prisoners, juvenile delinquents, and independent juries, as well as the rights to privacy, a prompt trial, an impartial judiciary, and effective and transparent government.

The ideology of constitutional interpretation that viewed the Constitution as assertions of principles of constitutional governance rather than just a list of regulations served as the impetus for post-emergency judicial activism.

The court has extensively interpreted Article 21, not only in conjunction with the Bill of Rights but also with regard to socio-economic rights, such as the right to a sufficient means of livelihood and primary education (as seen in the Unnikrishnan case), in lieu of Article 45, which pertains to a directive principle concerning the provision of free and compulsory education for children up to the age of 14 years. Following years of discourse and advocacy, subsequent to the Unnikrishnan case judgment, the 86th Constitution Amendment Act was ratified by the President in December 2002, enshrining education as a fundamental right for children aged six to fourteen years through the introduction of a new Article 21A. Concurrently, Article 45 underwent appropriate modifications to include provisions for early childhood care and education for all children until the age of six years.

Not only has the judiciary expanded the ambit of its activism, but it has also delved into uncharted territory where no legislation existed. For instance, in matters concerning the adoption of children by foreigners or in establishing guidelines for the prevention of sexual harassment in the workplace, the court has not merely been proactive; it has effectively crafted new legal frameworks, effectively assuming a quasi-legislative role under Article 141 of the Constitution.

However, the question arises: to what extent is this expanded judicial role desirable? In response to criticism, the court has acknowledged the importance of refraining from usurping the legislative function, asserting that its directives are intended solely to offer temporary relief.

Thus we see the enlarged and the empowered role of the judiciary in these cases.

## **Contribution of Justice Krishna Iyer:-**

In *Hoskot v State of Maharashtra*<sup>10</sup>, the court carved out a right to free legal aid from the provision of 'procedure established by law' under Article 21. Justice Iyer opined that this right is available under following circumstances: first "a person is disabled incommunicado situation"; second, if the circumstances of the case and the gravity of the situation so demands; and third, the end of justice call for such service. Once the court is satisfied on these counts, then it may order for providing the legal service to such person.

In *Hussainara Khatoon* case, the miseries of the helpless, hopeless, unfortunate, forgotten specimens of humanity languishing in jails for years awaiting trial in court of law to commence, has been exposed. According to Court, one of the causes for such situation was lack of legal service to these destitute and homeless, a cry that has yet to receive any response.

### **CONCLUSION:**

In conclusion, the evolution of judicial review in India reflects a dynamic and progressive journey marked by significant milestones and transformations. From its early days as a limited power exercised cautiously by the courts to check legislative and executive actions, judicial review has evolved into a robust mechanism for upholding constitutional principles, protecting fundamental rights, and ensuring the rule of law.

Over the years, landmark judgments have expanded the scope and application of judicial review, empowering the judiciary to intervene in matters of public policy, governance, and social justice. The judiciary's role has transformed from being reactive to proactive, as seen in cases addressing environmental protection, gender equality, and socio-economic rights.

Furthermore, the Supreme Court's creative interpretation of the Constitution and its willingness to innovate legal doctrines have contributed to the development of a vibrant jurisprudence that adapts to the changing needs of society. Judicial activism, while sometimes contentious, has played a crucial role in advancing democratic values and promoting accountability in governance.

However, challenges remain, including concerns about judicial overreach, delays in the justice delivery system, and the need for greater transparency and accountability within the judiciary itself. Balancing the principles of separation of powers and judicial independence with the imperative of democratic governance is an ongoing endeavor.

In essence, the evolution of judicial review in India underscores the judiciary's vital role as the guardian of the Constitution and the protector of individual rights. As India continues on its path of progress and development, the judiciary's commitment to upholding the rule of law and ensuring justice for all will remain essential for the nation's democratic fabric and inclusive growth.



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<sup>10</sup> (1979) 1 SCC 478

