

## Judicial Review of Ordinary Laws and Constitutional Amendments: A Comparative study

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### Abstract

*Judicial review is the essence of rule of law and supremacy of law in democratic countries. It is an important tool in the hands of the judiciary. Judicial review allows courts to review laws, whether made by the Parliament, executive, judiciary or otherwise. If there are laws that contradict the constitution, then they can be struck down as unconstitutional or held ultra-vires. The basis of the principle of Judicial review lies in the fact that in case of a conflict between the constitution i.e. the law of the land and any other law, the judiciary will choose the constitution and thus uphold its supremacy.*

**Keywords:** Judicial Review, Constitution, Amendments, Comparison, Ordinary Laws

### Introduction

As indicated by Reform, “Judicial review is the intensity of a court to enquire whether a law, official request or other authority activity clashes with the composed constitution and, if the court presumes that it does, proclaim it illegal and void”.<sup>2</sup>Essentially, the concept of judicial review emerged in the United States of America (USA). It was laid down in the landmark judgement of case of Marbury v. Madison<sup>3</sup>. However, the idea of judicial review can also be noted in Lord Coke’s decision in, Dr. Bonham vs. Cambridge University<sup>4</sup>, in 1610 in England.

Although judicial review has not been explicitly mentioned in the constitution of USA, it does have implicit presence in Articles III and IV of the Constitution. Even in case of United Kingdom (UK), due to the absence of a written constitution and the presence of ‘Parliamentary Sovereignty’, the operation of judicial review differs from that in USA and India. The Parliamentary Sovereignty indicates will of the people and since there is a superiority of the parliament, the courts cannot easily override the Parliament. They can do so only in select few cases dealing with human rights, freedom and liberty.

Judicial review is not limited to reviewing actions of the Parliament, but also the executive. Thus, courts have been empowered to check validity of administrative actions and secondary legislations. The article also focuses on Judicial Review of Constitutional Amendments, Judicial Review of Legislative Actions and Judicial Review of Administrative Actions.

In India, the courts have formulated various principles such as Doctrine of Prospective Overruling, Doctrine of Severability, Doctrine of Eclipse etc. on the basis of judicial review. Even in UK, the courts can review executive actions and administrative actions, since judicial review in UK is done on the basis of procedural grounds. Through USA, the concept of judicial review has travelled to other countries, especially democracies and has been incorporated in their respective judicial systems as per their national norms. For example, in the USA, the Supreme

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<sup>2</sup> Available at <https://blog.ipleaders.in/judicial-review-administrative-rulemaking-powers-india-usa-comparative-study/>, blogipleaders.in, (retrieved 5 March 2021)

<sup>3</sup> 5 U.S. 137 (1803)

<sup>4</sup> (1610) 8 Co Rep 114

Court does not review constitutional amendments, however in India, the courts have been given jurisdiction to check the validity of constitutional amendments.

The proponents of judicial review of constitutional amendments contend that like an ordinary legislation, a constitutional amendment can carry the vices of unconstitutionality and therefore the constitutional amendments should be subjected to judicial review. The opponents, on the other hand, maintain that amending the Constitution is the privilege of the political branches of the government, and the court should stay away from such a political question.

It should be noted that both the proponents and the opponents believe in constitutionalism backed by principles such as separation of power, amenability of constitution, judicial review etc. Their opinions differ on the scope of judicial review. There are several factors that contribute to these divergent approaches regarding judicial review of constitutional amendments, such as, flexibility of constitutional amendment process, position of judiciary in the political process, faith in elected representatives and faith in the democratic process.

## **Judicial Review: Concept and History**

### **Concept of Judicial Review**

Judicial review refers to the powers awarded to courts which allows them to scrutinize actions of the legislature, executive and the judiciary as well. The said power has been endowed in order to create a concrete mechanism of checks and balances amongst the various organs of the government. Judicial review allows courts to declare a law, act or any other actions of the government as ultra vires or unconstitutional. Therefore, it is said that judicial review finds its basis in the Doctrine of Rule of Law and Supremacy of law. If the legislature passes a law which contravenes the provisions of the constitution, then such a law can be struck down as being void by the judiciary. Herein, the definition of law is not necessarily limited to the acts passed by the legislature, but can also extend to the actions of the executive, such as rules, regulations and bye-laws. The objective behind the doctrine of judicial review is to uphold the constitution of the country and to ensure that its provisions are followed by the authorities. It further aims at curbing the use of arbitrary powers by the authorities, by keeping a check on them.

The Theory of Limited Government ensures that there is a robust system of checks and balances mechanisms upon the actions of the government, to avoid any form of abuse of power at the hands of the government. Judicial review is one such tool which helps attain the doctrine of theory of limited government. Furthermore, the principle of judicial review ensures that there is Supremacy of the Constitution<sup>5</sup>. It enforces the theory of separation of powers between the three organs of the government with the aim to curb any organ from gaining unlimited powers, which could lead them to defy the provisions of the constitution and hamper the fundamental rights of the citizens. The power given to the courts thus ensures that all the principles laid down in the Constitution are upheld and no one surpasses the authority of the Law of the Land.

Judicial review allows courts to strike down laws as unconstitutional if they violate the provisions of the Constitution. It thus ensures effective administration on part of the public officials. Furthermore, it aims at upholding the rights of the citizens by keeping checks on actions of the organs of the government. Judicial review bestows powers upon courts to decide the legitimacy of laws and acts passed by the legislature, executive and the judiciary.

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<sup>5</sup> Available at <https://www.jstor.org/stable/2125770?seq=1>, (retrieved 1 April 2021)

Therefore, judicial review can be understood in terms of judicial review of Legislative Actions, Administrative actions and that of Constitutional amendments. In addition to upholding the supremacy of law and enforcing the Rule of Law in the nations, judicial review also helps maintain equilibrium between Center and States and ensures that the powers between the two are constitutional in nature.<sup>6</sup>

Judicial review finds its backing in the concept of Rule of law, which requires public bodies to act within constitutional limits. Judicial review works as a tool to ensure that public authorities remain responsible and accountable to its citizens and that there is no unjust or arbitrary rule by them, which lies outside the scope of the constitution.

#### **A. History and Origin of Judicial Review**

The concept of Judicial Review was furnished in the USA, in the landmark judgement of *Marbury v. Madison*<sup>7</sup>. This case emerged during the change in presidency in the United States of America. The then President of USA, John Adams was defeated by the incoming President, Thomas Jefferson. In the last few days of his office days, John Adams made a lot of political appointments, however, when Jefferson became President, he asked the Secretary of State, James Madison, to not send the letters of appointments to the officers employed by Adams. One of the employees was William Marbury, who files a writ in the Supreme Court demanding his letter of employment from Madison.

This case brought forth the conflict between ordinary laws and constitutional laws, as well as the question of Supreme Court's authority in reviewing acts of the Congress.

Chief Justice Marshall in a landmark judgement herein held that in case of a conflict between the ordinary laws and the constitution. The constitution shall prevail. Furthermore, he held that the Supreme court does have the right to review the acts of the Congress with the objective of determining their validity and consistency with the constitution.

Chief Justice Marshall said that the constitution is the supreme law of the land and therefore must be paramount to any statute in conflict with it. He based his judgment upon the following assumptions;

- (i) The constitution is a written document that clearly defines and limits the powers of the government;
- (ii) The constitution is a fundamental law and superior to ordinary legislative enactments;
- (iii) An act of the legislature contrary to the fundamental law is void and therefore cannot bind the courts;
- (iv) The subject power, together with oaths to uphold the constitution that judges take, requires that the courts so declare when they believe that acts of the courts so declare when they believe that act of the congress violate the constitution.

After this Judgment, the principle of the judicial review was firmly embodied in the American system of government. It is now as clearly established as though it had been expressly provided in the Constitution. When the supreme court of the United States invalidates an act of the Congress or of a state legislature on the ground that it is not in conformity with the constitutional powers and provisions it is exercising the powers of the judicial review. It is thus an established fact that the Supreme Court determines the constitutional validity of federal and

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<sup>6</sup> Available at <https://iclrq.in/editions/jan/5.pdf>, (retrieved, 1 April 2021)

<sup>7</sup> 5 U.S. 137, 12 (1803)

state laws whenever they are challenged before it in the process of litigation. It's the power of the apex court to reject such laws as are construed to be ultra vires.<sup>8</sup>

Although the Marbury case laid the foundation for judicial review, the concept of judicial review can be traced back to the case of Thomas Bonham v. College of Physicians<sup>9</sup>, decided by Justice Coke in 1610 in the UK. Justice Coke stated that the imprisonment of Dr. Bonham for practicing without a license was wrongful and was to be struck down since the common law can control Acts of the Parliament.

This case laid down the roots of the concept of judicial review in the United States and later in other emerging democracies. The Constitution of USA does not explicitly mention judicial review. Article III and Article VI of the Constitution lay down that the judicial power of courts includes original and appellate jurisdiction, and that the Constitution is the supreme law of the land which all the authorities must necessarily abide by.

Judicial review in the US has thus been formulated by courts with the help of various case laws and judgements. The objective behind the idea of judicial review is to ensure that the Congress and the State legislatures stay in check. Abuse of power by authorities is kept under control by ensuring "due process of law" is followed in the law making process. The courts are given power to declare laws as void if they are in contravention to the provisions of the constitution.

On the other hand, in the UK, the principle of "Parliamentary Sovereignty" is followed. The Parliament is held to be supreme as it enforces the will of the people. Thus, courts are not given the power to check their actions. Furthermore, the UK has an unwritten constitution, this means that all laws laid down by the Parliament are said to be a part of the constitution and thus none of them can be scrutinized by courts. The Judicial review in UK is therefore only limited to the secondary legislation i.e. administrative actions. It does not extend to primary legislations formulated by the parliament. In UK, judicial review is based on procedural grounds which are largely related to Administrative actions.<sup>10</sup>

India has borrowed judicial review from the USA. It is a part of the basic structure doctrine of the constitution. Although the constitution does not expressly mention the concept, it has been formulated by the judiciary overtime and forms an integral part of the justice system in the country. The scope of judicial review is wide in India, it covers review of legislative actions, administrative actions as well as review of constitutional amendments. The objective is to maintain a system of checks and balances upon various organs of the government to ensure that power is not being misused and the rights of citizens are being upheld.

## **JUDICIAL REVIEW OF ORDINARY LEGISLATION**

### **Judicial Review of Parliamentary and State Legislative Actions**

Legislative powers refer to law making powers that have been awarded to an organ of the government. This organ is referred to as the Legislature which comprises of representatives whose function is to formulate the laws of the country. Such legislative powers exist at both the Central level as well as the state level. Although the American constitution does not explicitly mention judicial review, it is implied in Articles III and VI of the constitution.

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<sup>8</sup> Available at <https://www.cambridge.org/in/academic/subjects/law/comparative-law/politico-legal-dynamics-judicial-review-comparative-analysis?format=PB>, (retrieved 2 April 2021)

<sup>9</sup> 8 Co. Rep. 107 77 Eng. Rep. 638

<sup>10</sup> Available at <https://book.coe.int/en/international-law/4472-judicial-review-a-comparative-analysis-inside-the-european-legal-system.html>, (retrieved 3 April 2021)

The United States of America is a federal democratic country. It follows the principles of Rule of law as well as Separation of powers. Therefore, there is a need to maintain a system of checks and balances amongst the various organs of the government in the USA. Although the judiciary has not been given explicit powers of judicial review, they have been made the tribunal to exercise the said powers in order to uphold the values of the constitution. The judiciary can declare legislations of the Congress and the President as being void or ultra vires the constitution if they violate provisions of the constitution.

Independent judiciary acts as an effective fencing between the various organs and also acts as a roadblock of any oppression by the representatives of the people, upon the people. The main objectives of judicial review in the USA are to declare the laws as unconstitutional if they violate the constitution, and at the same time uphold laws as valid if they follow the directions laid down in the constitution. It also aims at maintaining the Supremacy of the Constitution by upholding the principle of Rule of law. It ensures that power is not abused by public authorities, by checking actions of both Congress as well as State Legislatives.

Before the case of *Marbury v. Madison*, the US Supreme Court could not declare legislation passed by the Congress as unconstitutional. However, post the judgement, there has been an expansion in the scope of powers of the judiciary wherein they have the right to determine validity of Congressional as well as State legislations. In the case of *MuColloch v. Maryland*<sup>11</sup> a federal bank was opened in the State of Maryland and was taxed as per state's legislation. Herein, the court intervened and provided immunity to the national government from state imposed taxes. In the case of *Youngstown Sheet Tube Co. v. Sawyer*<sup>12</sup>, when President passed ordinance to seize steel from citizens, the Court intervened to declare the executive encroachment upon legislative field as unconstitutional and struck down the order. In the case of *Reed v. Town of Gilbert*<sup>13</sup>, court declared that ordinance curbing right to display signs is void in nature.

In United Kingdom, although the *Bonham* case set the basis for principle of judicial review, the case of *City London v. Wood*<sup>14</sup> in 1701 decided by Justice Holt stated that "An Act of Parliament can do no wrong, though it may do several things that look pretty odd." This judgement set precedent for the concept of Parliamentary Sovereignty in the UK. This means that the Legislative or the Parliament is the supreme institution of the country and nobody lies above it, not even the constitution. Since the parliament is seen as a source of rule by the people, it is of the supreme authority and cannot be held accountable or answerable in any court of law. therefore, in the UK, Parliamentary legislations or Primary legislations are not privy to judicial review by courts. It is only the administrative actions or secondary legislations which can be scrutinised by courts.

In India, the doctrine of Judicial review forms a part of the basic structure doctrine. It aims at upholding the supremacy of constitution and the rule of law. The Constitution of India explicitly establishes the doctrine of Judicial Review in several Articles, such as 13, 32, 131, 136, 143, 226 and 246. It has further been formulated by the courts over several judgements.

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<sup>11</sup> 4 Wheaton 316, 1819

<sup>12</sup> 343 US 579, 1952

<sup>13</sup> 13 US 502, 2014

<sup>14</sup> 12 Mod. 669 (1701)

Judicial review in India, dates back to case of Emperor v. Burah<sup>15</sup>, wherein restrictions were imposed upon the powers of the Governor General. Articles 245 and 246 of the Constitution provide law making powers to the Parliament and the State Legislatures however, these powers are subject to the “provisions of the constitution”. This phrase imposes a limitation upon the law making bodies and allows courts to scrutinise their actions.

For example, in *SP Sampat Kumar v. Union of India*<sup>16</sup>, the Supreme court upheld the validity of Administrative Tribunals Act since it did not curb the power of judicial review of High courts and Supreme Court. In *IR Coehlo v. State of Tamil Nadu*<sup>17</sup>, Supreme court held that even the subjects in the ninth schedule of the constitution fall under purview of judicial review.

### **Judicial Review of Administrative Actions**

Judicial review of administrative action aims at protecting the rights of individuals from arbitrary and exploitative use of power by authorities in any branch other than the legislative branch.

Administrative actions are aimed at formulating secondary legislations when such power is bestowed upon them by the Legislative for various reasons.

The concept of judicial review of administrative action is very prominent in the UK.

The judicial review of administrative action is performed on the following grounds:-

- (1) Illegality- the rules, bye-laws etc. made by the authorities must be within the limits of the law. The secondary laws must not violate the provisions of law in existence.
- (2) Irrationality- the reason behind the laws should be reasonable and must not defy logic
- (3) Procedural Impropriety- the procedure followed while making the decisions and laws must be fair and just
- (4) Proportionality- there must be a reasonable connection between the administrative action and the end being achieved
- (5) Unreasonableness- the facts must be line with the conclusion drawn by the authorities<sup>18</sup>

**In the case of Council of Civil Service Unions v. Minister for the Civil Service**<sup>19</sup>, Lord Diplock stated the importance of judicial review of administrative action. He shed light on the need for administrative action to be reasonable, follow procedural propriety, legality etc while exercising their discretionary powers. India follows the principle of judicial review of administrative action, to check abuse of discretionary power by public authorities. For example, in **Ajay Hasia v. Khalid Mujib**<sup>20</sup>, the Court struck down the rule of the Regional Engineering College which placed impetus on marks obtained in oral exam as it was arbitrary and violative of Article 14 of the Constitution. In **Air India v. Nargesh Meerza**<sup>21</sup>, Supreme Court struck down the Air India’s regulations on the retirement and pregnancy criteria of air hostess as unconstitutional as it was unreasonable and arbitrary.

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<sup>15</sup> (1877) 3 ILR 63 (Cal)

<sup>16</sup> 1987 SCR (1) 435

<sup>17</sup> AIR 2007 SC 861

<sup>18</sup> <https://www.ijlmh.com/judicial-review-a-comparative-analysis-of-india-usa-uk/>, retrieved 3 April 2021

<sup>19</sup> 3 AII ER 935, 1984

<sup>20</sup> AIR 1981 SC 487

<sup>21</sup> AIR 1981 SC 1829

### Judicial Review of Constitutional Amendments

Constitutional amendments are made by the Parliament to existing provisions of the constitution with the aim of keeping the constitution up-to date with the changing times.

The approach of countries on judicial review of constitutional amendments varies based on situations-

- (1) Countries which do not allow judicial review of both procedural and substantive constitutional amendments, for example, USA and UK
- (2) Countries which allow judicial review of both types of constitutional amendments, for example, India
- (3) Countries which allow judicial review of only the procedural aspect or substantive aspect of judicial review

In the case of *Coleman v. Miller*<sup>22</sup>, the court declared questions relating to constitutional amendments as political questions and were kept out of the purview of judicial review. Before the *Coleman* case, judicial review was permitted for constitutional amendments.

The *Coleman* decision has often drawn discussion from various jurists on the reasonableness of the decision. One such debate is the Dillinger-Tribe debate wherein Dillinger believes that the absence of judicial review of constitutional amendments creates uncertainty and deprives judiciary of its power to interpret the constitution. It further fails to determine the legitimacy of actions of the Congress in making such amendments. Laurence Tribe, on the other hand believes that judicial power over constitutional amendment will create a never-ending clash between the judiciary and the Congress. He also questions the competence of courts in determining such question.

Despite on going discussions it is an established principle that constitutional amendments are not privy to judicial review in the USA. India's take on the issue is the opposite of the one taken by the US. In India, constitutional amendments are reviewable by the Supreme Court of India. The issue first arose in *Shankari Prasad case*<sup>23</sup> wherein the validity of First Constitutional Amendment (1951) was challenged. The court held that a constitutional amendment is valid even if it abridges one's fundamental right.

Later, when a similar question arose in the case of *Golak Nath v. State of Punjab*<sup>24</sup>, Supreme court overruled the *Shankari Prasad* judgement and held that constitutional amendment is a law under Article 13(2), it cannot abridge a citizen's fundamental rights. In *Keshavnanda Bharti Case*<sup>25</sup> Supreme Court overruled the *Golak Nath* judgement and held that the Parliament can amend the fundamental rights but it cannot abridge the basic structure of the constitution. In the case of *Minerva Mills v. Union of India*<sup>26</sup>, the Supreme court struck down certain clauses of the 42<sup>nd</sup> Amendment Act, 1974, since it made changes to the amending power of the Parliament, which is a part of the basic structure doctrine. The Supreme Court thus scrutinized the validity of the Constitutional amendments through the years with the help of the Doctrine of Judicial Review.

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<sup>22</sup> 7 U.S. 433

<sup>23</sup> AIR 1951 SC 458.

<sup>24</sup> AIR 1967VSC 1643

<sup>25</sup> AIR 1973 SC 1461

<sup>26</sup> AIR 1975 SC 2299

## **CONCLUSION**

Judicial review is an effective tool in the hands of the judiciary which helps it keep a check on the functioning of the legislature and the judiciary. It helps uphold the concept of rule of law and curtails abuse of power. The power of judicial review helps courts strike down laws as unconstitutional or ultra vires if they violate the provisions of the constitution. Judicial review is practised by different countries in varying ways based on the structure of their government, constitution etc. This paper discussed the concept of judicial review in context of USA, India and UK. It further attempted to understand Judicial Review in the context of power of judiciary over legislative actions, administrative actions and constitutional amendments.

The scope of judicial review in India is the widest of all the three countries, this is because the constitution of India is both flexible and rigid, as opposed to the constitution of the USA which is very rigid in USA. Furthermore, the concept of Parliamentary Sovereignty in the UK places the Parliament in a supreme position and disallows courts from scrutinising the actions of the legislative. UK sets precedent for judicial review of administrative action.

In terms of judicial review of constitutional amendments, USA witnesses constitutional amendments as political questions and thus places them outside the purview of scrutiny of courts. It also reflects the people's perception of the judiciary in the country. For example, in India, the public is more trusting of the judiciary and thus backs the idea of judicial review of constitutional amendments. On the other hand, in addition to a rigid constitution, the people of USA show higher faith in the electoral process of choosing the government which places the judiciary outside the purview of checking validity of their actions with respect to constitutional amendments.