

Introduction

The doctrine of judicial review originated in the USA. It was first propounded in the case of *Marbury vs Madison* in 1803. The Constitution of India confers the power of judicial review on the Supreme Court as well as High Courts. Judicial review has been declared as one of the basic structures of the Constitution by the Supreme Court.

Meaning of Judicial Review

Judicial review is the power of courts to examine the legislative enactments and executive orders of the Central as well as State Governments to check its constitutionality. If such enactments or orders are found to be in violation of the Constitution, they shall be declared null and void.

Justice Syed Shah Mohamed Quadri, in judicial review of administrative action, has classified judicial review into the following three categories:

- ❑ Judicial review of Constitutional Amendments
- ❑ Judicial review of legislation of Parliament and State Legislatures and subordinate legislations
- ❑ Judicial review of administrative action of the Union and State and its authorities.

The Supreme Court of India has repeatedly acknowledged the authority of judicial review, saying that this power is inherent in a written Constitution. Such judicial review powers are granted to maintain a balance of power among the legislature, executive, and judiciary. Articles 13, 32, 226, 141, 142, and 144 of the Constitution specifically grant the power of judicial review in light of a wide range of jurisdictions, authorities, and responsibilities, as well as Constitutional purposes.

There have been various instances in India wherein the Supreme Court has delivered landmark judgments using the power of judicial review. These instances include *Shankari Prasad*, *Indira Gandhi*, *Keshavananda Bharati*, *Sajjan Singh*, *Minerva Mills*, and many more cases. The Hon'ble Court stated in the case of

Keshavananda Bharati that judicial review has become an inherent element of our constitution, and the High Courts and the Supreme Court have been entrusted with the power to determine the legislative competence of statutory provisions.

The scope of judicial review before Indian courts has emerged in three dimensions –

- firstly, to establish fairness in administrative action,
- secondly, to protect the guaranteed constitutional fundamental rights and
- lastly, to rule on questions of legislative competence between the centre and the states.

In *Keshavananda Bharati vs State of Kerala*, the court held:

‘As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with the view to see that the guarantees afforded by these rights are not contravened.’

Features of Judicial Review

- ❑ **Power of judicial review can be exercised by both the Supreme Court and High Courts:** Under Article 226 a person can approach the High Court for violation of any fundamental right or for any legal right. Also, under Article 32 a person can move to the Supreme Court for any violation of the fundamental right or for a question of law. But the final power to interpret the constitution lies with the apex court i.e., Supreme Court. The Supreme Court is the highest court of the land and its decisions are binding all over the country.
- ❑ **Judicial Review of both state and central laws:** Laws made by centre and state both are the subject to the judicial review. All the laws, order, bye-laws, ordinance and constitutional amendments and all other notifications are subject to judicial review which are included in Article 13(3) of the constitution of India.
- ❑ **Judicial review is not automatically applied:** The concept of judicial review needs to be attracted and

applied. The Supreme court cannot itself apply for judicial review. It can be used only when a question of law or rule is challenged before the Hon'ble court.

- ❑ **Principle of Procedure established by law:** Judicial Review is governed by the principle of "Procedure established by law" as given in Article 21 of the Indian Constitution. The law has to pass the test of constitutionality if it qualifies it can be made a law. On the contrary, the court can declare it null and void.

Constitutional Provisions for Judicial Review

There is no direct and express provision in the constitution empowering the courts to invalidate laws, but the constitution has imposed definite limitations upon each of the organs, the transgression of which would make the law void.

The court is entrusted with the task of deciding whether any of the constitutional limitations has been transgressed or not.

Some provisions in the constitution supporting the process of judicial review are:

- ❑ Article 372 (1) establishes the judicial review of the pre-constitution legislation.
- ❑ Article 13 declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.
- ❑ Articles 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.
- ❑ Article 251 and 254 states that in case of inconsistency between union and state laws, the state law shall be void.
- ❑ Article 246 (3) ensures the state legislature's exclusive powers on matters pertaining to the State List.
- ❑ Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution.
- ❑ Articles 131-136 entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union; but the court may be required to interpret the provisions of the constitution and

the interpretation given by the Supreme Court becomes the law honoured by all courts of the land.

- ❑ Article 137 gives a special power to the Supreme Court to review any judgment pronounced or order made by it. An order passed in a criminal case can be reviewed and set aside only if there are errors apparent on the record.

Judicial review of the ninth schedule

- ❑ Article 31B saves the acts and regulations included in the Ninth Schedule from being challenged and invalidated on the ground of contravention of any of the Fundamental Rights.
- ❑ However, in a significant judgment delivered in the I.R. Coelho case (2007), the Supreme Court ruled that there could not be any blanket immunity from judicial review of laws included in the Ninth Schedule.
- ❑ The court held that judicial review is a 'basic feature' of the Constitution and it could not be taken away by putting a law under the Ninth Schedule.

It said that the laws placed under the Ninth Schedule after April 24, 1973, are open to challenge in court if they violated Fundamental Rights guaranteed under the Articles 14, 15, 19, and 21 or the 'basic structure' of the Constitution

Grounds for Judicial Review

- ❑ **Constitutional Amendment:** All those amendments which are in violation of Fundamental Rights are declared void and it is held to be unconstitutional
- ❑ **Administrative Actions:** The administrative actions of the legislature are judged by various parameters. These parameters are as follows:
 - **Illegality:** The acts and decisions can be made illegal if legislature fails to follow the law properly. Therefore, an action can be made illegal if the public body has no power to make decisions on its own or if they have acted beyond the powers.
 - **Irrationality:** The courts can also interfere to quash a decision if they think that it is unreasonable as it makes it "irrational" or "perverse" on the part of the decision maker.
 - **Procedure used:** The decision-makers should act fairly in making their decisions. It is the

principle which applies only to the matters of procedure rather than the substance of decision.

Types of Judicial Review:

❑ *Reviews of Legislative Actions:*

- This review implies the power to ensure that laws passed by the legislature are in compliance with the provisions of the Constitution.

❑ *Review of Administrative Actions:*

- This is a tool for enforcing constitutional discipline over administrative agencies while exercising their powers.

❑ *Review of Judicial Decisions:*

- This review is used to correct or make any change in previous decisions by the judiciary itself.

Importance of Judicial Review:

- ❑ It is essential for maintaining the supremacy of the Constitution.
- ❑ It is essential for checking the possible misuse of power by the legislature and executive.
- ❑ It protects the rights of the people.
- ❑ It maintains the federal balance.
- ❑ It is essential for securing the independence of the judiciary.
- ❑ It prevents tyranny of executives.

Problems with Judicial Review:

- ❑ It limits the functioning of the government.
- ❑ It violates the limit of power set to be exercised by the constitution when it overrides any existing law.
 - In India, a separation of functions rather than of powers is followed.
 - The concept of separation of powers is not adhered to strictly. However, a system of check and balances have been put in place in such a manner that the judiciary has the power to strike down any unconstitutional laws passed by the legislature.
- ❑ The judicial opinions of the judges once taken for any case becomes the standard for ruling other cases.
- ❑ Judicial review can harm the public at large as the

judgment may be influenced by personal or selfish motives.

- ❑ Repeated interventions of courts can diminish the faith of the people in the integrity, quality, and efficiency of the government.

Application of Judicial review

- ❑ The Supreme Court used the power of judicial review in various cases, for example, the Golaknath case (1967), the Bank Nationalisation case (1970), the Privy Purses Abolition case (1971), the Keshavananda Bharati case (1973), the Minerva Mills case (1980), and so on.
- ❑ In 2015, the Supreme Court declared both the 99th Constitutional Amendment, 2014 and the National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional and null and void.

Judicial Activism

Judicial Activism means the proactive role played by the judiciary in the protection of the rights of citizens and in the promotion of justice in the society. In other words, it is the role played by the judiciary to force the other two organs of the government (legislature and executive) to discharge their constitutional duties.

It is an effective tool for upholding citizens' rights and implementing constitutional principles when the executive and legislature fail to do so and counters the opinion that the Judiciary is a mere spectator.

The practice of Judicial Activism originated and developed in the USA, and historian Arthur Schlesinger, Jr. coined the term in 1947.

Judicial Activism in India

In India, Judicial Activism has played an important role in keeping democracy alive. The Indian Judiciary is considered the guardian and protector of the Indian Constitution, and citizens look up to the Judiciary as the last hope for protecting their rights.

According to the Indian Constitution, Article 13 when read with Articles 32 and 226, provides the power of judicial review to the higher judiciary to declare any executive, legislative or administrative action void if it is in contravention with the Constitution.

Judicial Activism evolved through the process of Judicial Review, which can be pursued from Britain's unwritten constitution. In India, the foundation of

Judicial Activism was laid down by Justice V.R. Krishna Iyer, Justice P.N. Bhagwati, Justice O. Chinnappa Reddy, and Justice D.A. Desai.

In India, multiple times, Judicial Activism has led to a controversy concerning the supremacy between Parliament and Supreme Courts.

Source of Judicial activism

Through Judicial Review

- ❑ Judicial review is the doctrine under which legislative and executive actions are subject to review by the judiciary.
- ❑ Judicial review is an example of check and balances in a modern governmental system.
- ❑ Judicial review is adopted in the Constitution of India from the Constitution of the United States of America.
- ❑ It gives power to the Supreme Court to examine the constitutionality of any law and if such a law is found to be inconsistent with the provisions of the Constitution, the Court can declare the law as unconstitutional.

Through PIL (Public Interest Litigation)

- ❑ Public interest litigation means a suit filed in a court of law for the protection of public interest.
- ❑ Judicial activism in India acquired importance due to public interest litigation. It is not defined in any statute or act.
- ❑ In India, PIL initially was resorted to towards improving the lot of the disadvantaged sections of the society who due to poverty and ignorance were not in a position to seek justice from the courts.
- ❑ Justices P.N. Bhagwati and V.R. Krishna Ayer has played a key role in promoting this avenue of approaching the apex court of the country.

Through Constitutional Interpretation:

- ❑ Constitutional interpretation comprehends the methods or strategies available to people attempting to resolve disputes about the meaning or application of the Constitution.
- ❑ The possible sources for interpretation include the text of the Constitution, its "original history," including the general social and political context.

Through access to international statutes for ensuring Constitutional rights:

- ❑ The court refers to various international statutes in its judgements.

- ❑ This is done by the apex courts to ensure the citizens of their rights.
- ❑ International Law is referred to by Supreme Court's judgments in many cases. Example: Recently, Supreme Court reaffirmed the rights of disabled person to live with dignity in Jeeja Ghosh v. Union of India. The court underlined the Vienna Convention on the law of treaties, 1963 which requires India's internal legislation to comply with international commitments.

Importance of Judicial activism in Indian democracy:

- ❑ Judicial activism allows judges to adjudicate in favour of progressive and new social policies helping in social engineering.
 - ❑ In a modern democratic set up, judicial activism act as a mechanism to curb legislative adventurism and executive tyranny by enforcing Constitutional limits.
 - ❑ Judicial activism helps in protecting or expanding individual rights. Where the legislature and the executive fail to protect the basic rights of citizens, like the right to live with dignity, judicial activism plays an important role.
 - ❑ Failure of Legislature and Executive to discharge their respective functions results in erosion of the confidence in the Constitution and democracy amongst the citizens. Judicial activism helps in upholding faith of citizens in constitution and judicial organs.
 - ❑ Judicial activism helps in ensuring freedom of citizens and help in providing social justice to suffering masses.
 - ❑ Judicial activism fills Legislative vacuum i.e., areas, which lack proper legislation. This help country to meet the changing social needs.
 - ❑ In case of a 'hung' legislature when the government is weak and insecure, judicial activism play an important role in ensuring social justice.
 - ❑ Sometime politicians afraid of taking honest and hard decisions for fear of losing power. Judicial activism helps in plugging such active political lacunae.
 - ❑ Judicial activism helps in enhancing administrative efficiency and help in good governance.
 - ❑ Judicial activism sometimes helps in balancing
-

powers among various organs of government through judicial control over discretionary powers.

- ❑ Judicial activism allows participation of judiciary in advancement of country and upholding democracy by extending the standard rules of interpretation in achieving economic, social and educational objectives.

Examples of Judicial Activism in India

Judicial Activism, in simple words, means when judges interrupt their personal feelings into a conviction or sentence instead of upholding the existing laws. Judicial Activism in India started in 1973 when the Allahabad High Court rejected the candidature of Indira Gandhi. The other examples of Judicial Activism in India include:

- ❑ ***A.K. Gopalan Case:*** The Indian Supreme Court rejected the argument that to deprive a person of his life or liberty, not only the procedure prescribed by law for doing so must be followed but also that such procedure must be fair, reasonable and just.
- ❑ ***Golaknath Case (1967):*** The Supreme Court declared that Fundamental Rights enshrined in Part 3 are immune and cannot be amended by the legislative assembly.
- ❑ ***Kesavananda Bharati case (1973):*** The Supreme Court of India declared that the executive had no right to intercede and tamper with the basic structure of the constitution. The concept of judicial activism started gaining more power from here.
- ❑ ***Hussainara Khatoon Case (1979):*** The inhuman and brutal conditions of the undertrial prisoners were published in the newspaper. Under article 21 of the Indian Constitution, the SC accepted it and held that the right to a speedy trial is a fundamental right and directed the state authorities to provide free legal facilities to the under-trial inmates to get justice bail or final release.
- ❑ ***Sheela Barse Case (1983):*** A letter by a journalist addressing the custodial violence of women prisoners in jail was addressed to the Supreme Court. The Court treated the letter as a writ petition and took cognizance of that matter. The Supreme Court issued the appropriate guidelines to the

concerned authorities

- ❑ The Supreme Court rolled out a blanket ban on firecrackers in the Delhi – NCR area with certain exceptions in 2018.
- ❑ The Supreme Court invoked terror laws against alleged money launderer Hasan Ali Khan.

Demerits of Judicial Activism

- ❑ ***Exceeding Power:*** Judges are supposed to exercise judgement in interpreting the law, according to the Constitution. But sometimes they appear to exceed their power in deciding cases before the Court.
- ❑ ***Hampering Spirit of Constitution:*** It destroys the spirit of the constitution as democracy stands on the separation of powers between the organs.
- ❑ ***Tyranny of Unelected:*** Results in tyranny of the unelected as Judges assume central role in day-to-day decision making.
- ❑ ***Personal Agenda:*** Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.
- ❑ ***Trust Deficit:*** It diminishes the trust of the people in public institutions which can be dangerous for democracy.

Issues related to Judicial activism:

The line between Judicial activism and Judicial Overreach is very narrow. When Judicial activism crosses its limits, it led to Judicial Overreach.

- ❑ It may interfere with the proper functioning of the legislative or executive organs of government.
- ❑ It destroys the spirit of separation of powers. Thus, damage balance between various organs of government.
- ❑ Judicial activism may lead to inactivity of legislature and executive, leading to running away from duties and responsibilities which they hold for people of India.

Judicial Overreach

The distinction between judicial activism and overreach is very narrow. Judicial Overreach is what happens when judicial activism oversteps its bounds and becomes judicial adventurism. When the court exceeds its jurisdiction, it risks interfering with the legislative and executive branches of government's functions.

Judicial overreach power originates from?

Judicial overreach power originates from nowhere. In any democracy, Judicial overreach is undesirable. The spirit of separation of powers is shattered by judicial overreach.

Examples of Judicial Overreach:

Imposition of Patriotism in National Anthem Case.

- ❑ The Supreme Court on December 2016, passed its judgment in the case of Shyam Narayan Chouksey v. Union of India, which makes it mandatory, that:
- ❑ All the cinema halls in India shall play the National Anthem before the feature film starts.
- ❑ To show respect during the National Anthem, everyone in the room is required to stand.
- ❑ Before the National Anthem is performed or sung in the movie hall, the entry and exit doors must be closed so that no one can cause a disturbance. After the National Anthem has been performed or sung, the doors can be opened.
- ❑ While the National Anthem is being played in the hall, the National Flag should be displayed on the screen.

Ban of Firecrackers

- ❑ In November 2020, during the 80th All India Presiding Officers' Conference, the Vice-President of India called the Supreme Court's prohibition on firecrackers during Diwali "judicial overreach." Aspirants should be aware that there are differing perspectives on the Supreme Court's actions, thus they must learn to critically evaluate ideas.
- ❑ The 99th Constitutional Amendment and the NJAC bill
- ❑ The National Judicial Appointments Commission (NJAC), which was constituted by the 99th Constitutional Amendment, was declared unlawful by the Supreme Court. This was supposed to take the place of the collegiate system.

Censorship of the Film Jolly LLB 2

- ❑ After the movie Jolly LLB 2 was certified by the Central Board for Film Certification (CBFC), a petition was filed that claimed that this film violated Section 5B of the Cinematograph Act, 1952.
- ❑ Section 5B deals with the prevention of the certification of films that involve defamation or

contempt of court.

- ❑ The court appointed a commission that looked into it, and finally, the commission ordered four cuts in the film and also asked the CBFC to recertify the film.
- ❑ This was in violation of the Cinematograph Act, which does not give courts any power to certify or modify films.

The cancellation of telecom licenses in the 2G case

- ❑ The Supreme Court ordered the cancellation of 122 telecom licenses and spectrum awarded to eight businesses after the CBI filed an FIR against employees of the Department of Telecom in the 2G scam case.
- ❑ The Supreme Court ruled that the allocation mechanism was faulty. It also told the administration that national resources would only be allocated through auctions.

Issues with Judicial Overreach

- ❑ It contradicts the spirit of the constitution because democracy is based on the division of powers among the organs.
- ❑ It creates a divide between the legislative and judicial branches of government.
- ❑ It erodes people's faith in government institutions, which is potentially disastrous for democracy.
- ❑ Unelected judges play a central role in day-to-day decision-making, resulting in the tyranny of the unelected.
- ❑ Allowing all PILs to be heard overburdens the judiciary, which could otherwise be used to resolve pending matters in the courts.

Difference between Judicial Activism and Judicial Overreach

- ❑ The boundary between judicial activism and judicial overreach is very thin, when activism exceeds that threshold and becomes judicial adventurism, it becomes judicial overreach.
 - ❑ The impression of the individuals determines whether the action is activism or excess.
 - ❑ The judiciary, on the other hand, has always claimed that due to legislative and executive overreach, they must intervene and issue the orders.
-

Judicial Restraint

Judicial Restraint is a theory of judicial interpretation that encourages judges to limit the exercise of their power. It is the antithesis of Judicial Activism and encourages the judiciary to respect the laws or rules in the Constitution.

Whereas, when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government and breaches the principle of separation of power, it is termed Judicial Overreach.

Some instances when the mechanism of Judicial Activism turned to Judicial Overreach are:

- ❑ **The case of State of Rajasthan vs Union of India (1977)** is a landmark judgement where the Court decided not to indulge into this matter as it involved political inquiry, thereby adhering to the principle of judicial restraint.
- ❑ **In S.R. Bommai vs Union of India**, the Supreme Court held that the case pertained to political inquiry and so, the Courts ought not to meddle.
- ❑ **In Almitra H. Patel vs Union of India**, the Supreme Court observed that it was not the duty of the court to direct the Municipality about the manner in which their tasks have to be performed unless there is a clear violation. The court is empowered to only direct the authorities to conduct their activities as is laid down by the law.
- ❑ **Lodha Committee report on the Board of Control for Cricket in India:** To bring law and order back into the BCCI, a committee was set up. The recommendations were treated as Judicial Overreach as BCCI is an independent body, not controlled by any state or central government. So, the Lodha committee had no authority to declare such recommendations.
- ❑ **Christian Medical College, Vellore & Others v. Union of India and Others:** The Supreme Court barred the states from conducting separate entrance exams for medical courses and ruled that undergraduate admissions to medical courses can only be done through the NEET.
- ❑ **Swaraj Abhiyan-(I) v. Union of India & Others.:** The Supreme Court instructed the Ministry of

Agriculture of the Union of India to update and amend the Drought Management Manual. The apex court also guided the state to constitute a National Disaster Mitigation Fund within three months.

Source of Judicial Restraint

Through referring to the original intent of the makers of the Constitution:

- ❑ Judges look to the original intent of the makers of the Constitution.
- ❑ Judges refer to the intent of the legislatures that wrote the law and the text of the law in making decisions.
- ❑ Any changes to the original Constitution language can only be made by Constitutional Amendments.

Through Precedent:

- ❑ Precedent means past decisions in earlier cases.
- ❑ Judicially-restrained judges respect stare-decisis, the principle of upholding established precedent handed down by past judges.

Through leaving the legislature and executive to decide policies:

- ❑ Judicial Restraint is practised when the court leaves policy making to others.
- ❑ The courts generally refer to interpretations of the Constitution by the Parliament or any other Constitutional body.

Comparison between Judicial Activism and Judicial Restraint	
Judicial Activism	Judicial Restraint
Judicial Philosophy of going beyond the traditional role of just checking the legality of the law. Judicial activism means interpretation of the constitution to advocate contemporary values and conditions.	Judicial Philosophy of showing restraint from striking down a law or stopping interfering in the working of the other organs of the government. Judicial restraint means limiting the powers of the judges to strike down a law.
Not defined in the Constitution	Not defined in the Constitution
When there is the scope of judicial intervention to correct things.	When there is scope to maintain separation of powers and other grievance redressal mechanisms are available.
The introduction of PIL, the courts taking up suo moto cases, Banning the sale of liquor on Highways	Expressing restraint from not involving in Speakers actions in deciding anti-defection law.

Judicial activism has a great role in formulating social policies on issues like protection of the rights of an individual, civil rights, public morality, and political unfairness.	Judicial restraint helps in preserving a balance among the three branches of government, judiciary, executive, and legislative.
<ul style="list-style-type: none"> ❑ Golaknath Case 1967 ❑ Keshavananda Bharti Case 1973 ❑ The 2G Scam verdict cancelling telecom licenses 	<ul style="list-style-type: none"> ❑ State of Rajasthan vs Union of India 1977 ❑ SR Bommai vs Union of India 1980 ❑ Almitra H. Patel vs Union of India 1998

Each organ of our democracy must function within its own sphere and must not take over what is assigned to the others. Judicial activism must also function within the limits of the judicial process because the courts are the only forum for those wronged by administrative excesses and executive arbitrariness. Hence legislation enacted by Judiciary must be in the rare cases as mentioned above.