

JUDICIAL REVIEW VIS A VIS CONSTITUTIONAL LANDSCAPE IN INDIA

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I. INTRODUCTION

Judicial review is the process of examining the constitutionality of any law passed by Parliament. If an enacted law is found to violate or violate the provisions of the Constitution of India, then the High Courts or the Supreme Court of India can declare them invalid, thereby disallowing them from being enforceable. John Marshall, an American politician and lawyer, created the concept of judicial review. Rule of law is followed in India and the Constitution of India is considered as the supreme law of the land. The adopted laws should be in accordance with the basic structure of the Constitution and not with it, because it is ipso facto repealed. Although no express mention of the term "judicial review" can be found in the Constitution of India, there are several provisions of the Constitution which refer or imply the concept.

Provision of judicial review in India ensures protection of individual rights without abuse. It upholds the principles of a "living constitution". It is the power vested in the Indian Judiciary to determine whether a law or decision taken by the legislative/executive/administrative arms of the government follows constitutional principles or not. If it is found to be unconstitutional, the Supreme Court or High Courts reserve the right to declare it invalid. Both Parliamentary and State Legislature Acts can be reviewed by the Supreme Court for any constitutional inconsistencies. Judicial activism and judicial review are two fundamental concepts that define the role of the judiciary in a democratic system. Judicial activism is a philosophy that advocates a more active and interventionist role for the judiciary in society. It encourages judges to go beyond their traditional role of interpreting the law and applying it to specific cases to uphold constitutional rights and shape the law according to their understanding of justice and societal needs. Judicial review is a more restrained and reactive approach. It includes the power of the judiciary to review the actions of the legislative and executive branches of government to ensure that they are in accordance with the Constitution and the law. This power acts as a check and balance on the other branches, preventing them from overstepping their authority or violating fundamental rights.

This chapter discusses in detail the concept of judicial review in relation to the Constitution of India.

II. IMPORTANCE/ FUNCTION OF JUDICIAL REVIEW

In Indian Supreme Court and High Courts are empowered to exercise judicial review to:

1. Verify the plausibility of the term "Statutory Procedure".

2. Control body ensuring the compliance of laws passed by the government with constitutional ideals.
3. Confirm the legality and appropriateness of the administrative decision.
4. To protect citizens' basic fundamental rights under Part III of the Constitution.
5. Resolve controversial contradictions in laws and statutes for future use in similar cases.
6. Maintain the supremacy of the Constitution.
7. Enables the judiciary to act as the guardian of the Constitution by upholding its principles.
8. Prevents abuse of power by the legislative, executive and administrative branches of government.
9. Ensures the maintenance of a "living constitution" - one that can be regularly changed for the better.

III. ELEMENTS OF JUDICIAL REVIEW VIS VIS CONSTITUTION OF INDIA

Although there is no direct mention of legal review in the Indian Constitution, all agenda that support the qualifying regulation that violates fundamental rights and is irregular accompanying constitutional rule can be challenged in the apex court.¹ The Supreme Court and High Courts have the power to exercise judicial review against one of them for violation or taint of the glorious fundamental rights². The Apex Court reviews some fatefully forgotten legislatures where leaders are entitled to ask the Court for review.³ The Supreme Court reviews neglected/encroached areas by legislation and Parliament to maintain pre-constitutional regulations.⁴ The power of judicial review extremely authenticates courts to curtail the other two organs,⁵ which can be regarded as the essential features of the mentioned provisions of the Constitution.⁶ In *LNJ Power Ventures Ltd. v. Rajasthan Electricity Regulatory Commission*, Rajasthan High Court has directly observed that the power of judicial review, which has become absolute in finding and no laws can have the scope to give any organ of the democracy a particular clothed area of authority.⁷

IV. GROUNDS FOR JUDICIAL REVIEW

- (1) Jurisdictional error
- (2) Irrationality/unreasonableness'
- (3) Procedural

V. TYPES OF JUDICIAL REVIEW

- (1) Legislative decision
- (2) Administrative decision

¹ Article 13, Constitution of India, 1950

² Art 32 and 226, Constitution of India, 1950

³ Articles 131-137, Constitution of India, 1950

⁴ Article 143, Constitution of India, 1950

⁵ Articles 245 and 246, Constitution of India, 1950

⁶ Article 372 (1), Constitution of India, 1950

⁷ Civil Writ Petition No. 7312/2019

(3) Court decisions

VI. LIMITATIONS ON JUDICIAL REVIEW

1. Judicial review lies only to Supreme Court and High Courts and not lower courts.
2. The Courts cannot interrupt any political questions or matters nor make or enforce laws, it only limits the functioning of government.
3. It only makes the authorities reconsider their decision and not its reversal.
4. Its time-consuming nature cumberosomes the entire process causing delays.

VII. DOCTRINE OF SEPARATION OF POWERS

The Indian Constitution is a classic example of the adoption of parliamentary and federal elements simultaneously. The parliamentary form of government implies legislative supremacy and the federal character requires the supreme judiciary to be able to exercise judicial review. The roots of the problem lie in the design of the Indian Constitution.⁸

The power to determine whether a law is consistent with the written Constitution and to strike it down if it is not was first exercised by Chief Justice Marshall of the US Supreme Court in the early 19th century in *Marbury v. Madison*.⁹ In India the power was assumed by the Federal Court under 1936 Constitution, and then by the Supreme Court in independent India.

Activism has been demonstrated by the Court in abandoning all pretense of administering justice in accordance with the law and freely indulging in non-textual scrutiny. In this kind of review, the court can strike something down simply because it appears repugnant to a majority of the judges on the bench or repugnant to some spirit permeating the Constitution.¹⁰ The change here is that the courts ignore the distinction between judicial and non-judicial questions and intervene in areas which are to be decided by the political branches of government on political and policy considerations and for which their responsibility is political, not legal.¹¹

To be accused of judicial activism in this matter would mean that the court failed to observe this limitation and began to function as if it were a roving miracle team with omnipresent jurisdiction listening to every person and investigating every matter brought to their attention by any means possible. , to abolish all restrictions usually associated with the exercise of the power of constitutional review; and usurped politics.¹²

The theory of judicial review has kept pace with global developments, and scholars have sought to answer how judicial review can transcend its traditionally understood role in

⁸ Available at <http://www.hardnewsmedia.com/portal/2006/02/341> (last visited August 14, 2007).

⁹ U.S. 137 (1803).

¹⁰ Dr. Udai Raj Rai, "In defence of judicial activism: A politico-legal analysis of the doctrine of basic structure", *Indian Juridical Review*, Vol. III, No.1, 2006, NUJS, Kolkata, p.4.

¹¹ G. Marshall, *Positivism, Adjudication, and Democracy in Law, Morality, and Society*, Ch. 7 (P.M.S. Hacker & J. Raz (eds.), Clarendon Press, Oxford, 1997).

¹² S.P.Sathe, *Judicial Activism In India* (Oxford University Press, 2002).

solving contemporary problems.¹³ On another level, the age-old debate rages over whether there should even be judicial review by unelected judges in a constitutional democracy.¹⁴ This paradox can be partly attributed to the fact that the study of judicial review has splintered into the study of judicial review of specific issues that arise in the Constitution, such as judicial review of socio-economic rights, judicial review of constitutional amendments, and judicial review in examination of matters relating to federalism and democracy, with little attention to whether and how they all fit together to form a coherent theory of judicial review. India is perhaps the ideal place to observe this paradox. The role of the Indian Judiciary is no longer limited to striking down legislative or executive action, but also includes evaluating the constitutionality of constitutional amendments and directions, bordering on policy-making, on various matters. Despite this, the court regularly questions its legitimacy to exercise its constitutionally mandated role of overturning state actions that are challenged as violations of fundamental rights on the grounds of democratic deficit or judicial competence.¹⁵ The legislature is the only body of government where diverse voices are represented. In the exercise of its functions, the legislature must respect and realize the right to political equality, by hearing and involving diverse voices in deliberations, and the legislature analyzing whether laws or executive actions violate fundamental rights. It is pertinent to note that the Indian judiciary often applies deferential standards on the basis that the legislature must be seen to have understood and considered the needs of the people.¹⁶

In the Indian context, judicial review can serve as an effective deterrent against abuse of power and promote better deliberation in Parliament.¹⁷ Article 122 of the Constitution does not serve as a blanket prohibition for courts to inquire into procedural matters but is limited to irregularities in procedure and refers to procedure designed by Parliament as permitted.¹⁸ The Supreme Court of India has held that Article 122 does not prevent a court from examining procedural irregularities which different from mere procedural

¹³ See David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis L Rev 1313; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (Univ Chicago P 2018); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge UP 2013). See also Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2009); Katherine Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' [2010] *Int'l J Const L* 385.

¹⁴ E. Delaney, 'The Federal Case for Judicial Review' [2022] *Oxford Journal of Legal Studies*; Giuliano Amato, Benedetta Barbisan, and Cesare Pinelli (eds), *Rule of Law vs. Majoritarian Democracy* (Bloomsbury 2021).

¹⁵ V. Narayan and J. Sindhu, 'A Historical Argument for Proportionality under the Indian Constitution' (2018) 2 (1) *Indian Law Review*; A. Chandra, 'Proportionality in India: A Bridge to Nowhere' (2020) 3(2) *University of Oxford Human Rights Hub Journal*; T. Khaitan, 'Beyond Reasonableness' (2008) 50(2) *Journal of India Law Institute*.

¹⁶ See pt III of this article; *Charanjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *Ram Krishna Dalmia v S.R. Tendolkar* AIR 1958 SC 538 (on reasonable classification and presumption of constitutionality); *A.K. Roy v Union of India*, AIR 1982 SC 710 (upholding preventive detention even after the recognition of the due process under art 21 in *Maneka Gandhi v Union of India* (1978) 1 SCC 248 : AIR 1978 SC 597); *N.B. Khare v State of Delhi* AIR 1950 SC 211 (upholding externment on grounds of subjective satisfaction); *Babulal Parate v State of Maharashtra* AIR 1961 SC 884 : (1961) 3 SCR 423; *Madhu Limaye v SDM, Monghyr* (1970)

¹⁷ A. Kavanagh, 'The Constitutional Separation of Powers' in D. Dyzenhaus & M. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016).

¹⁸ Arts 118(1), 243-O, 262, 363. Constitution of India, 1950 in opinion of Justice Chandrachud in *K.S. Puttaswamy v Union of India* (n 27) [1069]; V. Narayan and J. Sindhu (n 4) 70-73.

inaccuracies.¹⁹ This approach is particularly important in the Indian context where there is a tendency to apply deferential standards of review or stricter standards of review, namely indirect judicial review. In this regard, the test of proportionality to which the Supreme Court of India is directed as the dominant standard of review may be particularly appropriate in the performance of the Court's function of judicial review, providing a precise set of questions dealing with the constitutionality of measures which the legislature must consider at the time of making a law and the judiciary must ask at the judicial review stage.²⁰

VIII. REINING OF THE JUDICIARY'S POWERS

The move by the Supreme Court of India towards the enforcement of socio-economic rights through the "public interest litigation movement" in the 1970s is an early example of responsive judicial review, which is located in Part IV of the Constitution, referred to as the directive on principles of state policy between enforceable and unenforceable rights based on and follows the distinction between positive and negative rights in constitutional theory.²¹ The court is responding to the inability of the legislature and the executive in India to shake off the burden of inertia and state apathy by asserting socio-economic rights through its PIL movement, where it reads fundamental rights - such as the right to food, right to housing and right to water - as part of the right to life under of Article 21,²² which is a bare necessity for a dignified life,²³ is the closing of food shops in famine-like conditions,²⁴ the prevailing number of forced labor,²⁵ and the eviction of slum dwellers without notice and assistance in rehabilitation²⁶ to gain sociological legitimacy.²⁷ However, the court's PIL movement crossed the boundaries of fundamental socio-economic rights to include issues of corruption and governance and to protect the "minimum core of democracy",²⁸ directions issued against fundamental rights such as ordering the playing of the national anthem in cinemas halls,²⁹ identifying illegal immigrants in the state Assam under the Foreigners Act,³⁰ evict protesters who block roads causing public nuisance,³¹ PIL petitioners now belong to privileged classes, etc.³² In contrast, the theory of responsive judicial review would allow for a more nuanced and considered approach — the court would rightly expand judicial review in the face of apathy or the inaction of the state, but it would also have to take into account its

¹⁹ Raja Ram Pal v The Speaker, Lok Sabha (2007) 3 SCC 184.

²⁰ Malpe Vishwanath Acharya v State of Maharashtra (1998) 2 SCC 1 : AIR 1998 SC 602

²¹ Directive Principles of State Policy, Part IV, Constitution of India, 1950.

²² Olga Tellis v Bombay Municipal Corpn (1985) 3 SCC 545; Narmada Bachao Andolan v Union of India (2002) 10 SCC 408 : AIR 2000 SC 3751, People's Union for Civil Liberties v Union of India (2011) 12 SCC 675.

²³ Francis Coralie Mullin v UT of Delhi (1981) 1 SCC 608 : AIR 1981 SC 746

²⁴ People's Union for Civil Liberties v Union of India (2011) 12 SCC 675 over the course of 16 years.

²⁵ Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161.

²⁶ Olga Tellis v Bombay Municipal Corpn (1985) 3 SCC 545.

²⁷ U. Baxi, The Indian Supreme Court and Politics (Eastern Book Company 1985).

²⁸ Shyam Divan 'Public Interest Litigation' in S. Choudhry, M. Khosla and P.B. Mehta (eds), The Oxford Handbook of the Indian Constitution (Oxford University Press 2016).

²⁹ Shyam Narayan Chouskey v Union of India 2016 SCC OnLine SC 1411 which the court later walked back.

³⁰ Harsh Mander v Union of India, Writ Petition (Civil) 1045 of 2018.

³¹ Amit Sahni v Commr. of Police (2020) 10 SCC 439 : 2020 SCC OnLine SC 808.

³² 4 P. Chitlakar and V. Gauri, 'The Recent Evolution of Public Interest Litigation in the Indian Supreme Court' in S. Krishnaswamy and others (eds),(UP 2019) 77–91, 85.

limitations in terms of legitimacy and authority, which concerned the members of the Constituent Assembly. The judiciary can require the government to come up with a plan that will be enforced³³ with greater legitimacy, impose strong corrective measures that the government complies with the plan it has put forward, and address further inertia through follow-up hearings as well as sanctions such as costs if orders are not implemented. Until then, judges at the individual level should adopt a responsive judicial review approach by analysing before intervening whether the petition involves a fundamental right or a fundamental problem related to the minimum core of democracy and justifying the remedy applied, especially when choosing a strong remedy, such as imparting positive directions.³⁴

IX. LANDMARK CASES OF JUDICIAL REVIEW IN INDIA

The decisions in below given **landmark cases in India** reveal that the judiciary itself has been conscious enough while exercising the discretionary power of judicial review thereby avoiding judicial overreach and encroachment in its best terms.

- **Golaknath vs State of Punjab:** The Supreme Court ruled that the Parliament does not have the power to amend Fundamental Rights.
- **Kesavananda Bharati vs State of Kerala:** The Supreme Court ordained that the Parliament may amend a clause of the Constitution as long as it doesn't violate its basic structure.³⁵
- **Minerva Mills vs Union of India:** The Supreme Court asserted that the Parliament cannot have absolute and unlimited power to amend the doctrines of the Constitution.
- **Waman Rao vs Union of India:** The Supreme Court questioned the constitutional validity of Articles 31A, 31B and 31C (related to acquisition of property). This led to amendment of these laws to avoid future disparities.
- **Shankari Prasad v. Union of India :** the Supreme Court held that the Constitution can be amended and essential rights cannot be modified in a manner which will touch the elementary construction of the Constitution.³⁶
- **R. Coelho v State of Tamil Nadu:** The Court held that judicial review was considered an integral part of the Indian Constitution.³⁷
- **P.U.C.L. V Union of India:** the Supreme Court in this historic judgement that to disregard or disobey the decision given by the Court, the lawmakers of India have no power to ask for the instrumentality, if the legislature has influence over the subject matter.³⁸

³³ Katherine Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' [2010] Int'l J Const L 385.

³⁴ Swaraj Abhiyan v Union of India (2018) 12 SCC 170.

³⁵ (1973) 4 SCC 225.

³⁶ AIR 1951 SC 458

³⁷ AIR 2007 SC 861

³⁸ AIR 1997 SC 568

- **Mitthu Singh v. State of Punjab:** The Apex Court struck down Sec. 303 of Indian Penal Code, 1860 being unconstitutional to Art. 21 of the Constitution.³⁹
- **Santosh Nanta vs State of H.P. & Ors.:** The Himachal Pradesh High Court observed that judicial review if exercised in overlooking any decision that is made by expert domains of a selection committee for a reasoned selection process to be carried out, would be considered to be tantamount to treading on a thin sheet of ice and should be avoided.⁴⁰
- **Nallacheruvu Obulesu v. State of Andhra Pradesh & ors :** Andhra Pradesh High Court observed that courts' power to exercise judicial review in cases of dispute originating from tender invitation conditions, stands limited.⁴¹

X. PERSONAL AUTONOMY AND DIGNITY OF JUDICIARY.

The court reiterated that the enforceability of judicial review is a duty.⁴² In the same vein, the Court ruled that it must ask the government probing questions in matters of liberty and equality.⁴³ Paradoxically, however, there is an opposite current of precedent in India that advocates weak standards of evaluation,⁴⁴ deference,⁴⁵ and consideration of public opinion as grounds for avoiding or reversing decisions.⁴⁶ The choice of these conflicting currents, which can lead to diametrically opposed results on a given question of fundamental rights, renders the position of judicial review in India extremely precarious. In this context, matters of dignity and autonomy, such as LGBTQI rights, transgender rights, and abortion, which are amenable to sensitive judicial review, should be mediated through different standards of review, weak formal remedies, and deference and deferral to mitigate potential democratic backlash or reversed Inertia. However, it is possible that the constitution may address these issues differently and legitimize judicial interventions in matters of personal autonomy and dignity precisely because of the anti-majority nature of the court. However, due to the particular persistence of conflicting precedents on the role of the judiciary in India, which may lead the court to opposite results, it is necessary to clarify that responsive judicial review, specifically remedies and deference, should operate within the framework of the Indian Constitution.⁴⁷ This discretion should be interpreted to mean the option to choose the remedy best suited to the enforcement of the right, and not a blanket discretion to choose weaker remedies that do not achieve that result without any justification.⁴⁸ However, in a transformative constitution, the court would be in breach of duty if it retreated from a decision that is

³⁹ AIR 1983 SC 473

⁴⁰ CWPOA No.450 of 2019

⁴¹ 2023 LiveLaw (AP) 16.

⁴² State of Madras v V.G. Row AIR 1952 SC 196; State of Punjab v Khan Chand AIR 1974 SC543; Om Kumar v Union of India (2001) 2 SCC 386; Shayara Bano v Union of India (2017) 9SCC 1.

⁴³ K.S. Puttaswamy v Union of India (2017) 10 SCC 1; State of Maharashtra v Indian Hotel & Restaurants Assn (2013) 8 SCC 519 : AIR 2013 SC 2582.

⁴⁴ Chiranjit Lal Chowdhuri v Union of India AIR 1951 SC 41

⁴⁵ Ram Krishna Dalmia v S.R.Tendolkar AIR 1958 SC 538

⁴⁶ Kantaru Rajeevaru v Indian Young Lawyers Assn (2020) 2 SCC 1.

⁴⁷ P. Bobbitt, (n 7); C. Chandrachud, 'Constitutional Interpretation' in S. Choudhry, M. Khosla and P.B. Mehta (eds) (Oxford University Press 2016).

⁴⁸ Anuradha Bhasin v Union of India (2020) 3 SCC 637 : AIR 2020 SC 1308 .

legally legitimate on the basis of widely felt opposition that is not reasonable. Instead, the court can use dialogic review to discuss with the government how to raise awareness to reduce negative reactions and ensure that the government gets any potential violence under control.⁴⁹ Finally, regarding standards of review and compliance, a court should not apply weak standards of review (as it often does) without justifying why it is consistent with the relevant constitutional provision and the facts of the case.⁵⁰ A possible justification would be the finding that the legislator has sufficiently discussed the constitutionality of the law so that the court should not replace these conclusions of the legislator. The state must explain what kind of sensitive information will be affected or affected if the court addresses the particular issue at hand.⁵¹

CONCLUSION

Judicial review is often viewed from an all-or-nothing perspective. Need to combine a principled and pragmatic approach while applying judicial review to mitigate risks to democratic responsiveness while remaining conscious of the court's own competence and legitimacy. The Indian Constitution provides an excellent example of how judicial review can vary across issues such as civil and political rights, socio-economic rights, and judicial review of legislative process. However, the gaps in academic literature in India on the contours of the judicial role and its legitimacy under the Indian Constitution must first be addressed to ensure that a theory of responsive judicial review does not become a theory promoting unguided discretion on the part of the judiciary. The system of judicial review serves as the conscience keeper of our Constitution. It keeps the faith in the Judiciary alive. It reiterates the fact that even the government's actions are not absolute and may be subjected to review. As Chief Justice of India, N.V. Ramana, rightly stated, "If the judiciary does not have the power of judicial review, then the functioning of democracy in this country would be unthinkable".⁵² Judicial review is the most important and powerful tool provided in the hands of senior courts by the Indian Constitution. It keeps a check on the other organs of the government so that they function properly without unnecessary interference. Thus, judicial review stands as a requirement for time immemorial and is also considered to be the basic structure of the Indian Constitution.⁵³

The roots of the confrontation between Parliament and the Supreme Court lay in the Constitution itself. It can be perceived from the fact that the Constitution gives contradictory signals about the value and status of judicial review and it appears that framers had a pathological faith in positivism and textualism. At present, the question is not whether any creative interpretation of the court, blocking unfettered discretion for Parliament's power of amenability has done some good against the uncertainties of majoritarian politics, or whether the Constitution is safer in the hands of the Court than of Parliament; the question is whether 'the people' operating through a representative parliament are helpless to determine the structure and quality of governance and whether a small, often divided, set of appointed judges can replace democratic judgment on 'basic

⁴⁹ Indian Young Lawyers Assn v State of Kerala (2019) 11 SCC 1.

⁵⁰ State of Gujarat v Shri Ambica Mills Ltd. (1974) 4 SCC 656 : AIR 1974 SC 1300.

⁵¹ Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33

⁵² <https://unacademy.com/content/karnataka-psc/study-material/polity/judicial-review-in-india/>

⁵³ <https://blog.ipleaders.in/judicial-review-under-the-indian-constitution/>

features', whatever it means. One cannot forget that the infamous judgment in *ADM Jabalpur*⁵⁴ also came from the very same court that unhesitatingly approved the suspension of the Right to Life and Liberty under Emergency laws. The difficulty arises because of the uncertainty of so-called 'basic features' and the inclination of the court to change its interpretation by narrow majorities from time-to-time. Therefore, it is legitimate to ask whether we are heading for an arrangement that is contrary to the spirit of parliamentary democracy and concentrates unfettered power in one institution, which, incidentally, is not an elected body. Can one proceed on the assumption that judges cannot go wrong and what they decide would always be in the best interests of the people? Or is it that 'the people themselves' do not know their interests and they need to be told by an expert body? These are discomfoting questions that loom large in the public mind and present themselves whenever controversial decisions on popular issues are rendered by the Court.⁵⁵

Former Chief Justice A.S. Anand in his Millennium Law Lectures, while defending judicial activism, emphasised the need for caution to ensure that activism does not become 'judicial adventurism'. Otherwise, he warned, it might 'lead to chaos and people would not know which organ of the state to look for to stop abuse or misuse of power'. He reiterated the principle that 'the role of the judge is that of a referee. One can blow the judicial whistle when the ball goes out of play; but when the game restarts one must neither take part in it nor tell the players how to play.' Justice Anand further added: The judicial whistle needs to be blown for a purpose and with caution. It needs to be remembered that Court cannot run the government. The Court has the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation.⁵⁶

Thus, the confrontation between Parliament and the Supreme Court cannot be resolved by declaring that in India the Constitution is supreme. This is because of the vastness of the power of judicial review the courts have assumed, and the limitations on the amending power of Parliament, again developed through judicial interpretation. The proposition that 'the Constitution is what the judges say it is' cannot be accepted under any democratic scheme of governance, particularly when there is no clarity or certainty as to the nature, number and scope of unamendable basic features of the Constitution. In the present situation, the need of the hour is that a national debate should be initiated between the three wings of the government, on a common platform available, on the scope and procedure of amendment of the so-called 'basic feature'.

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⁵⁴ MANU/SC/0062/1976: AIR 1976 SC 1207

⁵⁵ N.R. Madhava Menon; *Basic Structure: After 30 years*, in Pran Chopra (ed), *The Supreme Court versus the Constitution*,

⁵⁶ Kerala High Court Advocates' Association. 37 1977[2] WLR 234 at 267.

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