JUDICIAL REVIEW : A COMPARATIVE LEGAL STUDY

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ABSTRACT

This article states the position of judicial review in U.S.A., U.K. and India by doing a comparative legal study of the origin, development, working and the current position of Judicial Review in these countries. The true nature of democracy is to maintain such balance in power that no branch of government can exercise its powers exuberantly. The need for check and balance arises so that each branch of the government does not encroach upon the functions and power of the other. Judicial review should work in a manner as to protect the law making power of the legislature rather than abducting such power of the legislature. Therefore, the article criticizes the concept of judicial review based on the loopholes and lack of necessary laws in the governments, making it a powerful yet useless weapon. Furthermore, it tries to collectively compare the judicial reviewing powers of these powerful countries side by side.

However, the statements made against the working bodies with regard to judicial review, are not absolute or unconditional. In this article, it is premised on a limited number of conditions, including the governments in question having a good working democratic & administrative

Lastly, the article ends by considering what should be done in Indian scenario, in order to learn from the mistakes and failures present in these organizations of the government.

KEYWORDS: Judicial Review, Constitution, Government, Administration, Supreme Court.

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1. INTRODUCTION

In democratic countries judicial review plays the role of the guardian, looking after the rights of the citizens and protecting them from undue power exercised by the governments. Many countries with written constitutions have the doctrine of judicial review incorporated. It means that the constitution is the supreme law of the land and any law inconsistent therewith is void. The courts perform the role of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. The responsibilities which a court carries in a country with a written constitution are much more difficult when compared to the court without a written constitution. In a country like Britain, which does not have a written constitution, the court interprets the laws but not the constitution. But in a country like India which has a written constitution, the courts interpret the provisions of the constitution. The courts thus act as the supreme interpreter, protector and guardian of the supremacy of the constitution by keeping all authorities-legislative, executive, administrative, judicial or quasi-judicial, with the legal bound. The judiciary has the responsibility to scrutinize all governmental actions in order to assess whether or not they conform to the constitution and the valid laws made there under. This action of the courts of assessing laws and regulations made by the legislature thus gave rise to a conflict between the judiciary and the legislature. It raised the question whether judiciary is compatible with democracy or is it intervening with the democratic process of a nation. Indian judiciary and legislature had seen many such scenarios over the years after the independence. And a compatible solution has not yet been arrived between the judiciary and the legislature.

2. BASIC UNDERSTANDING OF DOCTRINE OF JUDICIAL REVIEW

2.1 Concept of Judicial Review

'Judicial review' refers broadly to the jurisdiction of courts to keep the public authorities within their respective domains. Judiciary could only intervene and not interfere. The power is neither a police power nor that of a teacher. The precise role is that of an umpire, who has to closely watch whether the executive and the legislature are complying with the constitutional and statutory limitations and mandates while exercising their powers and, if not, to blow the whistle and stop their moves.

The power of judicial review only looks into the legality, rationality and procedural propriety of the decision and not into the contents, the quality or wisdom of the decision. It is a power to verify whether the decision making authority is competent to take that decision, and whether the decision is taken in a fair and just manner complying with the procedural requirements. Practically, the power of judicial review is more concerned with the manner in which the decision is taken than with the decision itself. Wherever legal limitations are imposed upon the organs of government, there has to be an adjudicator to decide the disputes arising therefrom and that role is entrusted with the judiciary, which alone is competent to interpret the legal instruments.[1]

Judicial review is, in fact, not 'judicial control' of administration, but it is 'judicial protection' of individual against mal-administration.[2] But, since the courts provide legal protection to the citizens against the administration, in a system where challenge against administrative decisions is frequent and common, in an indirect way, the courts control the administration in a substantial manner.

It is not as if the entire administration is under a systematic or institutionalized control of the judiciary. Therefore, judicial review does not amount to judicial supremacy, but only defend the constitutional supremacy and that of rule of law.

2.2 Origin of Judicial Review

The concept of separation of powers - the corner stone of rule of law and the fountain-head of judicial independence - is the basis of the modern judicial system and the soul and strength of the doctrine of judicial review. The history of western political thought portrays the development and elaboration of a set of values- justice, liberty, equality, and the sanctity of property- the implications of which have been examined and debated down through the centuries. Equally important are the institutional structures and procedures which are necessary if these values are to be realised and reconciled with each other.

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[1] Durga Das Basu, *Limited Government and Judicial Review* 291 (Tagore Law Lectures, S C Sarkar & Sons, Calcutta 1972)

[2] Ederhard Schmidt Abmann, "Basic Principles of German Administrative Law" in M. P. Singh *et. al. 405, Comparative Constitutional Law*, (Eastern Book Company, Lucknow, 1989)

The rudiments of the modern concept of judicial review appeared in England for the first time in the seventeenth century.[3] In England the trend-setter of judicial review was the constitutional culture campaigned and asserted by the school of constitutionalism, spearheaded by the English lawyers. The King's power of reviewing or testing the propriety of the state decisions i.e. his own decisions came under challenge in a slow and gradual process. The common law school believed that the King is not above the law and that he is also bound by law. This faith in the letters of law, as opposed to the men, is the essence of common law and the subsequent innovation of the 'rule of law'. The traditions handed down from the constitutional struggles of the seventeenth century created an all but invincible prejudice against encroachments upon the province annexed by the common law courts in the field of Public Law.[4] In the process of creating a welfare state, the state started creating numerous public authorities to achieve the goal of social welfare and such public bodies and officials had to be vested with duties and powers to achieve those ends. The sum total of the special legal authority thus created by the state and vested on the public officials and authorities is termed as 'official power'.[5] It is this 'official power' that is being subjected to judicial review on the administrative as well as legislative spheres as and when called for by the aggrieved citizens.

2.3 Jurisprudence of Judicial Review

The concept of Judicial Review was recognised for the first time by Lord Coke in *Dr. Thomas Bonham* v. *College of Physicians*[6], where he observed that "in many cases, the common law will control Acts of Parliament", he intended the kind of Judicial Review. The concept thereafter has truly come into force when it was expounded in *Marbury* v. *Madison*[7] by Marshall C.J., where he asserted, "it is emphatically the province and duty of the judicial department to say what the law is." The power of the courts to invalidate a law made by the Legislature in case it conflicts with the mandate of the Constitution emanates from the other part of the juristic nature of the Constitution, namely, that it is the 'supreme law of the land.'

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[3] Jaffe and Henderson, *Judicial Review and the Rule of Law: Historical Origins* 72 (L.Q.R. 345, 1956); Jaffe, *Judicial Review: Constitutional and Jurisdictional Pact* 70 (L.R. 953, 1957).
[4] S. A. de Smith, Woolf & Jowells, *Principles of Judicial Review* 54 (Sweet & Maxwell, London 1999).
[5] C.T. Emery and B. Smythe, *Judicial Review: Legal Limits of Official Power* 15 (Sweet & Maxwell, London 1986).
[6] See 8 Co. 114a, 77 Eng. Rep. 646 (C.P. 1610).
[7] 5 U.S. 137.

While governing the questions involving the exercise of discretion, Marshall pointed out – "the discretion of the courts is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and once that law course is discerned, the courts are obliged to follow it. What that means is that any motion to the discretion of the court is a motion not to its inclination, but to its judgment, and its judgment is to be guided by sound legal principles."[8]

The principles confirmed by Marshall on judicial review can be summed up as –

- Judicial review is an implied power under a written constitution.
- By presuming that the act is always valid and also by using this power of judicial review sparingly, there is less possibility of exploitation of the power.
- While reviewing any legislation the judges should restrict themselves to the legality of the law and not the morality and adhere to the boundaries of the judicial power and this power should not contravene with the power of the executive and legislature.

It is in the background of these principles that judicial review has developed under the Modern Constitutional Law.

3. JUDICIAL REVIEW IN THE UNITED STATES OF AMERICA

The American Constitution, which is written and federal democratic in spirit, is based on the Rule of law and the individual liberty is protected. It provides "separation of powers with check and balances which are the heart and soul of the American Constitution". One of the fundamental processes in the America to determine the validity of law is Judicial Review. In the United States, the judiciary can check the actions of Congress and the action of the President, if it is contrary to the Constitution then the judiciary will declare null and void. The Constitution of the United States doesn't provide express provisions for Judicial Review. But, the power of judicial review to declare the laws unconstitutional and to scrutinize the validity of law implicitly incorporated in the Article III and IV.

[8] Osborn v. Bank of the United States, 22 US 738 (1866).

According to the Bernard Schwartz "*The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America*."[9]

Justice Frankfurter in *Gobitis*[10] case "Judicial review is a limitation on popular government and is a part of the Constitutional scheme of America."

American judicial review is a peculiar government feature among the nation of the world. The concept of judicial review has its foundation on the doctrine that the constitution is the Supreme law.

3.1 Objectives of Judicial Review in U.S.

The main objectives of Judicial Review in the United States are as follows:

- To declare the laws unconstitutional if they are contrary to the Constitution.
- To defend the valid laws which are challenged to be unconstitutional.
- To protect and uphold the Supremacy of the Constitution by interpreting its provision.
- To save the legislative function of Congress being encroached by other departments of the Government.
- To check the action of Congress and the State Legislature for them delegating the essential legislative functions to the executives or to check Congress from delegating its legislative function to the State Legislatures.[11]

3.2 Origin of Judicial Review in U.S.

Doctrine of Judicial review in USA is a fundamental feature of the Constitutional system. Dr. Bonham's case[12] is said to be great heritage to the American system of judicial review. According to Willis " *Dr. Bonham's case was soon repudiated in England , but the doctrine announced in Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that*

[9] Bernard Schwartz, *The Powers of Government* (2nd edition, 1963).
[10] Minersville School District v. Gobitis 310 U.S. 586.
[11] C. D. Jha *et. al., Judicial Review of Legislative Acts* 195 (2nd edition, 2009).
[12] *Supra* note 6.

it was applied by the US Supreme Court in the decisions of cases coming before it."[13] But, in 1794, *United States* v. *Tale Todd*[14] was decided by the Supreme Court of the United States in which Act of Congress was declared unconstitutional. It is said that this was the first case in which the Supreme Court a statute of Congress unconstitutional. Again, in 1796, in *Hylton* v. *United States*[15], Chief Justice Chase observed that "It is necessary for me to determine whether the court constitutionally possesses the power to declare an Act of the Congress void on the ground of its being contrary to and in violation of the Constitution, but if the courts has such powers, I am free to declare it but in a clear case.

In 1803, the power of judicial review was again used with *(en banc)* judicial authority to declare the Act of the Congress unconstitutional in the historic landmark case of *Marbury* v. *Madison*[16].

3.3 System of Judicial Review in U.S.

There is no express provision in the Unites States Constitution for judicial review. The system of judicial review was basically started in the United States in the case: *Marbury* v. *Madison*[17]

Issues:

- Does the Supreme Court have original jurisdiction to issue writs of mandamus?
- Can Congress expand the scope of the Supreme Court's original jurisdiction beyond what is specified in Article III of the Constitution?
- Does the Supreme Court have the authority to review acts of Congress?

Held: On determining the issues the Supreme Court held that it has no jurisdiction to issue Mandamus because to issuing writ of Mandamus, court should have the appellate jurisdiction. Further court held that Congress cannot expand the scope of the Supreme Court's original jurisdiction beyond the scope Article III of the Constitution. The Supreme Court observed that Supreme Court has the authority to review acts of Congress and determine whether they are valid

[13] *Supra* note 6 at page 196.
[14] 15 Washington and Lee Law Review. 220. 230 (1991). *available at* : http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=3848&context=wlulr (last accessed on Feb 3, 2020).
[15] 3 U.S. 171.
[16] *Supra* note 7.
[17] *Supra* note 7.

or not. It is inherent power of the Supreme Court to determine the validity of any law. The Supreme Court declared Section 13 of the Judiciary Act of 1789 unconstitutional and dismissed the writ petition and hence Madison didn't get the commission.

In this way, Supreme Court of US formulated the concept of Doctrine of Judicial Review. This landmark judgment was given by *Chief Justice Marshal*. In USA, before this judgment Supreme Court didn't declare any action of Congress unconstitutional en boc (with full judicial authority). This case provides the foundation of power of judicial review to the Supreme Court to determine the validity of any legislative action of Congress. It also provides great extent of power of judiciary to maintain check and balance.

Again in 1857, *Dred* v. *Scott*[18] the Congress enacted Missouri Compromise Act, 1820 which provides compensation to the owners of the slaves if they freeing the slaves. Dred Scott was an enslaved African American who had taken by his owners to free State. Due to the Act of the Congress he had attempted to sue for his freedom. The Court held that whether enslaved or free, could not be American citizens and therefore had no right to sue in federal court, and Federal Govt. had no power to regulate the slavery to the territories because the Fifth Amendment to the Constitution barred Congress from taking property without "due process. *Chief Justice Roger B. Taney* held that Act of Congress unconstitutional and denied the Scott request. This judgment of Justice Taney was against the spirit of the nation and very much criticized by the American people.

3.4 Current position of Judicial review in U.S.

After *Marbury's*[19] case the expansion of judicial review in the United States of America in very broad in nature, its widened scope of judicial review in the Unites States in present scenario. The Supreme Court in the recent case of *Reed* v. *Town of Gilbert, Arizona*[20] passed an ordinance concerned with Gilbert town which prohibits the display of outdoor sign except some signs which are *political signs* which defined as designed to influence the outcome of an election, and *ideological signs* which defined as communicating ideas and another one *directional signs* which

[18] 60 U.S. 393.
[19] *Supra* note 7.
[20] 135 S. Ct. 2218.

defined as directing the public to church or other qualifying event. This ordinance was challenged by a church and its priest.

Justice Clarence Thomas on behalf of the majority held that distinctions drawn by the ordinance were impermissible. It was held that all "content based law" requires the exacting form of judicial review and strict scrutiny. Court further held that content based law which are target speech based on its communicative content are presume to be unconstitutional and may be justified only if the Govt. proves that they are narrowly tailored to serve compelling State interests.[21]

4. JUDICIAL REVIEW IN THE UNITED KINGDOM

In England due to the absence of a written Constitution and the prevalence of the Doctrine of Parliament Sovereignty, the Courts of England have refrained from striking down a primary legislation and the power of judicial review is exercised only in the case of secondary legislation.

A.V. Dicey defines Parliamentary sovereignty as,

"The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e., as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

As per Dicey the function of the judges is to give effect to the intentions of the Parliament. They are to expound, explain and give effect to the legislations that come before them.

This view of Dicey's does not cover one of the important facts of rule of law and that of the law making that even though the courts cannot review the legislation made by the parliament, they can view the procedure undertaken by the parliament to make the legislation. It is the duty of the court to ascertain whether the legislation adheres to the rule of law of law making. In the *Wauchope's* case Lord Campbell said this:

"*All that a court of justice can do is to look at the Parliamentary Roll; if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous*

[21] *Ibid.*

to its introduction, or what passed in Parliament during its progress in its various stages through both Houses."[22]

The meaning of Lord Campbell's words must be that even though courts will not review the propriety of the internal procedures of Parliament, they will look at whether this purported Act is really an Act, i.e., that the Bill at least appears to have passed both Houses and received the Royal Assent. And at least since the *Prince's Case*, the courts will check if the bill was passed according to the standing rules of legislative power.[23]

Another view with regard to Parliamentary Sovereignty is presented by Sir William Wade. He propounds that what Parliament is and how it acts successfully in producing an Act is not a matter of fact to be determined by politics, but a matter for law. He is therefore of an opinion that there exists a higher constitutional law that organises the relations of statutes with the common law. However, it is submitted that such is not an absolute rule. If one refers to the principle of law laid down especially in the recent years one would be tempted to conclude that while the Judiciary may not have exercised its power to review legislation, it is not the case that it was devoid of such power.

4.1 Origin of Judicial Review in U.K.

History of the Judicial review in the United Kingdom can be traced from seventeenth century in *Dr. Bonham* v. *Cambridge University*[24] was decided in 1610 by Lord Coke was the foundation of judicial review in England. But in the case of *City London* v. *Wood*, Chief Justice Holt remarked that "*An Act of Parliament can do no wrong, though it may do several things that look pretty odd". This remark establishes the Doctrine of Parliamentary Sovereignty which means that the court has no power to determine the legality of Parliamentary enactments*.[25] In the United Kingdom, there is a system which is based on Legislative Supremacy and Parliamentary Sovereignty. Earlier, there was no scope of judicial review in UK, but after the formation European Convention of Human Rights, the scope of judicial review become wider. The enactment of Human Rights Act 1998 also requires domestic Courts to protect the rights of individuals. In the United Kingdom, there is no written Constitution and Parliamentary Supremacy is the foundation in the United

[22] Edinburgh & Dalkeith Ry. [Railway Co.] v. Wauchope (1842) 8 Cl. & F 710.
[23] *The Prince's Case* (1606), 8 Co. Rep. 1a, at 20b.
[24] *Supra* note 6.
[25] 12 Mod. 669.

Kingdom. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in the United Kingdom.

Parliamentary Sovereignty in the United Kingdom:

In England, people are the source of all the powers and they are also the sovereign power. But, the people snatching all essential powers from the Monarch respond to them in Parliament. This is the great constitutional fiction of the English Constitution. Thus, powers, originally vesting in the people, are the true sovereign powers. Due to this, Parliament can make any matter and Constitution assigns no limitations to enact any legislation. The Act of the Parliament cannot be answerable to any authority whether it is unjust or contrary, no matter how it is. There is unlimited power of Parliament in the United Kingdom. There is no scope of judicial review of legislative Act in the United Kingdom. The legislative Act of Parliament is also known as Primary Legislation and the delegation by the Parliament to the executive with adequate legislative guidance are known as Secondary legislation, secondary legislation are administrative in nature, therefore it is subject to judicial review in the United Kingdom.

Primary and Secondary Legislations:

There is two dimensions of legislation in the United Kingdom, one is Primary legislation which are basically legislations enacted by Parliament and another one is Secondary legislation which provides rules, regulation, directives and act of Ministries. Primary legislation is outside the purview of judicial review except in few cases which encroaches the law of European Community law. After the formation of European Union and Human Rights Act 1998, Primary legislation is subject to judicial review in some cases. But on the other hand, Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions, rules, regulations court can review any of the actions and may declare ultra vires and unlawful.

4.2 Judicial Review under European Community Law

The United Kingdom's membership of the European has brought with it significant changes to the English legal system and the UK constitution. European Community law in judicial review claims

in England and Wales though that the needs to be set in general context of the European legal system. In the Administrative Court:

- Claimants may challenge actions and omissions by English public authorities, and even provisions of an Act of Parliament, on the ground of breach of Community law.
- Mostly, claims for judicial review may also on the validity of administrative decisions and legislations made by the institutions of the European Union.[26]

Community law has basic methods of work of national courts, including their approach to interpreting legislation, the procedures to be followed by litigants and the nature of the *remedies available to protect individual's rights under Community law.*

In *R* v. *Secretary of State for Transport*[27] it was observed by the Court that "by relying upon the direct effect of community law, the individual may be able to challenge national measures and have declared unlawful. It further observed that all national measures can be subject to judicial review on the grounds of compatibility with Community law, i.e. primary legislation, secondary regulations and administrative decisions."

In, *Les Verts* v. *European Parliament*[28], it was held that "the European Union is a community based on the Rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional character."

4.4 Current Position of Judicial Review in U.K.

Basically, in the United Kingdom, present scenario is much deviated to the judicial review. The Courts in the United Kingdom are strictly followed the principles of judicial review with regard to administrative actions and secondary legislations. So far as primary legislations, they are outside the purview of judicial review but with some exceptional cases. Judicial review of administrative actions which are executive in nature and which are mostly subject matter in the present scenario in the United Kingdom.

[26] Harry Woolf, Jeffrey Jowell, Andrew Le Suer, *De Smith's Judicial Review* 226 (Thomson Sweet & Maxwell, 6th edution, 2007).
[27] (1990) 2 A.C. 85.
[28] (1986) E.C.R 1339.

In, *R. (on the application of Drammeh) v. Secretary of State for the Home Department*[29]

Facts: An immigration detainee who had failed to take his medication for schizoaffective disorder and had gone on hunger strike, but who did not lack mental capacity, failed to establish that his detention was unlawful by virtue of his pre-existing serious mental illness where the facts indicated that his actions were calculated to avoid deportation. The claimant applied for judicial review of the lawfulness of his immigration detention.

Held: There was no doubt that the effect of detention on a detainee's mental health was a very relevant factor in evaluating what constituted a "reasonable period" of detention. The secretary of state's policy in Chapter 55.10 of the Enforcement Instructions and Guidance in relation to the detention of the mentally ill imposed a duty to inquire into the relevant circumstances of a detainee to assess whether serious mental illness existed and whether it could be satisfactorily managed in detention. Further held that, where a detainee had capacity, his refusal to consent to medical treatment put him outside the scope of the secretary of state's policy statements.

5. JUDICAL REVIEW IN INDIA

"Supremacy of the law is the spirit of the Indian Constitution. In India, the "Doctrine of Judicial Review" is the basic feature of the Constitution. It is the concept of Rule of Law and it is the touchstone of Constitution India. Though there is no express provision for judicial review in Indian Constitution but it is an integral part of our constitutional system, and without it there will be no Government of laws and Rule of law would become a mockery delusion and a promise of futility. In India, Judicial Review is a power of court to set up an effective system of check and balance between legislature and executive. Various provisions in Indian constitution explicitly provides for the power of judicial review to the courts such as Article 13, 32, 131- 136, 141, 143, 226, 227, 245, 246, 372.

The most prominent object of judicial review to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real

[29] 2015 EWHC 2754.

purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law.[30]

The fundamental subject of judicial review in the present Constitution relates to:

(i) Enactment of legislative Act in violation of the constitutional mandates regarding distribution of powers.
(ii) Delegation of essential legislative power by the legislature to the executive or any other body.
(iii) Violation of Fundamental Rights.
(iv) Violation of various other constitutional restrictions embodied in the Constitution.
(v) Violation of implied limitations and restrictions.

The Constitution envisages a very healthy system of judicial review and it depends upon the Indian Judges to act in a way as to maintain the pint of democracy. In the present democratic sit up in India, the court cannot adopt a passive attitude and ask the aggrieved party to wait for public opinion against legislative tyranny, but the Constitution has empowered it to play an active role and to declare a legislation void and may refuse to enforce it, if it violates the Constitution.

5.1 Origin of Judicial Review in India

The doctrine of Judicial Review of United States of America is really the pioneer of Judicial Review in other Constitutions of the world which evolved after the 18th century and in India also it has been a matter of great inspiration .In India the concept of Judicial Review is founded on the Rule of Law which is the swollen with pride heritage of the ancient Indian culture and society. Only in the methods of working of Judicial Review and in its form of application there have been characteristic changes, but the basic philosophy upon which the doctrine of Judicial Review hinges is the same. In India, since Government of India Act, 1858 and Indian Council Act, 1861 imposed some restrictions on the powers of Governor General in Council in evading laws, but there was no provision of judicial review. The court had only power to implicate. But in 1877 *Emperor* v. *Burah*[31] was the first case which interpreted and originated the concept of judicial

[30] C. D. Jha *et. al., Judicial Review of Legislative Acts*, (2nd edition, 2009).
[31] 1877(3) ILR 63 (Cal).

review in India. In this case court held that aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor General council in excess of the power given to him by the Imperial Parliament. In this case the High court and Privy Council adopted the view that Indian courts had power of judicial review with some limitations. Again, in *Secretary of State* v. *Moment*[32], Lord Haldane observed that "the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858". Then, in *Annie Besant* v. *Government of Madras*[33], Madras high court observed on the basis of Privy council decision that there was a fundamental difference between the legislative powers of the Imperial Parliament and the authority of the subordinate Indian Legislature, and any enactment of the Indian Legislature in excess of the delegated powers or in violation of the limitation imposed by the imperial Parliament will null and void."[34]

Though there is no specific provision of the Judicial Review in Government of India Act, 1935 and the constitutional problems arising before the court necessitated the adoption of Judicial Review in a wider perspective. Now, Constitution of India, 1950 overtly establishes the Doctrine of Judicial Review under various Articles 13, 32, 131-136, 143, 226, 227, 245, 246, 372.

Judicial review in India comprises of three aspects:

(1) Judicial review of judicial decisions,

(2) Judicial review of legislative action,

(3) Judicial review of administrative action.

5.2 Judicial Review of Constitutional Amendments

In India, constitutional amendments are very rigid in nature. Although Supreme Court of India is the guardian of Indian Constitution, therefore Supreme Court from time to time scrutinizes the validity of constitutional amendment laws, parliament has the supreme power to amend the constitution but cannot abrogate the basic structure of the constitution. But, there was a conflict between Court and Parliament regarding Constitutional Amendment that whether fundamental rights are amendable under Article 368 or not, in *Shankari Prasad* v. *Union of India*[35], the first

[32] [1913] 40 ILR 391 (Cal).
[33] 1918. AIR 1210 (Mad).
[34] *Ibid.*
[35] 1951 AIR 548.

case on amendability of the constitution the validity of the constitution (1st Amendment) Act, 1951, curtailing the "Right to Property" guaranteed by Article 31 was challenged. It was argued that the "State in Article 12 included Parliament and the word 'law' in Article 13(2), therefore, must include constitutional amendment". The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights is contained in Article 368, and that the word 'law' in Article 13(2) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Hence, a constitutional amendment will be valid even if it abridges or takes away any of the fundamental rights.

Again, in *Sajjan Singh* v.*State of Rajasthan*[36], the same question was raised when the validity of the Constitution (Seventeenth Amendment) Act, 1964, was called in question and once again the court revised its earlier view that constitutional amendments, made under Article 368 are outside the purview of Judicial Review of the Courts. In this case the Constitution (17th Amendment) Act, 1964 was challenged an upheld.

Once again the Supreme Court was called upon to consider the validity of the Twenty Fourth, Twenty Fifth and Twenty Ninth Amendment in the famous case of *Keshavananda Bharti* v *State of Kerala* [37] which is also known as "Fundamental Rights Case". In this case the petitioner had challenged the validity of Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Schedule by the Twenty Ninth Amendment Act. The petitioner was challenged the validity of Twenty Fourth, Twenty Fifth, and Twenty Ninth Amendment to the Constitution and also the question was involved was as to what extent of the amending power is conferred by Article 368 of the Constitution. Through these cases Supreme Court scrutinize the validity of constitutional Amendment Law by using the Doctrine of Judicial Review. In *Minerva Mills* v. *Union of India*[38], the Supreme Court observed that, "the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the Law". The power of the judicial review is an integral part of our Constitutional system and without it, there will be no Government of Laws and the rule of law would become a teasing illusion and a promise of unreality. If there is one feature of our

[36] 1915 AIR 845.
[37] 1973 AIR 1461.
[38] (1973) 4 SCC 225.

constitution which, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of the judicial review and it is unquestionably a part of the basic structure of the constitution. Judicial Review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution[39].

5.3 Judicial Review of Parliamentary and State Legislative Actions

Article 245 and 246 of the Indian constitution gives legislatives powers to Parliament and State Legislatures. Article 245 (1) states that "subject to the provisions of the constitution , the parliament may make any laws for the whole and any part of the territory of India and a State Legislature may make a law for whole of the state and any part thereof." The word "subject to the provisions of the constitution" are imposed limitations to the Parliament and State Legislature to make legislation. These words are the essence of Judicial Review of legislative actions in India. It ensures that legislation should be within the limitations of constitutional provision. These words provide power to the Courts to scrutinize the validity of legislation. The Supreme Court has supreme power under Article 141 which incorporates "Doctrine of Precedent" to implement its own view regarding any conflicted issue and it's also having binding force.

Supreme Court gives us some relevant observations through judicial decisions regarding the legislative actions of Parliament and State Legislatures.

In, *S. P. Sampat Kumar* v. *Union of India*[40] the constitutional validity of Administrative Tribunal Act,1985 , was challenged on the ground that that the impugned Act by excluding the jurisdiction of the High Court under Article 226 and 227 in service matters had destroyed the judicial review which was an essential feature of the constitution. The Supreme Court held that though the Act has excluded the judicial review exercised by the High Courts in service matters, but it has not excluded it wholly as the jurisdiction of the Supreme Court under Article 32 and 136. Further held that "a law passed under Article 323-A providing for the exclusion of the jurisdiction of the High Courts must provide an effective alternative institutional mechanism of authority of judicial review. The judicial review which is an essential feature of the constitution can be taken away

[39] *Ibid.*
[40] 1 SCC 124 (1987).

from the particular area only if an alternative effective institutional mechanism or authority is provided."

Then, in the recent scenario *I.R. Coelho* v. *State of Tamil Nadu*[41], the petitioner had challenged the various Central and State laws put in the Ninth Schedule including the Tamil Nadu Reservation Act. The Nine Judges Bench held that "any law placed in the Ninth Schedule after April 24, 1973 when Keshvananda Bharati's case judgment was delivered will open to challenge, the court held that the validity of any Ninth Schedule law has been upheld by the Supreme Court and it would not be open to challenge it again , but if a law is held to be violation of fundamental rights incorporated in Ninth Schedule after the judgment date of Keshvananda Bharati's case, such a violation shall be open to challenge on the ground that it destroy or damages the basic structure of constitution". The Supreme Court observed that "Judicial Review of legislative actions on the touchstone of the basic structure of the constitution".

5.4 Judicial Review of Administrative Actions

The system of judicial review of administrative action in India came from Britain. Judicial Review of Administrative action is perhaps the most important development in the field of public law. The Doctrine of Judicial Review is embodied in the Constitution and the subject can approach High Court and Supreme Court for the enforcement of fundamental right guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action id mala fide, the same can be quashed by the ordinary courts of law. *All the rule, regulations, ordinances, bye-laws, notifications, customs and usages are "laws" within the meaning of Article13 of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared ultra vires by the Supreme Court and by the High Courts.* Judicial review of administrative action aims to protect citizens from abuse of power by any branch of State.

"When the legislature confers discretion on a court of law or on an administrative authority, it also imposes responsibility that such discretion is exercised honestly, properly and reasonably".[42]

[41] 2007 AIR 861.

[42] De Smith, *Judicial Review of Administrative Action 296-99* (1995); CK Takwani, *Lectures On Administrative Law* 276 (4th edn., 2008).

This view of "DE Smith" clearly point out that discretion of administrative action should be used with care and caution. So, the abusive discretionary power of Administrative action must be review by judiciary. If judiciary founds any ground of illegality of any administrative action, it is the duty of the judiciary to maintain check and balance.

5.5 Current Position of Judicial Review in India

The Supreme Court of India since the era A. K. Gopalan's case to the historic judgment in I.R. Coelho's case magnified the concept of Doctrine of Judicial Review. In the present scenario, Supreme Court plays a very crucial role to interpret the constitutional provisions and now the concept of Judicial Review became a fundamental feature of the Constitutional Jurisprudence. In its recent judgment in *Madras Bar Association* v. *Union of India*[43] the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provisions ultra vires. In this case, the petitioner challenges the constitution of NCLT and NCALT and also challenges the formation of the Committee, the appointment of the judicial members as well as the technical members. Section 409(3)(a), 409(3)(c), 411(3) and 412(2) are the provision which incorporates Constitution of Board of company law administration. The Supreme court upheld the validity of NCLT and NACLT, but declared the above mentioned provisions ultra vires and held that these provisions are unconstitutional in nature on the ground that any institution performing a judicial function should be constituted of members having judicial experience and expertise and thus judicial member were to exceed the technical members so as to maintain the essential feature of that constitution.

In this way, the Supreme Court of India time to time scrutinizes the validity of law through the Doctrine of Judicial Review. It is now the foundation to ensure the Supremacy of Constitution of India.

6. Judicial Review in India, the United States of America and the United Kingdom

- The scope of judicial review is wider in India as compared to the United Kingdom and the United States because the U. S. Constitution is very concise in nature and the words and expression used therein is vague and general in nature. On the part of the United

[43] (2015) SCC 484.

Kingdom, there is no written Constitution; therefore in the U.K. scope of judicial review is very limited in nature.

- In India, there are specific and extensive provisions of judicial review in the Constitution of India such as Article 13, 32, 131-136, 143, 226, 227, 246, and 372. Though the term "judicial review is not mentioned in these Articles but it is implicit in these Articles. Whereas US Constitution doesn't have any specific provision for judicial review, Article III, IV, V incorporates judicial power of the Court, and constitutional supremacy and all the laws are subject to Constitution; therefore, it is implicit in nature.

- In India, Article 13 provides for "Judicial Review of Pre-constitutional as well as Post Constitutional laws" whereas there is no such provision of judicial review of pre constitutional laws in the United States and United Kingdom.

- In India, power of judicial review can be used in three dimensions such as Judicial Review of Constitutional Amendments, Legislative Acts and Administrative acts. Whereas the United States Constitution is very rigid in nature therefore review of constitutional amendment in very rarely used, the Supreme Court of the United States has power to scrutinize the Legislative Act and Administrative act which is contrary to Constitution. While in the United Kingdom there is no scope to check the validity of Legislative acts of Parliament, but secondary legislations are subject to judicial review.

- In the United Kingdom, Acts of Parliament cannot be challenged on any grounds in any Court. Whatever legislation enacted by Parliament whether it is just and unjust, it cannot be accountable to any authority. Whereas in India and the US, Constitution is supreme law of the land, all the laws are subject to Constitution. If any act are violated the provisions of the Constitution, court can strictly scrutinize the validity of law.

- Judiciary in India and the USA has very wider power to scrutinize and determine the validity of law but in the UK court has very limited power to determine the law before ECHR and Human Rights Act. But, in the present scenario the position has been

changed, courts are subject oriented to judicial activism to making a body of principles. Unlike the USA and India, the UK courts are now widened the scope of judicial review.

7. CRITICAL ANALYSIS OF JUDICIAL REVIEW IN INDIA

7.1 Judicial Activism and Judicial Restraint

Judiciary in India has adopted doctrine of judicial restraint in order to limit the use of Judicial Review to restrain itself from striking down legislation unless they are obviously unconstitutional. It is a theory of judicial interpretation that encourages judges to limit the exercise of their own power. As pointed out by Justice Frankfurter in *West Virginia State Board of Education* v. *Barnette*[44], "since this great power can prevent the full play of the democratic process, it is vital that it should be exercised with rigorous self-restraint."

The basic idea behind the adoption of such mechanism is to determine the questions which are completely political in nature and should not be interfered with by judiciary. However, this concept is latent in Indian Judicial System. It is disappearing as; on the contrary, judicial activism has acquired the scope. It is 'judicial restraint' which should be read and understood with the concept of judicial review in order to limit it. On the contrary, however, India has developed a completely new and opposite mechanism called Judicial Activism. A role of judge is only to say authoritatively 'what law is' but the Judiciary in India is keep confusing it Judicial Review. There lies a paradox and ambiguous state of powers with Judiciary in this country where both Judicial Restraint and Activism are in operation simultaneously.

Judicial Activism can be criticized on various aspects. Firstly, judge who in the light to judicial activism pronouncing any law may lack the expertise to make it. A judge who is issuing guidelines for Foreign Exchange may not lay proper ones if he doesn't have economical knowledge. Secondly, it violated the Doctrine of Separation of Power. In a country like India where well written and defined Constitution, which clearly distribute and direct the power and its use,

[44] 319 US 624 (1943).

concepts like judicial activism are mere hardship to the proper and regular functioning of the State. There are number of grounds to call Judicial Activism itself as unconstitutional.

The concern is not only with a particular section of society but it is also expressed deeply by judges at different occasions. One such occasion arouse in *State of Kerala* v. *A. Lakshmi Kutty*[45] wherein it was observed that: "Special responsibility devolves upon the judges to avoid an over activist approach and to ensure that they do not trespass within the spheres earmarked for the other two branches of the State".

Judicial Review in form of Activism has surpassed the constitutionality and legitimacy. This approached has not only confused the original powers vested with different organs of the state but also lead India towards Judicial Supremacy much away from its aspirations of Constitutional Supremacy.

7.2 A Threat to Democracy

Undemocratic Judicial Review is basic structure of Democratic Constitution. Democracy is defined as a government of the people, by the people, and for the people. It involves election of representatives by the people in whom they vest their collective voice. The representative put forth the need and expectation of the people in assembly and determines the laws to be implemented in pursuance thereof. The representative is accountable and responsible for the erroneous legislations. The concept of Judicial Review is against such basic principles of Democracy. S.P. Sathe considering this controversy maintains that it is a conflict between democracy and judicial review. In fact, because the power of judicial review is essentially counter-majoritarian, such a conflict is inherent. This power gives the judges the right to examine the Acts of the popularly elected legislature to find whether they violate any of the citizen's fundamental rights. A judge, unlike from representatives, is unaware of the grounded realities and needs of people. He approaches things in the ideological way which is, to a greater extent, different from reality. Unlike representatives, a judge is not elected by people who diminish the sense of accountability in him. In this regard the views of Prof. Jeremy Waldron are of Great Significance. "Judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to

[45] (1986) 4 SCC 632.

focus clearly on the real issues at stake when citizens disagree about rights….And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality". [44]

It is illustrated in *S R Bommai* v. *Union of India*[45] laying down that the Presidential Proclamation dissolving a State Legislative Assembly is subject to judicial review and that if the court strikes down the proclamation, it has the power to restore the dismissed State Government to office. This is absolutely a case of overreaching the power provided in Constitution. This not only deviates us from the Democratic but also the Republic structure of our constitution.

7.3 Constitutional Limits of Judicial Review

There are limitations to Judicial Review. However the power is used inappropriately the Apex court has recognized its limitations. In *Tata Cellular* v. *Union of India*[46], the Supreme Court held that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself to the question of legality. Its concern should be whether a decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal would have reached, or abused its power.

7.4 Procedure established by law

Article 22 of the Indian Constitution creates an exception to the fundamental rights by authorizing the National and State Legislatures to make laws providing for detention without charge or trial of individuals considered as a threat to security or order. In addition, to avoid the threat that substantive due process posed to the State's regulatory power, the framers of the Indian Constitution purposely removed the 'due process clause' found in the Fifth and Fourteenth Amendments of the American Constitution. Instead, they replaced it with the bland guarantee that "no person shall be deprived of his life or personal liberty except according to the procedure established by law."[47] The words 'procedure established by law' were specific and it was hoped

[44] Jeremy Waldron, "*The Core of the Case Against Judicial Review"*, The Yale Law Journal 1353 (2006).
[45] [1994] 2 SCR 644: AIR 1994 SC 1918: (1994) 3 SCC 1.
[46] AIR 1996 SC 11.
[47] The Constitution of India, Article 21.

that they would not give any scope for judicial veto against reforming legislation. While doing so, they unintentionally made the valuable fundamental right to life and liberty completely dependent on the goodwill of the Legislature. In one of its earliest landmark cases, the Supreme Court dutifully followed the wording 'procedure established by law' in rejecting a substantive challenge to a preventive detention law allowing detention without trial. [48]

8. CONCLUSION

After analysing the concept of Judicial Review in the preceding chapters of this research article, the conclusions drawn by the researcher are given below:

(1) Under the concept of Judicial Review, the courts are not confined merely to deciding whether actions taken by the Central or State Governments or their bureaucrats are within the four corners of the legislative list enmarked for them: but the courts under judicial review, also deal with the question as to whether these actions are taken in conformity with and not in violation of the provisions of the constitution.

(2) The power of the courts of the Judicial Review can, traditionally, only be asserted in the course of litigation in the form of Petition. But, Judiciary in India has become vigilant about the cause of the poors, illiterates and weaker section of the society. That is why it initiated a new concept of 'Public Interest Litigation' for ensuring the social justice. Under this concept, the Supreme Court of India and the High Courts of various states can take notice of the matter of wrongdoings even themselves *suo motu.*

(3) The Constitution of India explicitly establishes the doctrine of Judicial Review in several Articles such as, Article 13, 32, 131-136, 143, 226, but the term 'Judicial Review' is mentioned in none of these articles. Thus, it can be said that the judicial review is firmly rooted in India, and has the explicit sanction of the Constitution.

(4) Though Indian Constitution impliedly provides about the Judicial Review, but unfortunately Administrative Law in India is unwritten, and there is no provision in any law in India, neither in Constitution nor in any other law, which specifically provides for the review of the Administrative Actions and Mal-actions by the Judiciary.

[48] *A. K. Gopalan v. State of Madras,* AIR 1950 SC 27.

(5) Judicial check upon the Governmental or Administrative actions is not violative of Doctrine of Separation of Power because in a Federal Constitution, it is essential that Judiciary must be Supreme.

(6) With the expanding horizon of Article 14 read with other Articles dealing with Fundamental Rights, every executive action of the government or other public bodies, including Instrumentalities of the Government, or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Courts under Article 226 and can be validly scrutinized on the touch stone of the Constitutional mandates.

(7) The concept of Judicial Review is also criticized. By the strict behaviour of the Courts, sometimes it is criticized in the political corridors. It should not happen in any manner, because Supremacy of law prevails in the interpretations of the Courts. We the people, cannot question the actions of judiciary because Supreme Court is performing as the guardian of the Law of the land.

9. SUGGESTIONS

Keeping in view the abovementioned discussion of this research article, following are the suggestions for making the Judicial Review more effective:

- India should adopt a system of Judicial Check upon the matters on the lines of French system of Droit Administratif. Keeping in view the increase in the rate of matters and disputes and, the public interest, it is strongly suggested that separate courts should be established in order for speedy disposal of such matters.
- It is suggested that by making a Constitutional Amendment, the scope and ambit of Article 32 should be extended at par with Article 226, so that, the apex Court becomes capable of entertaining the petitions of misuse of powers directly, even when an ordinary right of individual is violated by the exercise of such powers, in appropriate cases.
- It is further suggested that there should be no need of taking the prior permission from the Central Government to prosecute the "public servant', because Government always

tries to save its ministers and bureaucrats as they are themselves, a part of the Government. Thus, it is recommended that Section 19 of Prevention of Corruption Act, 1988 should be repealed by the Parliament, because it gives undue benefits to the corrupt Ministers and Bureaucrats.

- It is suggested that, in order to make the Administration more accountable to the general people of India, an amendment should be made in the Constitution and express provisions be introduced for authorizing the courts to review exercise of any Administrative power or performance of duties by the Administrative Agencies and Officials.
- It is said that "Prevention is better than Cure". Thus, keeping in view this maxim, is is strongly recommended that *Administrative Law should be Codified in India.* If Administrative law becomes codified, then administrative authorities will derive their powers from such law and easily become responsible to the common people as they have to follow the "procedure established by law". Therefore, scope of arbitrary exercise of Administrative Powers by the concerned authorities will be reduced to large extent.