

# JUDICIAL REVIEW IN INDIA: AN ANALYSIS OF THE CONSTITUTIONALITY OF LAWS

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## **Introduction:**

Indian Constitution is blend of American and British Constitution. Indian Parliament is not a sovereign law making body like its English counterpart. It is owing to this reason that our constitutional system “wonderfully adopts the via media between the American system of judicial supremacy and the English principles of parliamentary supremacy”.<sup>1</sup>

India has written constitution and has a democratic federal constitution, which is the supreme law of land and all other laws are subject to this supreme law. The tendency in the growth and prolixity of the unconstitutional legislation in India unquestionably signifies a matter of great concern and it requires alertness and determination to cultivate the habit of evading laws in conformity with the Constitution. There is no express provision in the Constitution of India declaring the Constitution to be the supreme law of land, because they believed that when all the organs of government, federal and State, owe their origins to the constitution and derive powers therefrom, and the Constitution itself cannot be altered except in the manner specifically laid down in the Constitution.<sup>2</sup>

Judicial Review is one of the cardinal features of Indian constitutional system. India has constitutional and limited democracy which imposes limitations on the power of the government and banks on majority rule to avoid tyranny and arbitrariness.

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1. D.D. Basu, *Commentary on the Constitution of India*, (Calcutta: 1955) at 412.

2. Jitendra Pandey & R.K. Dubey, *Civil Liberty under Indian Constitution*, (New Delhi: Deep & Deep Publication, 1992) at 36.

The Preamble of the Indian Constitution has promised equality and justice to all citizens of India and have the laws of India are liable to be tested judicially. The majority rules though the best rule is found generally to be addicted to tyranny. This is why the existence of some impartial body is essential for the democracy.<sup>3</sup>

The framers of the constitution were aware of the inherent weaknesses of judicial Review; therefore they tried to define its scope and adopted several devices to prevent courts from abusing their powers and acting as “super legislature” or permanent “third chambers”.<sup>4</sup>

The Constitution makers of India very wisely incorporated in the Constitution itself, the provisions of Judicial Review so as to maintain the balance of federalism, to protect the fundamental rights guaranteed to the citizens and to afford a useful weapon for equality, and freedom. So observed Patanjali Sastri, J., in *State of Madras v. Rao*, Justice Khanna, former judges of the Supreme Court of India has in his book “Judicial Review or confrontation”.<sup>5</sup> made the following in this “Judicial Review has constitutional system and a power has been vested in the High Court and Supreme Court to decide about the constitutional validity of the provision of the statutes”.

The Constitution of India explicitly establishes the doctrine of Judicial Review in several Articles, such as 13, 32, 131, 136, 143, 226 and 246.

Article 13(2) says that “the State shall not make any law which takes away or abridges the right conferred by this part and law made in contraventions of this clause shall, to the extent of the contravention, be void”. But the law relating to judicial review has modified by the Constitution.<sup>6</sup>

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3. Chkradhar Jha, *Judicial Review of Administrative Acts*, (Bombay: B.M. Tripathi, Private Limited, 1974) at 95.

4. R.C.S. Sarkar, “*Some Aspects of Constitutional Reforms*” (1976) Vol. X, No. 1-4. at 352.

5. (1952) SCR 597; (1952) SCJ 253; AIR 1952 SC 196.

6. Forty-second Amendment) Act, 1976 by the amendment of the existing Articles 31C, 226, 228, 366 and 368 of the Constitution and by the addition of new Articles 31D, 32A, 131A, 139A, 144A, 226A and 323A. (Amendment of Article 31A and 368 and insertion of Articles 31D, 323A came into effect from 3<sup>rd</sup> January 1977, While amendment of Article 226, 228, 366 and insertion of Article 32A, 131A, 139A, 144A, 226A and 228A will be effective from 1<sup>st</sup> February 1977.

The doctrine of Judicial Review is not a revelation to the modern World. In India the concept of Judicial Review is founded on the rule of law which is the proud heritage of the ancient Indian culture and traditions. 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 the modern world also where the doctrine of Judicial Review prevails, the system of its working and the method of its application are dissimilar in different countries. The basic idea of Judicial Review is that law should be the generator of peace, happiness and harmony; the ruler has no legal authority to inflict pain, torture and tyranny on the ruled and to usurp the basic rights of freedom and liberty of people which are rooted in the ancient Indian civilization and culture. The fundamental object of Judicial Review is to assure the protection of rights, avoidance of their violations, socio-economic uplifts and to alert the legislature to be in conformity with the Constitution. In India such spirit was prevalent.<sup>7</sup>

In *Minerva Mills Ltd. v. Union of India*,<sup>8</sup> P. N. Bhagwati J., observed, “It is for the judiciary to uphold the Constitutional values and to enforce the Constitutional limitations, that is the essence the Rule of law, which *inter alia* requires that the exercise of powers by the Government whether it be the legislative or the executive or any other authority be conditioned by the Constitution and the law”. It indicates that the apex courts always to keep hold the constitutionality of laws by exercising the power of judicial review. The present paper discusses the meaning, concept and signification of judicial review and comparison with other countries like USA and UK. How far some doctrines have formulated at the time of exercising judicial review and the power of review in the Indian judiciary has protected fundamental rights of citizens as well as constitutionality of laws.

### **Meaning and technical significance of Judicial Review:**

The dictionary meaning of review is “the act of looking over something (again) with a view to correction or improvement”<sup>9</sup> The primary legal meaning of the term, accordingly, is the revision of the sentence or decree of one court by a higher court.

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7. Chkradhar Jha, *Supra* note 3 at 113.

8. (1980) 3 SCC 625.

9. Shorter Oxford English Dictionary.

But the review of inferior judicial pronouncements by a higher tribunal, which is analogous to appeal, has no particular importance in Constitutional law. It appertains to the judicial administration, in some form or other, of every modern country, irrespective of the nature of its constitutional system, and has no bearing on public law in particular.<sup>10</sup>

There is more technical significance of judicial review in the public law of the United State and India, which is not to be found in England. It flows from the concept of limited government and from the theory of two laws, such as ordinary and organic. As soon as it is assumed that there is a paramount law which constitutes the foundation and source of all other legislative authorities in the body politic, it follows that any act of the ordinary law-making bodies which contravenes the provisions of the paramount law, must be void and that there must be some organ which is to possess the authority or power to pronounce such legislative acts as void. The American Judiciary has, by common consent, assumed to itself this task. This is the primary sense of judiciary review and this is the sense in which former Chief Justice Marshall, who is known as the formal profounder of the doctrine of judicial review, understood it.

In public law, of course, judicial review is not confined to a review of legislative acts. Once the Constitution is regarded as the supreme law of the land the power of all organs of government are considered as limited by its provisions, it follows that not only the Legislature but also the Executive and all administrative are equally limited by its provisions, so that Constitution must, similarly, be void and the courts must invalidate them.<sup>11</sup>

The judicial review of executive acts cannot, however, be said to be a special feature of the American and Indian constitutional system in the same sense as the judicial review of legislative acts can be. For even in those countries like England and France, where there cannot be any judicial review of legislation owing to the sovereignty or omnipotence of the legislature, there is judicial review of administrative acts in no less a real sense than in the United States. A judicial review of administrative acts may take place not only on the ground of repugnance to the paramount law but also of repugnance to the ordinary law.<sup>12</sup>

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10. Durga Das Basu, Supra note 1 at 349.

11. Ibid.

12. Judicial Review of administrative acts, therefore, deserves a separate treatment.

The ordinary or statute law of the land is the source of administrative authority in a vast field and the doctrine of *ultra-vires* is perhaps more deep-seated and widespread in the realm of ordinary law than in the realm of constitutional law. In fact, it is the English doctrine of *ultra-vires* in the sphere of ordinary law which offered the source of inspiration to those who invented the doctrine of judicial review in the public sphere.<sup>13</sup>

### **Aims and objective of judicial review:**

The object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is incorrect in the eye of law.<sup>14</sup>

In *Minerva Mills Ltd. v. Union of India*,<sup>15</sup> the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and validity of legislation. It is the solemn duty of the judiciary under the Constitution to keep different organs of the State within the limits of the power conferred upon them by the constitution by exercising the power of judicial review as sentinel on the qui vive. Therefore, judicial review aims to protect citizen from abuse or misuse of power by any branch of the State.

### **Judicial review in ancient period:**

The ancient India concept of law is the king of kings and nothing can be higher than law by whose aid even the weak prevail over the strong. The *vedic* concept of sovereignty was that the State was a trust and the monarch was the trustee of the people. The address of the people to the monarch at time of coronations and the reply of the consecrated king to his people on the occasion of *Abisheka* (coronation) embodied in the *yajurveda* reveals the concept of ideal kingship and the democratic concept of law and governance which required ancient India.<sup>16</sup>

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13. Bryce, *American Common Wealth*, Vol. I, at 30.

14. *Chief Constable v. Evans*, (1982) All ER 141; *Sterling Computers Ltd. v. M & N Publication*, AIR 1996 SC 51; *LIC of India v.* AIR 1995 SC 1811.

15. AIR 1980 SC 1789.

16. Chkradhar Jha, *Supra* note 3 at 113.

In all history, no republic had as rich a heritage of the system of judicial review as in India. The roots of judicial review go long back into ancient India, ancient medieval Europe, pre Revolution England and into colonial and Post-Constitution regimes in the United States of America and for certain other countries which had a heritage of judicial review from the United States, such as Canada, Australia, Ireland, Japan etc.<sup>17</sup>

In ancient India the Rule of Law had a firm stand which meant that the law was above the ruler and that the government had no constitutional authority to enforce any arbitrary or tyrannical law against the government. Thus the people of ancient India visualized and cherished the supremacy of law and not the supremacy of the king.<sup>18</sup>

In the colonial courts the legality of law in several instances, was vehemently challenged on the basis of the principle enunciated by Chief Justice Coke, Subsequently, the United States of America not by any specific and clear provision in the Constitution but by judicial precedents created before the world a new pattern of democracy and demonstrated to the world that judicialreview could act as a poet and powerful check on democracy against degenerating into autocracy and submitting to a rule of tyranny. India was wiser in incorporate into the Constitution itself the provision of judicial review and by this method India has established a Constitution which has its individuality and uniqueness in so far as it lays down new standards of constitutional rule in the modern World. Former Chief Justice Patanjali Shastri in *V.G. Row v. State of Madras*,<sup>19</sup> has remarked, “While the court naturally attaches a great weight to the legislative judgments, it cannot desert its own duty to determine finally constitutionality of an impugned statute”.

Judicial review of India for the first time saw its light in *Emperor v. Burah*.<sup>20</sup> The Calcutta High Court as well as Privy Council adopted the view that the Indian courts had power of judicial review under certain limitations. This view was further reaffirmed in certain other case before the Government of India Act, 1935 came into operation.

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17. Ibid. at 422.

18. Ibid, at 422.

19. AIR 1952 SC 196.

20. (1877) ILR, Calcutta, 63.

By the Government of India Act of 1935, Federation was introduced and the experiment in judicial review took a new approach under the Constitution of 1950, judicial review assumed an important role in the Indian democracy. Its working under the present Constitution of India is a real protection of liberty and freedom of the people. Some Indian writers have observed that the scope of judicial review in India is very limited and the Indian Courts do not enjoy as wide jurisdiction as do Courts in America. In their opinion it is due to the '*due process*' clause that the America courts have wider scope but in India the scope of judicial review is narrow.<sup>21</sup>

In India the residuary power vest in the Union Parliament and as such in India there is greater fear of interference from the side of the union. The Indian judiciary has to keep this aspect in view while dealing with the constitutionality of the law violating the mandates of the Constitution regarding distribution of powers.

#### **Judicial review in historical interpretation:**

A historical interpretation of the constitution evolution of India, England, the united State of America, Canada and Australia becomes necessary in order to appreciate the growth, functioning and practical operation of judicial review. The system of judicial review in India too is not an event of sudden emergence but it has a gradual evolution which predominantly depended on the constitutional thoughts and ideas in the different stages of the constitutional evolution in India. The constitutional growth the United States of America reveals that the legislative powers were subjected to constitutional limitations and restriction at each stage of its growth. In India, since the enactment of Government of India Act, 1858 to the Government of India Act, 1935, the Indian legislature was subordinate to the English Parliament and any legislative Acts in India in contravention of the parliamentary directions and restrictions were void. By the Government of India Act of 1935 federalism was introduced which led to the expansion of the concept of judicial review in India. From 1885, when Indian National Congress was established, to the inauguration of the Indian Republic there were constant and vigorous agitations, for the establishment of federalism and for the State recognition of fundamental rights. India which had the heritage of the Rule of Law from ancient India acted strenuously and assiduously towards establishing the judicial control of the legislative powers.

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21. M.C.J. Kagzi, *The Constitution of India*, (Metropolitan Delhi: 1958) at 85-86.

As result the provision for judicial were incorporated in the constitution itself.<sup>22</sup>

### **Some important doctrines formulated by Courts through the judicial interpretation:**

Judicial review in India is based on various dimensions like judicial review of legislative, executive and judicial acts which are clearly provided some doctrines such as:

- (a) **Doctrine of Severability:** Under Article 13 of the constitution incorporates this doctrine. In Art. 13 the word “to the extent of contravention” are the basis of doctrine of severability. This doctrine enumerates that the court can separate the offending part unconstitutional of the impugned legislation from the rest of its legislation. Other parts of the legislation shall remain operative, if that is possible. This doctrine has been considerations of equality and prudence. If the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be void. This is known as “doctrine of severability”. In *A.K. Gopalan v. State of Madras case*,<sup>23</sup> section 14 of prevention Detention Act was founded out to be in violation of Article 14 of the constitution. It was also held that it is section 14 of the Act which is to be struck down not the act as a whole. It was also held that the omission of section 14 the Act will not change the object of the Act and hence it is severable.<sup>24</sup> In *State of Bombay v. F.N. Balsara*,<sup>25</sup> eight sections of the Bombay Prohibition Act, 1949, were held *ultra vires* on the ground that they infringed the fundamental right of the citizens. But the Act, minus the invalid provisions, was allowed to stand. The Court said: “The decision declaring some of the provisions of the Act to be invalid do not affect the validity of the Act as it remains”. The rule that the invalidity is only to the extent of inconsistency is not peculiar to Article 13, but is a general principle of statutory interpretation.<sup>26</sup>

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22. Chkradhar Jha, *Supra* note 3 at 423.

23. AIR 1950 SC 27.

24. Prashant Gupta, “Doctrine of Judicial Review: A Comparative Analysis between India, U.K. and U.S.A” IJL& AI, at 53.

25. AIR 1951 SC 318.

26. Cooley, *Constitutional Limitation*, Vol. I, at 246.



(b) **Doctrine of Waiver:** The question of waiving of fundamental rights arose in *Basheshier Nath v. I.T. Commissioner*.<sup>27</sup> In this case, the petitioner regarding Income Tax had been referred to the Income Tax Commissioner under Section 5(1) of the Income Tax Act, 1947 and it was found that he had concealed a large amount of his income. In order to escape from heavy punishment, he agreed as a settlement under section 5-A of the Act to pay Rs. 3 lakh in installments by way of arrears of tax and penalty.

In the meantime the Supreme Court in another case,<sup>28</sup> declared section 5 of Income Tax Act, 1947 *ultra vires* of the Constitution as it was inconsistent with the fundamental rights laid down in Article 14. The assessee accordingly, invited the Court to hold that he was absolved of his obligation under the settlement. The respondent (I.T. Commissioner) on the other hand contended that the assessee had waived his right under Article 14 by making a settlement. Three different judgments were delivered by the Supreme Court.

1. Bhagwati and Subba Rao JJ., held that it is not open to a citizen to waive any of the fundamental rights conferred by Part-III of the Constitution.
2. S.R. Das C.J., and Kapur J., confined their decision to the fundamental right actually involved in the case and held that the right under Article 14 cannot be waived.
3. S.K. Das J., who dissented, held that where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit, it can be waived, provided such waiving is not forbidden by law and does not contravene public policy or public moral.

Thus as per majority, it was held that fundamental rights are not to be waived.

In Kerala Education Bill, 1957,<sup>29</sup> also the Supreme Court had held that a fundamental right cannot be lost or deemed to have been waived merely on the ground that such right cannot be exercised.<sup>30</sup>

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27. AIR 1959 SC 149.

28. AIR 1954 SC 545.

29. AIR 1958 SC 956.

30. S.M. Mehta, Indian Constitutional Law, 1990 edn. (New Delhi: Deep&Deep Publication) at 58-59.

(c) **Doctrine of eclipse:** An existing law inconsistent with a fundamental right, though becomes inoperative from the date of the commencement of the Constitution, is not dead altogether. “It is overshadowed by the fundamental right and remains dormant, but is not dead.<sup>31</sup> It is a good law if a question arises for determination of rights and obligations incurred before the commencement of the Constitution, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution.<sup>32</sup> This has led the Supreme Court to apply to the existing laws, i.e. the Pre-Constitution laws, what may be described as the doctrine of *eclipse*. According to this doctrine, an existing law, i.e., a law made before the commencement of the Constitution, remains eclipsed or dormant to the extent it comes under the shadow of the fundamental right, i.e., is inconsistent with it, but the eclipsed or dormant parts become operative and effective again if the prohibition brought about by the fundamental right is removed by an amendment of the Constitution. The Supreme Court decision in *Bhikaji Narain Dhakras v. State of M.P.*,<sup>33</sup> is a good illustration of the application of the rule.

In that case an existing State Law authorized the State Government to exclude all private motor transport operators from the field of transport business. Parts of this law became void on the commencement of the Constitution as it infringed the provisions of Article 19(1)(g) of the Constitution and could not be justified under the provisions of clause (6) of Article 19. In 1951, clause (6) of Article 19 was amended to allow the Government to monopolize any business. The Supreme Court held that after the amendment of clause (6) of Article 19, on June 18, 1951, the constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable.<sup>34</sup>

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31. *Bhikaji Narain Dhakras v. State of M.P.*, AIR 1955 SC 130.

32. *Keshavan Madhava Menon v. State of Bombay*, AIR 1951 SC 128; *Behram Khurshid Pesikaka v. State of Bombay*, AIR 1955 SC 123.

33. AIR 1955 SC 781.

34. V.N. Shukla, *Constitution of India*, 11th edn. (Lucknow: Eastern Book Company, 2008) at 37-38.

The doctrine of eclipse which at one time was supposed to be applicable only to pre-Constitution laws, but now it has extended to post-Constitution laws also.<sup>35</sup>

(d) **Doctrine of prospective overruling:** The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs, but in such a way that it does not create a binding effect upon the parties to the case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is laying down a new law for the future. This doctrine was propounded in India in the case of *Golak Nath v. State of Punjab*,<sup>36</sup> the court overruled the decisions laid down in *Sajjan Singh*<sup>37</sup> and *Shankari Prasad*<sup>38</sup> cases and propounded doctrine of prospective overruling. The judges of Supreme Court of India laid down its view on this doctrine in very substantive way, by saying “The doctrine of prospective overruling is a modern doctrine suitable for a fast moving society”. The Supreme Court applied the doctrine of prospective overruling and held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth amendment will continue to be valid.<sup>39</sup>

(e) **Doctrine of colourable legislation:** This doctrine was applied by Mohan J. in *Dwarkadas v. Sholapur Co.*,<sup>40</sup> to determine whether the Sholapur Spinning Company (Emergency Provisions) Ordinance, 1950 contravened the provision of Article 31 (2), as it then stood:

“In order to decide these issues, it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature has really done; the court, when such questions arise, is not over persuaded by the mere appearance of the legislation. In relation constitutional prohibitions

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

36. AIR 1965 SC 845.

37. AIR 1965 SC 845.

38. AIR 1951 SC 458.

39. Prashant Gupta, Supra note 24 at 54.

40. (1954) SCR 674.

binding a legislative it is clear that the legislative cannot disobey the prohibitions merely by employing indirect method of achieving exactly the same result. Therefore, in all such cases the court has to look behind the names, forms and appearance to discover the true character and nature of the legislation”.<sup>41</sup>

The doctrine has its application both as regards limitations on the legislative competence of a legislature under a federal system as well as other constitutional limitation, such as fundamental rights, which cannot be transgressed by the legislature. Its application with respect to legislative power will be dealt with separately under Part-XI, post. In the present context, we shall discuss its bearing on constitutionality on the ground of contravention of fundamental rights.<sup>42</sup>

It has been applied by our Supreme Court in the case of *Gajapati v. State of Orissa*<sup>43</sup>

“The doctrine of colorable legislation does not involve any question of *bona fides* or *mala fides* on the part of legislature. The whole doctrine resolves itself to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power”.<sup>44</sup>

### **Judicial Review in United States of America:**

The doctrine of judicial review was for the first time propounded by the Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. The power of judicial review was, however, assumed by the Supreme Court of America in the historic case of *Murby v. Madison*.<sup>45</sup>

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41. *Dwarkadas v. Sholapur Co.*, (1954) SCR 674.

42. *Durga Das Basu*, *Supra* note 1 at 508.

43. (1954) SCR 1 (16).

44. *Arizona v. California*, (1931) 283 U.S. 423 (455).

45. 2L Ed. 60.

The facts of the case were as follows: The federalists had lost the election of 1800, but before leaving the office they had succeeded in creating several new judicial posts. Among these were 42 justices of peace, to which the retiring Federalist President John Adams appointed forty two Federalists. The appointments of commissions were confirmed by the Senate and they were signed and sealed, but Adam's Secretary of State, John Marshall, failed to deliver certain of them. When the new President, Thomas Jefferson, assumed office, he instructed his Secretary of State, James Madison not to deliver seventeen of these commissions including one for William Marbury, filed a petition in the Supreme Court for the issue of a writ of mandamus to Secretary Madison, ordering him to deliver the commissions. He relied on Section 31 of the Judiciary Act of 1789 which provided: "The Supreme Court shall have the power to issue.....writs of mandamus, in cases warranted by the principles and usages of law, to.....persons holding office, under the authority of the United States". The Court, speaking through Marshall who had now become Chief Justice, held that Section 13 of the Judiciary Act was repugnant to Article-III, Section 2 of the Constitution inasmuch as the Constitution itself limited the Supreme Court's original jurisdiction to case, "affecting ambassadors, other public ministers and consuls, and those to which a State is party". Since Marbury fell in none of these categories the court had no jurisdiction in his case. The observations of Marshall, C.J., in that case are pertinent to note:

"The Constitution is either superior paramount law unchangeable by ordinary means or it is on a level with ordinary legislative Acts, and like other Acts is alterable when the legislature shall please to alter it..... Certainly, all those who framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation and, consequently, the theory of every such Government must be that an Act of the legislature repugnant to the Constitution is void. And further, "It is emphatically the province and duty of the judicial department to say what the law is...."<sup>46</sup>

### **Judicial review in United Kingdom:**

The judicial review was prevalent in England, Dr. Thomas Bonham v. College of Physicians case<sup>47</sup> was decided in 1610 by Lord Coke who was the foundation of judicial review.

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46. J.N. Pandey, The Constitutional Law of India, 45<sup>th</sup>edn. (Allahabad: Central Law Agency. 2008) at 66.

47. (8 Co. 114a, 77 Eng. Rep. 646 (1610).

But in *City of London v. Wood* case,<sup>48</sup> Chief Justice Holt remarked that “An Act of Parliament can do no wrong, through 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. In UK, 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 of European Convention of Human Rights, the scope of judicial review became wider. The enactment of Human Rights Act, 1998 also requires domestic Courts to protect the rights of individuals. In UK, there is no Written Constitution and parliamentary supremacy is the foundation. Principle of ‘Parliamentary sovereignty’ dominates the constitutional democracy in UK. The two dimensions of legislation in UK are:

- (1) Primary legislation, which are basically legislations enacted by parliament. 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.
- (2) Secondary legislation, which provides rules, regulation, directives and act of Ministries. Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions, rules, regulations can be reviewed by Courts and any of the actions can be declared as unlawful which is *ultra vires* to the Constitution.

In *Les Verts v. European Parliament*,<sup>49</sup> 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”.

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48. (1701) 12 Mod. 669, 687.

49. (1986) ECR 1339.

### **Judicial Review in India:**

Judicial Review is the power of courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void.<sup>50</sup> “Judicial Review” said Khanna, J., in the Fundamental Rights case,<sup>51</sup> “has thus become an integral part of our Constitutional System and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any of the articles of the Constitution which is the touchstone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provision”

That power corrupts a man and absolute power corrupts absolutely which ultimately leads to tyranny, anarchy and chaos has been sufficiently established in course of evolution of human history, and all round attempts have been made to erect institutional limitations on its exercise. When Montesquieu gave his doctrine of separation of power, he was obviously moved by his desire to put a curb on absolute and uncontrollable power in any one organ of the Government. Legislature, an executive and a judicial power comprehend the whole of what is meant and understood by Government. It is by balancing each of these two powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in the Constitution.<sup>52</sup>

Judicial Review is thus the interpretation of judicial restraint on the legislative as well as the executive organs of the Government. The concept has the origin in the theory of limited Government and in the theory of two laws such as an ordinary and supreme (i.e., the Constitution). From the very assumption that there is a supreme law which constitutes the foundation and source of other legislative authorities in the body policy, it proceeds that any act

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50. Durga Das Basu, *Commentary on the Constitution of India*, 5<sup>th</sup> edn., Vol. VIII, at 457.

51. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

52. Letter by James Adams to Richard Henry.

of the ordinary law-making bodies which contravenes the provisions of the supreme law must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts void.<sup>53</sup>

Generally the judicial review in India is explicitly in two dimensions such as administrative action and of legislation. These two kinds of review have thus much in common in their origin and rationale, they have branched off basically from each other and their development has been on different lines. Apart from the fact the judicial review of administrative action had originated and developed much earlier than the judicial review of legislation, the nature and scope of two has become basically different from each other.

### **Judicial review of legislation:**

The judicial review of legislation did not take root in England but in other countries like United States and India, the judicial review of legislation becomes an essential part of the constitutional system and a higher rule of law. Firstly, the federal system which is based on the distribution of legislative and executive powers between the Centre and the States cannot function, smoothly without resort to judicial review of legislation, when necessary. Secondly, the regional and linguistic diversities in India also make it desirable that an independent and impartial judiciary should be established by the constitution so that the fundamental Rights of the individual and minorities shall be placed beyond the pale of ordinary legislation.

It is inadequacy of the judicial review of administrative action to give protection against legislative invasions of liberties of the individual which accounts for the simultaneous expansion of the judicial review of legislation. The impetus was given when the inviolability of the basic human rights was first recognized by the United Nations in approving the Universal Declaration of Human Rights in 1948. Since these were to be above the reach of ordinary laws, it was implied that the courts should protect them by exercising the power of judicial review of legislation. In the development of the human rights which had an impact on the growth of judicial review of legislation.<sup>54</sup>

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53. Durga Das Basu, Commentary on the Constitution of India, Vol.I.

54. V.S. Deshpande J., Judicial Review of Legislation, (Lucknow: Eastern Book Company, 1977) at 44.



Justice Bhagwati's argument in *Minerva Mills* case,<sup>55</sup> that "effective alternate institutional mechanisms or arrangements to exercise the power of judicial review could be created by Parliament. He put forth the following argument:

"...The constitutional safeguards which ensure the independence of the judges of the superior judiciary are not available to the judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Court's under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of the High Courts and Supreme Court to test the constitutional validity of legislations can never be ousted or excluded".

In *I.R. Coelho v. State of Tamil Nadu* case,<sup>56</sup> 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 said 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 *Keshvanand 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".

In recent judgment of *Madras Bar Association v. Union of India*,<sup>57</sup> the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provision *ultra vires*. In this case the petitioner challenges the constitution of NCLT and NAJAC and also challenges the formation of the Committee, the appointment of the judicial members as well as the technical members.

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55. (1980) 3 SCC 625.

56. AIR 2007 SC 861.

57. (2015) SCC 484.

Section 409(3)(a), Section 409(3)(c), Section 411(3) and section 412(2) are the provision which incorporates the Constitution of Board of company law administration. The Supreme Court upheld the validity of NCLT and NACL, 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.<sup>58</sup>

### **Judicial review of administration action:**

Public authorities today affect the rights of the public in the course of their functioning. This is done through administration action. To promote *rule of law*, it is necessary that there should be an effective control and redressal mechanism over the administration. This the only way to instill responsibility and accountability in the administration and make it law abiding.

Redressal can be done in the way of appeal against the administrative action when redressal mechanism is provided. In absence of such mechanism, the action can be challenged before the courts. This is not an appeal, but a request for reviewing the administrative.<sup>59</sup>

According to Wade, “Judicial review thus, is fundamental mechanism rule of law”.<sup>60</sup> Without some kind of judicial power to control administrative authorities, there is a danger that they may be tempted to commit excesses and degenerate into arbitrary bodies. Such a development would be inimical to democratic constitution and the concept of rule of law. The courts develop the norms for administrative behavior, adjudicate upon individual grievances against the administration, give relief to the aggrieved person in suitable cases and in the process control the administration.

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58. Prashant Gupta, Supra note 24 at 61.

59. Gagan Krishnadas, “Judicial Review of administrative action with special reference to Infrastructure Projects” (2013) Vol. XL (4), Indian Bar Review, at 111.

60. Wade & Forsyth, Administrative Law, 8<sup>th</sup>edn. (2000) at 34.

In *State of UP v. Johri Mal*,<sup>61</sup> the Supreme Court succinctly explained the scope of judicial review in the following way:

- (i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.
- (ii) A petition for a judicial review would lie only on certain well defined ground.
- (iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.
- (iv) A mere wrong decision without anything more is just enough to attract the power of judicial review, the supervisory jurisdiction conferred on a court is limited to seeing that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.
- (v) The courts cannot be called upon to undertake the government duties and functions. The court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a judge should not be invoked as a substitute for the judgment of the legislative bodies.

The Supreme Court in the case of *Tata Cellular v. Union of India*,<sup>62</sup> laid down the test for judicial review of administrative action:

- (i) Whether decision making authority exceeded its powers?
- (ii) Committed an error of law;
- (iii) Committed breach of the rules of natural justice;
- (iv) Reached a decision which no reasonable tribunal would have reached; or
- (v) Abused its power.

In India, the courts interfere with the discretionary power exercised by the administration in either of these circumstances- (1) Failure to exercise discretion; or (2) Excess/abuse of discretion. Shortly put, the ground upon which an administrative action is subject to control by judicial review can be classified as under:

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61. (2004) 4 SCC 714.

62. (1994) 6 SCC 615.

- (i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it;
- (ii) Irrationality, namely, *Wednesbury*<sup>63</sup> unreasonableness;
- (iii) Procedural impropriety.<sup>64</sup>

### **Judicial review and apex courts determine the constitutionality:**

Our Constitution envisages that only two<sup>65</sup> Courts shall be competent to determine the constitutionality of laws, namely, the Supreme Court and the High of a state.

Our federal not being based on the theory of sovereignty of the State, no artificial distinction is made between State and federal laws, either as regards their application or administration or as regards litigation to test their validity. It follows; therefore, the Supreme Court and a High Court are entitled to examine the validity of laws under their respective constitutional jurisdictions, whether they are Union or State laws.

In India, the instrumentalities of judicial review are of two kinds: (a) Those founded on the ordinary law, such as a declaratory action, which is governed by Section 34 of the Specific Relief Act, 1963. (b) Those provided by the Constitution, e.g., the writ jurisdiction under Article 32 and 226: appeal.

It would be convenient to discuss these different powers of judicial review of constitutionality with reference to the Courts which are entitled to exercise them.<sup>66</sup>

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63. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* KB 229 ALL ER 682. In this case, Lord Green MR held that a decision of a public authority will be liable to be quashed in judicial review proceeding where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have arrived it.

64. *Reliance Airport Developers Pvt. Ltd. v. Airport Authority of India and Others*.

65. Art. 32(3), of course, empowers parliament to confer on subordinate courts (i.e., Courts inferior to the High Court) the power to issue the writs for the enforcement of Fundamental Rights, but no such Court has so far been empowered by parliament . It is interesting to note in this connection that in the U.S.A., the federal All Writs Act, 1948 [28 U.S.C., S. 1651 (a)] has empowered “all federal Courts to issue in aid of their respective jurisdictions”.

66. *Durga Das Basu*, *Supra* note 1 at 367.

### **Judicial review and ninth schedule:**

The ninth schedule was included in the Indian Constitution by Constitution (first Amendment) Act, 1951, along with Article 31-B. It provides that none of the Acts and Regulations included in the ninth schedule to the Constitution shall be deemed to be void on the ground that they are inconsistent with any of the rights conferred by Part-III of the Constitution. In effect, the sole purpose of the ninth schedule read with Article 31-B is to save the Acts passed by the legislature from the power of the judicial review of the courts. In Shankari Prasad's case,<sup>67</sup> the Supreme Court upheld the constitutional validity of the ninth schedule.

In order to overcome the verdict given in the case of Kameswar Singh,<sup>68</sup> and to carry out the agrarian reforms in a country, Parliament in the first instance brought 1<sup>st</sup> amendment by which they added Article 31-A and 31-B read with ninth schedule to reduce the power of judiciary to question of the constitutional validity of the land reforms legislations. Thereby Article 31-B<sup>69</sup> and ninth schedule made controlled Constitution into uncontrolled.

The constitutional amendments by which certain legislative Acts have been included in ninth schedule of the constitution, intend also to include all the antecedent and subsequent amendment of these legislative Acts. But in many cases the principal Acts alone have incorporated in ninth schedule of the constitution and the amending acts have not been included therein. The Supreme Court has held that amending acts as well as the original statutes would be deemed to be included in ninth schedule. The reason is that ordinarily if an Act is referred to by its title it is intended to refer to that Act with all the amendments made in it up to the date of reference.<sup>70</sup>

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67. AIR 1951 SC 458.

68. AIR 1951 Pat. 91, SB.

69. " Art.31-B Validation of Certain Acts and Regulation : Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the ninth schedule nor any of the provisions thereof shall be deemed to be void, or even to have become void, on the ground that such Act, regulation as provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of the part, and notwithstanding any judgment, decree or order of any Court or legislature to repeal or amend it, continue in force".

70. State of Maharashtra v. Madhav Rao, AIR 1968 SC 1395.

Article 31-A was inserted as an immunity from judicial review of the acquisition law regarding State and also the law regarding management of any property for a limited period, extinguishment or modification of any property for a management and amalgamation of corporation etc. This Article debars judicial review of a legislative Act relating to agrarian reforms.<sup>71</sup>

Article 31-B is a mechanical Article which provides that any legislative Act or its provision, which is added in ninth schedule, is immune from judicial review. This Article is very drastic and is a political device to fetter the hands of the court in determining legislative lapses. The rule made under such statutes and Regulations are immune from judicial scrutiny.<sup>72</sup>

### **Conclusion:**

Under the Indian Constitution, there is a specific provision in Article 13(2) that the State shall not make any law which takes away or abridges the fundamental rights enshrined in the Constitution, and any law made in contravention of this provision shall, to the extent of inconsistency, be void. The inclusion of this provision appears to be due to abundant caution, because even in the absence of such a provision, the courts would still have the power to examine the constitutionality of a law on ground of infringement of fundamental rights.<sup>73</sup> This is so because the judges are bound by oath to uphold the Constitution and the courts can be approached for the enforcement of the fundamental rights. One of the unique features of the Constitution is that a person has a fundamental right to approach the Supreme Court. Moreover wide original and appellate jurisdiction has been given to the Supreme Court and High Courts to adjudicate on the constitutionality of any (legislative or executive) actions.<sup>74</sup> Judicial review in India is based on the assumption that Constitution is the supreme law of land. It is the power of apex courts to review the action against legislature, executive as well as the judiciary. It has been extended to reviewability of constitutional amendments by the doctrine of the 'basic structure' of the constitution through the verdicts era from Gopalan to Golok Nath and Keshavananda Bharati to I.R. Coelho.

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71. K.W. Estate v. State of Madras, AIR 1971 SC 161.

72. Krishnaraju v. A. O. Land Reforms, AIR 1967 Mad. 352.

73. A.K. Gopalan v. State of Madras, AIR 1950 Sc 27.

74. V.N. Shukla, Supra note 33 at A-54.

It has been protected the violation of constitutional provisions with the parameter of basic structure doctrine. It should be checks and balance among the three organs of government.

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 purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law.<sup>75</sup> So the judiciary authorities should be upholds the constitutionality of laws by exercising the power of judicial review.

The framers of our Constitution were aware of the inherent weaknesses of judicial review; therefore they tried to define its scope and adopted several devices to prevent courts from abusing their powers and acting as “supper legislature” or “permanent “third chambers””.<sup>76</sup> According to the Indian Constitutional commenter, D.D. Basu, our Constitution adopts the via-media between American systems of judicial supremacy and the English principle of parliament supremacy; by endowing the judiciary with the power of declaring a law unconstitutional if it is beyond the legislative competency, i.e. when legislature over steps its assigned field or violates fundamental rights, but it has no power to review the wisdom of legislative policy.<sup>77</sup> With the form of quasi-federal/quasi-unitary our Constitution, judiciary should be protected the fundamental rights of the people as an armor in the light of human right norms when the functioning the power of judicial review.

Lastly, Supreme Court of India as the guardian of our Constitution, with the power of judicial review it may extends to adjudicating upon the constitutionality of legislation and the legality executive action.

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75. Justice C.K. Thakkar, Justice ArijitPasayat, Dr. C.D. Jha, *Judicial Review of Legislative Acts*, 2<sup>nd</sup>edn. (Nagpur: Lexis NexisButterworthsWadhwa, 2009) at 116.

76. R.C.S. Sarkar, *Supra* note 4 at 352.

77. D.D. Basu, *Introduction to the Constitution of India*, 6<sup>th</sup>edn. at 36.