Judicial Review: A Comparative Analysis of India, USA & UK

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Abstract:

In India, the essence of judicial review is the supremacy of law. It is the power of the court to review the actions of legislative, executive and judiciary. It is the great weapon in the hands of the court to hold unconstitutional and unenforceable any law and order which is in conflict with the basic law of the land. This paper will deal with the various doctrines formulated by the Apex Court on the basis of judicial review, for e.g., *Doctrine of Severability, Doctrine of Eclipse, Doctrine of Prospective Over-ruling* etc. The paper will also focus on *Judicial Review of Constitutional Amendments, Judicial Review of Legislative Actions* and *Judicial Review of Administrative Actions.*

The paper will further look into the stand of judicial review in USA and UK. Judicial review had mainly originated in USA from the notable landmark case of ***Marbury vs. Madison.*** But originally Lord Coke's decision in, ***Dr. Bonham vs. Cambridge University*** had rooted the scope of judicial review first time in 1610 in England. This paper will discuss as to how the U.S. Constitution does not provide power of judicial review expressly but Articles III and VI of the U.S. Constitution touch down this concept. There being no written Constitution in UK, the paper will also deal with the principle of "Parliamentary Sovereignty" which dominated the Constitutional democracy. Parliament Supremacy in UK incorporates the will of the people and the Courts cannot scrutinize the actions of Parliament. Parliament prevents the scope of judicial review to primary legislation except in few cases related to human rights and individual freedom. But secondary legislations are subject to judicial review. Court can review the administrative and executive actions in UK.

Through this paper the author has made an attempt to present a comparative analysis of judicial review in India, U.S.A and UK.

Keywords: Comparison, India, Judicial Review, UK, U.S.A.

I. JUDICIAL REVIEW IN INDIA

The Supremacy of Law is the spirit of the Indian Constitution. In India, the Doctrine of Judicial Review is the basic feature of the Constitution and is considered to be its hallmark. Though there is no express provision for judicial review in the Indian Constitution but it is an integral part of it. Judicial Review is a power of court to set up an effective system of check and balance between legislature and executive.

The most prominent object of Judicial Review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The perceived notion of judicial review is to justify some alleged right of one parties to litigation and thus granting relief to the aggrieved party by declaring an enactment void, if in law it is void. But its real purpose is something higher i.e., no statute which is

repugnant to the Constitution should be made enforceable by the Court of Law.[1] In India the concept of Judicial Review is founded on the Rule of Law. The Government of India Act, 1858 and The 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. ***Emperor v. Burah,***[2] was the first case which interpreted and originated the concept of Judicial Review in India in 1877. 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. Lord Haldane in, ***Secretary of State v. Moment***[3]**,** observed that "the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. the Government of India Act of 1858". Then, in ***Annie Besant v. Government of Madras***[4]**,** 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 be null and void.

There was no specific provision for 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. However, Constitution of India, 1950 explicitly establishes the Doctrine of Judicial Review under various Articles i.e. 13, 32, 131-136, 143, 226, 227, 245, 246, 372, etc. Article 13 of the Constitution incorporates "Judicial Review of Post constitution and Pre- constitutional laws". This Article inherited most important doctrines of Judicial Review like *Doctrine of Severability, Doctrine of Eclipse.* The power of Judicial Review has been conferred on the High Courts and the Supreme Court of India under Article 226 and 32 respectively, which can declare a law unconstitutional if it is inconsistent with any of the provisions of Part 3 of the Constitution. Some other doctrines formulated by the courts using the power of Judicial Review are *Doctrine of Pith and Substance, Doctrine of Colorable legislation*. Some of the Doctrines are:

- **Doctrine of Eclipse**

This doctrine applies to the case of a pre constitution statute. Under Article 13(1), all Pre Constitution statutes which are inconsistent to Part III of the Constitution become unenforceable and unconstitutional after the enactment of the Constitution. Thus, when such statutes were enacted they were fully valid and operative. They become eclipsed on account of Article 13 and lost their validity. This is called Doctrine of

[1]JUSTICE CK THAKKAR & JUSTICE ARIJIT PASAYAT, DR. CD JHA JUDICIAL REVIEW OF LEGISLATIVE ACTS 116 (2d ed. Lexis Nexis Butterworths Wadhwa, 2009).
[2]Emperor v. Burah, (1877) 3 ILR 63 (Cal).
[3]Secretary of State v. Moment, (1913) 40 ILR 391 (Cal).
[4] Annie Besant v. Government of Madras, (1918) AIR 1210 (Mad).

Eclipse. If the constitutional ban is removed, the statute becomes free from eclipse and becomes enforceable again.

In ***Bhikaji Narain Dharkras v. State of M.P.[5],*** an existing State law authorized the State Government to exclude all the private motor transport operators from the field of transport business. Part of this law became void on the commencement of the Constitution as it infringed the provisions of Article 19 (1) (g) and could not be justified under the provisions of Article 19 (6) of the Constitution. First Amendment Act, 1951 amended the Article 19 (6) and this amendment permitted the Government to monopolize any business. The Supreme Court held that after the amendment of clause (6) of Art. 19, the Constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable

- **Doctrine of Severability**

Article 13 of the Indian Constitution, the words "*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. If the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is held to be void.

In ***A.K. Gopalan v. State of Madras[6],*** section 14 of the Prevention Detention Act was found out to be in violation of Article 14 of the Constitution. It was held by the Supreme Court 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 of the Act will not change the object of the Act and hence it is severable. The Supreme Court by applying the doctrine of severability invalidated the impugned law.

- **Doctrine of Prospective Over-ruling**

The basic meaning of prospective over-ruling is to interpret 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 original 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.[7]*** In this case the court overruled the decisions laid down in ***Sajjan Singh [8]and Shankari Prasad*'s**[9] cases and propounded the Doctrine of Prospective Overruling. The Judges of Supreme Court of India laid down their view on this doctrine in a very substantive way, by saying "The doctrine of prospective overruling is a modern doctrine

[5] Bhikaji Narain Dharkras v. State of M.P., (1955) 2 SCR 589 (India).
[6] A.K. Gopalan v. State of Madras, (1950) SC 27 (India)
[7] Golak Nath v. State of Punjab, AIR 1967 S.C. 1643 (India).
[8] Sajjan Singh v. Rajasthan, (1965) 1 S.C.R. 933 (India).
[9] Shankari Prasad v. Union of India, AIR 1951 S.C. 455 (India).

suitable for a fast moving society." The Supreme Court further held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth amendments will continue to be valid.

In the Indian Constitution, Judicial Review is explicitly provided in three dimensions; *Judicial Review of Constitutional Amendments, Judicial Review of Parliament and State Legislation and also Judicial Review of Administrative actions of Executives*. These dimensions have been summarized as follows:

II. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

Constitutional amendments are very rigid in nature. Parliament has the supreme power to amend the Constitution but cannot abrogate its basic structure. There was a conflict between the Supreme Court and Parliament regarding Constitutional Amendment as to whether fundamental rights are amendable under Article 368 or not? The question came for consideration of the Supreme Court in ***Shankari Prasad v. Union of India[10].*** It was the first case on amendability of the Constitution. The validity of the Constitution (1st Amendment) Act, 1951, curtailing the "Right to Property" guaranteed by Art. 31 was challenged. The argument against the validity of (1st Amendment) was that Art. 13 prohibits enactment of a law infringing and abrogating the fundamental rights, that the word 'law' in Art 13 would include" any law", then a law amending the constitution and therefore, the validity of such a law could be judged and scrutinized with reference to the fundamental rights which it could not infringe. It was argued that the "State in Article 12 included Parliament and the word "law" in Art. 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 Art. 368 and that the word 'law' in Art. 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. Therefore, a Constitutional amendment will be valid even if it abridges or takes any of the fundamental rights.

Again, in the case of ***Sajjan Singh v. Rajasthan[11]*** the Constitution (17th Amendment) Act, 1964 was challenged and the Court held that when Art. 368 confers on Parliament the right to amend the Constitution, the power in question can be exercised over all the provisions of the Constitution. After the decision of Sajjan Singh, in 1967 in ***Golak Nath v. State of Punjab[12],*** the same question regarding constitutional amendment was raised. In this case the inclusion of the Punjab Security of Land Tenures Act, 1953 in the Ninth Schedule was challenged on the ground that the Seventeenth Amendment by which it was so included as well as the First and the Fourth Amendments abridged the fundamental rights was unconstitutional. The Supreme Court overruled the decision of Shankari Prasad and Sajjan Singh's case and observed that "An amendment is a 'law' within the meaning of Art. 13(2) which included every kind of law; statutory as well

[10] Shankari Prasad v. Union of India, AIR 1951 S.C. 455 (India).
[11] Sajjan Singh v. Rajasthan, (1965) 1 S.C.R. 933 (India).
[12] Golak Nath v. State of Punjab, AIR 1967 S.C. 1643 (India).

as constitutional law and hence a constitutional amendment which contravened Art. 13(2) will be declared void." Court further observed that "The power of Parliament to amend the Constitution is derived from Art.245, read with Entry 97 of list 1 of the Constitution and not from Art.368. Art. 368 only lays down the procedure for amendment of Constitution. Amendment is a legislative process."[13]

The minority view of five out of eleven judges was that the word 'law' in Art. 13(2) refers to only ordinary law and not a constitutional amendment and hence *Shankari Prasad* and *Sajjan Singh* case have been rightly decided. According to these cases, Article 368 dealt with not only the procedure of amending the constitution but also contained the power to amend the constitution.[14]

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 ***Keshavananda Bharati v. State of Kerala***[15] 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 challenged the validity of twenty fourth, twenty fifth, and twenty ninth amendment to the Constitution and further the question was involved as to what extent the amending power has been conferred by Article 368 of the Constitution? The Supreme Court overruled the Golak Nath's case and held that "*Under Art. 368 Parliament can amend the fundamental rights but cannot take or abridge the Basic Structure of the Constitution".* This judgment propounded the "*Theory of Basic Structure: A Limitation on Amending Power."* It was formulated by the Supreme Court through Doctrine of Judicial Review.

Further, in ***Indira Nehru Gandhi v. Raj Narayan***[16], the amendment was made to validate with retrospective effect the election of the then Prime Minister which was set aside by the Allahabad High Court. The Supreme Court struck down clause (4) of Art.329-A which was the offending clause inserted by 39th Amendment to validate the election with retrospective effect. Khanna J. struck down the clause on the ground that "it violated the free and fair election which was an essential postulate of democracy which in turn was a basic structure of the constitution".

Again in ***Minerva Mills v. Union of India***[17]**,** the petition was filed in the Supreme Court challenging the taking over of the management of the mill under the Silk Textile undertaking (Nationalization) Act, 1974, and an order made under S. 18-A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the constitutional validity of clauses (4) and (5) of Art. 368, introduced by Sec. 55 of the 42nd Amendment. If these clauses were held valid then petitioner could not challenge the validity of the 39th

[13] MP SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA 999 (11th ed., Eastern Book Company 2008).
[14] DR. J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA (49th ed., Central Law Agency 2012).
[15] Keshavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India).
[16] Indira Nehru Gandhi v. Raj Narayan, AIR 1980 S.C. 1789 (India).
[17] Minerva Mills v. Union of India, A.I.R. 1975 S.C. 2299 (India).

Amendment which had placed the Nationalization Act, 1974, in the IX schedule. S. 55 of the Constitution (42nd Amendment) Act, 1976 inserted sub-sections (40 and (5) in Art. 368. The Supreme Court struck down clauses (4) and (5) of Art. 368 inserted by the 42nd Amendment on the ground that these clauses destroyed the basic structure of the Constitution. Limited amending power is a basic feature of Constitution and these clauses removed all limitations on the amending power and thereby conferred an unlimited amending power, and it was destructive of the basic feature of the Constitution."

Through these cases Supreme Court scrutinized the validity of Constitutional Amendment Law by using the Doctrine of Judicial Review.

III. JUDICIAL REVIEW OF PARLIAMENTARY AND STATE LEGISLATIVE ACTIONS

Art. 245 and 246 of the Indian constitution gives legislatives powers to Parliament and State Legislatures. Art. 245 (1) provides "subject to the provisions of the constitution , the parliament may make any law 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 on the Parliament and State Legislature to make legislation. These words are the essence of Judicial Review of legislative actions. 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 Art. 141 which incorporates "Doctrine of Precedent" to implement its own view regarding any conflicted issue and it also have binding force. Supreme Court gives us some relevant observations through judicial decisions regarding the legislative actions of Parliament and State Legislatures.

In, ***SP Sampat Kumar v. Union of India,***[18] the Constitutional validity of Administrative Tribunal Act, 1985, was challenged on the ground that that the impugned Act by excluding the jurisdiction of High Courts under Art. 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 Art. 32 and 136 is still there. Further it was held that "a law passed under Art. 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 from the particular area only if an alternative effective institutional mechanism or authority is provided."

In ***L Chandra v. Union of India***[19]**,** clause 2(d) of Art. 323-A and clause 3(d) of Art.323-B was challenged

[18] SP Sampat Kumar v. Union of India, (1987) 1 S.C.C. 124 (India).
[19] L Chandra v. Union of India, A.I.R. 1997 S.C. 1125 (India).

on the ground that these clauses excludes the jurisdiction of High Courts in service matters. The Constitutional Bench unanimously held that "these provisions are to the extent that they exclude the jurisdiction of the High Courts and Supreme Courts under Art.226/227 and 32 of the constitution are unconstitutional as they damage the power of judicial review. The power of judicial review over Legislative Actions vested in the High Courts and Supreme Court under Art. 226/227 and Art.32 is an integral part and it also formed part of its basic structure."

Recently in, ***I.R. Coelho v. State of Tamil Nadu***[20]**,** 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 be 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 Keshvananda Bharati's case, such a violation shall be open to challenge on the ground that it destroys or damages the basic structure of constitution". The Supreme Court observed that "Judicial Review of legislative actions is the touchstone of the basic structure of the constitution.

IV. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

Judicial Review of Administrative action is perhaps the most important development in the field of public law and it came from Britain. 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."[21] 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 reviewed 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. As a general rule, courts have no power to interfere with actions taken by administrative authorities in exercise of discretionary powers. But this does not mean that there is no power of court to control over the discretion of administration. In India, the court will interfere with the discretionary powers exercised by the administration on two grounds: i.e. failure to exercise discretion and excess or abuse of discretion. The judicial review of administrative action can be exercised on the following grounds:

- **Illegality** means that the decision maker must correctly understand the law that regulates his decision making power and must give effect to it.

[20] I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861 (India).
[21] De Smith, Judicial Review of Administrative Action (1995) 296-99, CK TAKWANI, Lectures On Administrative Law 276 (4th ed., Eastern Book Company 2008).

- **Irrationality** means that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at such a decision.
- **Procedural impropriety** means that the procedure for taking administrative decision and action must be fair, reasonable and just.
- **Proportionality** means in any administrative decision and action the end and means relationship must be rational.
- **Unreasonableness** means that either the facts do not warrant the conclusion reached by the authority or the authority or by the decision is partial and unequal in its operation.

But in the famous case of ***Council of Civil Service Unions v. Minister for the Civil Service***[22]**,**

Lord Diplock highlighted the grounds by his observations, "Judicial review has I think developed to a stage by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', second 'irrationality' and the third 'procedural impropriety'." Doctrine of proportionality' is another important basis for exercising judicial review. This entails that administrative measures must not be more drastic than what is necessary for attaining the desired result. The doctrine operates both in procedural and substantive matters. This principle contemplates scrutiny of whether the power that has been conferred on an executive agency is being exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred[23].

In ***Ajay Hasia v. Khalid Mujib***[24]**,** the Regional Engineering College made admissions on the ground that it was arbitrary and unreasonable because high percentage marks were allocated for oral test and candidates were interviewed for very short time duration. The Court struck down the Rule prescribing high percentage of marks for oral test because allocation of one third of total marks for oral interview was plainly arbitrary and unreasonable and violative of Article 14 of the Constitution.

In ***Air India v. Nargesh Meerza***[25]**,** one of the Regulation of Air India provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within the four years of service or on first pregnancy, whichever is occurred earlier. The Regulation did not prohibit the marriage after four years and if an air hostess after having fulfilled the first condition became pregnant, there was no reason why pregnancy should stand in the way of her continuing in service. The

[22] Council of Civil Service Unions v. Minister for the Civil Service, 3 AII. E.R. 935, (1984).
[23] Mr. K.G. Balakrishnan, Seminar on 'Judicial Review of Administrative Action, THE SUPREME COURT OF INDIA (July 12, 2018, 8:52 PM), http://www.supremecourtofindia.nic.in/speeches/speeches_2009/judicial_review_of_administrative_action_-_24-8-09.
[24] Ajay Hasia v. Khalid Mujib, A.I.R. 1981 S.C. 487 (India).
[25] Air India v. Nargesh Meerza, A.I.R. 1981 S.C. 1829 (India).

Supreme Court struck down the Air India's and Indian Air lines' Regulations on the retirement and pregnancy bar on the services of air hostess as unconstitutional on the ground that the conditions laid down therein were entirely unreasonable and arbitrary.

V. PRESENT SCENARIO OF JUDICIAL REVIEW IN INDIA

Supreme Court plays a very crucial role to interpret the constitutional provisions and now the concept of Judicial Review has become a fundamental feature of the Constitutional Jurisprudence. In ***Madras Bar Association v. Union of India***[26]**,** the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provisions ultra vires. In this case, the petitioner challenged the constitution of NCLT and NCLAT and also challenged the formation of the Committee, the appointment of the judicial members as well as the technical members. Sec 409(3) (a), 409(3) (c), 411(3) and 412(2) are the provision which provide for the Constitution of Board of company law administration. The Supreme Court upheld the validity of NCLT and NCLAT, 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 members were to exceed the technical members so as to maintain the essential feature of the constitution.

In this way, Supreme Court of India scrutinizes the validity of law through the Doctrine of Judicial Review.

VI. JUDICIAL REVIEW IN USA

The American Constitution, which is written and federal democratic in spirit, is based on the Rule of law. It provides for separation of powers with check and balances which are its heart and soul. One of the fundamental processes in the America to determine the validity of law is Judicial Review. In USA, the judiciary can check the actions of Congress and the action of the President, if it is contrary to the Constitution, then the judiciary can declare it null and void. The Constitution of the USA does not provide express provisions for Judicial Review but it is implicitly incorporated in the Art. III and IV. 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."[27] Justice Frankfurter in Gobitiz[28] case laid down that "Judicial review is a limitation on popular government and is a part of the Constitutional scheme of America." The concept of judicial review has its foundation on the doctrine that the Constitution is the Supreme law. The main objectives of Judicial Review in USA 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.

[26] Madras Bar Association v. Union of India, 2015 S.C.C. 484 (India).
[27] BERNARD SCHWARTZ, THE POWERS OF GOVERNMENT 19 (2nd ed., The Macmillan Company, 1963).
[28] Gobitiz 310 U.S. 586, 600 (1940).

- To protect and uphold the Supremacy of the Constitution by interpreting its provisions.
- To save the legislative functions 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.

Dr. Bonham's case 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 it was applied by the US Supreme Court in the decisions of cases coming before it." But, in ***United States v. Tale Todd***[29] it was decided by the Supreme Court of USA that Act of Congress was unconstitutional. Again, in 1796, in ***Hylton v. United States***[30]**,** 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 judicial authority to declare the Act of the Congress unconstitutional in the historic landmark case of ***Marbury v. Madison***[31]**.** In this case, When President John Adams did not win a second term in the 1801 Presidential Election, he utilized the last days of his administration to make a substantial number of political arrangements. At the point when the new president (Thomas Jefferson) took office, he told his Secretary of State (James Madison), not to convey the official printed material to the administration authorities who had been named by Adams. In this way the administration authorities, including William Marbury, were denied their new employments. William Marbury filed petition in the U.S. Supreme Court for a writ of mandamus, to compel Madison to convey the commission. Following were the issues:

- Does the Supreme Court have original jurisdiction to issue writ 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?

Chief Justice Marshal, held that it has no jurisdiction to issue Mandamus because for issuing writ of Mandamus, court should have the appellate jurisdiction. Further, court held that Congress cannot expand the

[29] United States vs. Tale Todd, 77 U.S. 617, 12 (1794).
[30] Hylton vs. United States, 3 U.S. 171, 32 (1796).
[31] Marbury vs. Madison, 5 U.S. 137, 12 (1803).

scope of the Supreme Court's original jurisdiction beyond the scope Article III of the Constitution. Supreme Court has the authority to review acts of Congress and determine whether they are valid 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 Judicial Review.

In USA, before this judgment Supreme Court didn't declare any action of Congress unconstitutional 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.

There was tremendous expansion of judicial review after Marbury's judgment. It increased the protection to civil liberties and personal freedom. Some of the relevant decisions are as follows:

In ***McCulloch v. Maryland***[32] there was a dispute regarding the powers of Federal law and State law. A bank was established by Federal law named Bank of America in the State of Maryland. Thereafter State of Maryland passed a tax legislation which imposes the tax on bank in relation to relative transaction. This was challenged on the ground that can State law impose tax on bank which was established by Federal law? It was held by the Court that State cannot impose tax on Union authority. Court created immunity to the National Govt. According to this judgment US Supreme court formulated the doctrine of Immunity of Instrumentalities.

Youngstown Sheet Tube Co. v. Sawyer[33]**,** in this case, President Truman ordered the seizure of the steel in order to avoid the national adversity prevailing at that time. In this way President made a law to seize the steel of all the citizens. The Court held on the opinion of Justice Black that it is the instance wherein the legislative encroachment by the Executive was held unconstitutional and further observed that Constitution does not provide law making power to Presidential or Military supervision or control.

- **Present Scenario of Judicial Review in USA**

After Marbury's case the scope of judicial review has widened in USA. In ***Reed v. Town of Gilbert, Arizona***[34] an ordinance was passed concerned with Gilbert town which prohibits the display of outdoor sign except some signs which are *political signs* which were defined as designs to influence the outcome of an election, and *ideological signs* which were defined as designs for communicating ideas and another one *directional signs* which were defined as designs for 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 exact form of judicial review and strict scrutiny. Court further held that content-based laws

[32] McCulloch v. Maryland, 4 Wheaton 316, 32 (1819).
[33] Youngstown Sheet Tube Co. v. Sawyer, 343 U.S. 579, 32 (1952).
[34] Reed v. Town of Gilbert, Arizona, 13 US 502, 23, (2014).

target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

VII. JUDICIAL REVIEW IN UK

Dr. Bonham v. Cambridge University[35], 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. 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 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. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in UK.

In England, people are the source of all the powers and they are also the sovereign power. But, people snatch all essential powers from the Monarch who respond to them in Parliament. This is the great constitutional fiction of the English Constitution. Due to this, Parliament can legislate upon any matter and Constitution assigns no limitations to enact any legislation. The Act of the Parliament cannot be answerable to any authority howsoever unjust it may be. There is unlimited power with Parliament in UK. There is no scope of judicial review of legislative Act in UK. 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, which are administrative in nature; therefore it is subject to judicial review in UK.

Primary legislations are basically enacted by the Parliament Secondary legislation provides rules, regulation, directives and act of Ministries. Primary legislation is outside the purview of judicial review except in few cases which encroaches upon the law of European Community. 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 can be reviewed by the court and may be declared ultra vires and unlawful.

"The UK's membership of the European Community has brought with it significant changes to the English legal system and the UK constitution. In the Administrative Court:

[35] Dr. Bonham vs. Cambridge University, 638 Eng. Rep. 638, 646, (1610).

- 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 be on the validity of administrative decisions and legislations made by the institutions of the European Union."[36]

In, ***R v. Secretary of State for Transport[37],*** 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 can declare them unlawful. Further, it was observed that all national measures can be subject to judicial review on the grounds of incompatibility with Community law, i.e. primary legislation, secondary regulations and administrative decisions."

In, ***Les Verts v. European Parliament[38],*** it was held that "the European Union is a community based on the Rule of law, in as much 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."

In England, subordinate legislation is subject to judicial review. The Sovereignty of Parliament is not affected by such subordinate legislation .The doctrine of ultra vires in the domain of subordinate legislation can be classified as procedural and substantive ultra vires. According to the European Convention, Parliament acting jointly with the Council may make regulations, directives, take decisions, make recommendations or deliver opinions. Secondary legislation is *administrative* or *executive* legislation; it is valid only to the extent that it is enacted within the authority granted to the executive government by Parliament. Judicial review of secondary legislation is not only justified but mandated by the trinity of constitutional doctrines - the Rule of law, the Separation of Powers and Parliamentary Supremacy that lie at the core of the UK legal system.[39]

- **Present Scenario of Judicial Review in UK**

The Courts in UK are strictly following the principles of judicial review with regard to administrative actions and secondary legislations. So far as primary legislations are concerned, they are outside the purview of judicial review but with some exceptional cases. Administrative actions which are executive in nature are mostly the subject matter of judicial review in the present scenario. In, ***R. (on the application of Drammeh) v. Secretary of State for the Home Department[40]*** an immigration detainee who had failed to take his medication for schizo-affective 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

[36] HARRY WOOLF & JEFFREY JOWELL, DE SMITH'S JUDICIAL REVIEW 226 (6th ed., Thomson Sweet & Maxwell, 2007).
[37] R v. Secretary of State for Transport, 2 A.C. 85, 34 (1990).
[38] Les Verts vs. European Parliament, 1 E.C.R 1339 (1986).
[39] Professor Mark Elliott, From bad to worse: Justice Secretary on Judicial Review, PUBLIC LAW FOR EVERYONE (July 11, 2018, 4:40 PM) http://publiclawforeveryone.com/2015/01/14/the-justice-secretary-on-judicial-review-from-bad-to-worse.
[40] R. (on the application of Drammeh) v Secretary of State for the Home Department, 3 EWHC 2754 (2015).

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. It was held that 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, it was 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.

VIII. CONCLUSION

The scope of judicial review is wider in India as compared to US and UK. The Constitution of USA is concise and the words and expression used therein are vague and general in nature. It is the most rigid Constitution in the world. Whereas Indian Constitution is rigid as well as flexible in nature as it has detailed provisions and it is the bulkiest Constitution in the World. The words and expressions used in the Indian Constitution are specific and exact. Whereas in UK, there is no written Constitution and hence, the scope of judicial review is very limited in nature.

Constitutional Provisions for Judicial Review

There are specific and extensive provisions of judicial review in the Constitution of India such as Articles 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. US Constitution also does not have any specific provision for judicial review. Articles III, IV and V incorporates judicial power of the Court and constitutional supremacy and all the laws are subject to Constitution, therefore, it is implicit in nature. Judicial review in US is the formulation by court. In UK, there is no express provision of judicial review and it totally depends upon the discretion of the Court.

Pre-Constitutional laws and Judicial Review

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 US and UK.

Dimensions of Judicial Review

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

Supremacy of the Constitution

In UK, Acts of Parliament cannot be challenged on any ground in any Court as Parliament Sovereignty dominated Constitutional democracy. Whereas in India and US, Constitution is the Supreme law of the land and all the laws are subject to Constitution. If any Act is in violation of the provisions of the Constitution, court can strictly scrutinize the validity of law.

Judge made laws

The term "*Due Process of Law"* extends the power of judicial review in USA. By applying this Supreme Court of USA works with great caution in determining the constitutionality of legislative Act on the substantive grounds as well as procedural grounds. Whereas in India, the term "*procedure established by law"* expressly provided in the Constitution in Art 3 which incorporates that Court can declare acts void only on the substantive grounds. Court cannot make laws in India because it's not the role of judiciary; Court can only interpret and determine the law. On the other hand, in US judges made laws exist, they strictly scrutinize the law, if found invalid they can declare it void.

Doctrine of ultra vires

Judicial review of Administrative Acts is very wide in nature and is subject to judicial review in all the three countries. All the executive actions can be determined by Courts if they are illegal, irrational or malafide in nature. All the administrative and ministerial acts can be challenged if they exceed their power as doctrine of ultra vires exist in all the three countries.

Incorporation of doctrines

In India, courts formulated various doctrines like doctrine of severability and doctrine of eclipse etc. these doctrines are also implicitly incorporated in US. But in UK, there is no scope of these doctrines due to the absence of Judicial Review of Legislative Acts.

Determination of validity of laws

Judiciary in India and USA has very wide power to scrutinize and determine the validity of law but in UK courts had very limited power to determine the validity of law before the enactment of ECHR and Human Rights Act. However, in the present scenario the position has been changed. UK courts have now widened the scope of judicial review.

It is for the judiciary to uphold the Constitutional values and to enforce the Constitutional limitations that is the essence of 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."[41] It enables the court to maintain the harmony in the State. Individual and collective rights are protected by the Courts, by declaring a law as invalid. The basic feature is to protect the individual rights therefore; there is a need of expansion of judicial review. By strengthening the judicial review, the liberty and freedom of individuals will also be strengthened. The concept of judicial review has also been criticized in the political corridors by the strict behavior of the Courts. It should not be happen in any manner, because Supremacy of law prevails by the interpretation of the Courts. We should not question the actions of judiciary because Supreme Court acts as the guardian of the law of the land

[41] Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789 (India).