Page 4158 - 4175 **DOI:** *https://doij.org/10.10000/IJLMH.11910*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

A Comparative Analysis of the Doctrine of Judicial Review in India and the U.S.A

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ABSTRACT

Judicial Review is the power vested in the court of law to review the actions of the Legislature, the Executive and the Judiciary. This power is based on 'Limited Government' and 'Supremacy of the constitution wherein the ordinary law should confirm to it.' The Concept of Judicial Review was developed by Lord Coke in England. This concept was later recognised by various countries around the world including India and USA. In USA, even though there is no express provision for Judicial Review this power can be interpreted to vest in the U.S. Supreme court by virtue of Art III and Art IV. The power of Judicial review exists in India as well. Under the Indian Constitution, the Supreme Court (under Article 32) and the High Courts(under Article 226 & Article 227) are vested with this power. This paper undertakes the Comparative analysis of Judicial Review operating in USA and India. The Author also describes the origin and source of Judicial Review operating in the two countries. This paper offers a comprehensive picture of the similarities and difference between the two States. The Author has undertaken the analysis on five parameters namely Judicial Review of Legislative Actions, Judicial Review of Executive or Administrative Actions , Judicial Review of Judicial Actions, Judicial Review of constitutional Amendments and Limitations on the Power of Judicial Review. The Comparative analysis of the countries indicates various similarities and difference existing due to different systems of government. The author has come to the conclusion that the scope of judicial review is wider in the USA as compared to India.

Keywords: *Judicial Review, Judicial Review in India, Judicial Review in USA.*

I. INTRODUCTION

The term 'Judicial Review' refers to the power vested in the court of law to review the actions of the Legislature, the Executive and the Judiciary. This power is a facet of Rule of law. The existence of Judicial Review acts as a check on the power vested in organs of the government and hence helps to maintain the Separation of power. Judicial Review helps to declare any law unconstitutional and unenforceable which is not consistent with the provisions of the

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Constitution. The Judicial Review rests on the principles of 'Limited Government' and ' Supremacy of the constitution wherein the ordinary law should confirm to it.' The concept of Judicial Review and limited Government involve three main elements- Firstly there should be a written constitution which defines the scope and limitation of the organs of the Government. Secondly, there should be supremacy of the Constitution whereby the other organs should derive their powers from it. Thirdly, a deterrent by which the violation of superior law should be restrained or prevented or even annulled. This deterrent or sanction in the modern-day Constitutional law is Judicial Review. Even though the legislature has the absolute power to formulate law, it has to function within the limits prescribed by the Constitution. The Constitution is considered as the Supreme law of the law and duty rests on the court to interpret the Constitution in order to ensure no organ of the state transgresses its power or violates fundamental rights of the individuals. The term Judicial Review is explained by Smith & Zurcher[2] as, "The examination or review by the Courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it, and if so, to declare them void and of no effect." Judicial Review is the duty as well as the power of the court to not allow any act- whether legislative or executive, if it violates the constitution as defined by Edward S. Corwin.[3] As defined by Professor Wade " Judicial Review is a mechanism adopted to keep public authorities within bounds and upholding the rule of law."

The concept of Judicial Review developed as early as in 1610 in England in the decision by Lord Coke in the case- Dr. Bonham vs. Cambridge University[4]. The concept achieved full-fledged recognition in the decision of the U.S. Supreme Court in Marbury vs. Madison[5]. The power of Judicial Review exists in India as well as the USA. The Indian constitution expressly vests this power in the India Supreme Court under Art 32 and to the various High courts under Art 226 and 227. In USA there is no express provision for this Judicial Review however this can be interpreted to vest in the U.S. Supreme court by virtue of Art III and Art IV.

This paper undertakes the Comparative analysis of Judicial Review operating in USA and India. The Author also describes the origin and source of Judicial Review operating in the two countries. This paper offers a comprehensive picture of the similarities and difference between the two states. The Author has undertaken the analysis on five parameters in order to compare

[2] Edward Conard Smith & Arnold Jhon Zurcher *Dictionary of America Politics* Barnes and Noble (1959) 212.
[3] Edward S. Corwin *A Constitution of Powers in a Secular State*, 46 American Political Science Review 898–898 (1952).
[4] (1610) 8 Co Rep 114
[5] 5 U.S. 137 (1803).

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the two systems. These parameters are-

1. Judicial Review of Legislative Actions
2. Judicial Review of Executive or Administrative Actions
3. Judicial Review of Judicial Actions
4. Judicial Review of constitutional Amendments
5. Limitations on the Power of Judicial Review

II. JUDICIAL REVIEW IN THE USA

(A) Origin

The term 'Judicial Review' finds no mention under the U.S. Constitution. The presence of Judicial Review is felt in an implied manner under Article III and VI of the constitution. Article III provides that for the establishment of one Supreme court and states "the judicial power of the United States which includes original, appellate jurisdiction and also matter arising under law and equity jurisdiction proving the judicial power." Art VI of the Constitution states that "The Constitution, the laws of the United States made under the constitution and all treaties shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." The source of this power of review can be understood by the statement of The Federalist No. 78, Hamilton according to whom the Judiciary was least likely to violate the rights of the individual and hence it should be vested with the powers to protect it.

The concept of Judicial Review found express mention in the 1803 landmark case Marbury v. Madison[6] in which the Supreme Court declared the Section 13 of the Judiciary Act of 1789 as unconstitutional. Prior to this case the Supreme Court did not declare any act of the congress unconstitutional with complete judicial authority. Therefore, this case laid the foundation of power of Judicial Review of Supreme Court to determine the legislative action. The Author discusses the case Marbury v. Madison in detail in the next section.

(A) Facts

When the President John Adams failed to secure second term of office he made considerable changes in the political arrangements. When the new President Thomas Jefferson assumed office, he directed his secretary (James Madison) not to issue official printed materials to the appointments made by Adams. This resulted in denying employments to the newly appointed administration. Madison filed a petition the U S Supreme Court for writ of mandamus in order

[6] Marbury v. Madison, 5 U.S. 137 (1803).

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to compel Madison to convey the commission.

(C) Issues

1. Whether the Supreme Court has original jurisdiction to issue the writ of mandamus?
2. Can the jurisdiction of the Supreme Court be expanded beyond what is contemplated under Art III?
3. Is the Supreme Court vested with the authority to review acts of the congress?

Chief Justice Marshall questioned- whether the remedy could originate from the Supreme Court. The court held that such a remedy could originate in the appellate jurisdiction not in the original jurisdiction. In doing so Chief Justice Marshall quoted the Art. III of the U.S. Constitution "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which the states shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."[7] The Chief Justice held that the legislature could not expand the jurisdiction of the Supreme Court beyond what is contemplated by the constitution. While answering the question whether the legislature could alter the contents of the constitution, the court held "a legislative act contrary to the constitution is not law"[8]

It was held that the Supreme Court had the power to review acts of the congress and determine the validity of the laws. Hence the judicial power of review of the Supreme Court was acknowledged. The court declared section 13 of Judiciary Act of 1789 unconstitutional and Madison did not get commission.

III. THE EXERCISE OF JUDICIAL REVIEW IN THE USA

(A) The Judicial Review of Executive Acts

The power of Judicial Review is excised by the courts over all the branches of the government. The court excised this power over the executive branch in a variety of cases to determine the validity of Administrative acts. The court in Hayburn's case[9] held that the congress could not require the courts to give advisory opinions to the executive. In Little v. Barreme[10] the Supreme court declared 1799 order providing for the ship seizures bound for French ports as invalid. In the year 1952 executive power of the President was used to seize the private steel mills in order to make the workers go back to work. This order was justified on the grounds of national

[7] U.S. Const. art. III, § 2
[8] *Id.* at 177.
[9] Hayburn's Case, 2 U.S. 409 (1792).
[10] Little v. Barreme, 6 U.S. 170 (1804).

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security. In Youngston v. Sawyer[11] the U.S. Supreme Court held that this executive action was unconstitutional. The court examined a case where the GPS devices were installed in the cars of suspects in order to obtain evidence for conviction. In doing so the officials did not obtain search warrant. The court held the searches as unconstitutional under the Fourth Amendment Act.[12] However, the scope of the present-day system of review is limited to only two grounds[13]-

(i) Improper procedure violating the due process

(ii) Where a person acts beyond his scope of power

(B) Judicial Review of Legislative Action

The legislative branch has been subjected to Judicial Review on many occasions. The U.S. Supreme Court has exercised this power with respect to federal as well as the state laws.

1. Judicial Review of Federal Laws and State Laws

The era of New Deal witnessed several laws to be struck down as unconstitutional by the Supreme Court. In U.S. v. Butler[14] held the Agricultural Adjustment Act as invalid, Railroad Retirement Act was declared as invalid in the Railroad Retirement Board v. Alton Railroad Co[15]. In the year 1990 the Gun-Free Schools Zone Act was enacted by the congress to prevent the possession of arms within limits of the school. This Act was declared unconstitutional in Lopez v. U.S[16] wherein the court held that federal statute was unconstitutional extension of the legislative power to regulate the interstate commerce as found under the U.S. Constitution. More recently the constitutionality of The Patient Protection and Affordable Care Act, also known as Obamacare was in question. The court by a majority of 5-4 held the Act to be constitutional.[17] The court held that the Act was in consonance with the legislative power of taxation as contemplated by the constitution. In U.S. v. Alvarez,[18] the Court held that the Stolen Valor Act which criminalised the false claim of military medal was declared unconstitutional by the U.S. Supreme Court. The State Acts as well as the State Constitutions are also subject to the Judicial Review of the High courts and Supreme Courts. In Romer v Evans[19] the U.S. Supreme court was approached regarding the constitutional validity of amendment made to the Colorado Constitution. By virtue of this amendment there was prohibition of any governmental

[11] Youngston v. Sawyer, 343 U.S. 579 (1952).
[12] U.S. v. Jones, 565 U.S. 400 (2012).
[13] E. F. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* 35 Harvard Law Review 151 (1921).
[14] 297 U.S. 1 (1936).
[15] 295 U.S. 330 (1935).
[16] Lopez v. U.S., 514 U.S. 549 (1995) .
[17] Physician Hospitals of America v. Sebelius, No. 11-40631 (5th Cir., Aug. 16, 2012).
[18] U.S. v. Alvarez, 567 U. S. 709 (2012).
[19] 517 U.S. 620 (1996).

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preferential treatment on the basis of sexual orientation. The court held this amendment of being violative of the Fourteenth Amendment to the U.S. Constitution. The state statutes have also been subjected to the Judicial Review of the Supreme Court. In Arizona et al. v. United States[20] the Supreme Court declared major part of the Arizona statute unconstitutional under the supremacy clause. The court reasoned that the power of immigration and naturalisation rests with the federal government in order to establish a uniform rule of naturalization.[21] State statutes which are violative of the provisions of the U.S. Constitution have been declared unconstitutional. For example in Miller v. Alabama[22], and Roper, Superintendent, Potosi Correctional Center v. Simmons[23], the constitutional validity of the state statutes and procedures providing for mandatory life imprisonment and capital punishment was in question . The court declared the statutes as void being violative of the Eighth Amendment of constitution (prohibiting cruel punishment). Similarly, the U.S. Supreme Court has held the statutes prohibiting inter racial marriages was violative of the equal protection clause.[24]

(C) Judicial Review of the Judicial Acts

The Judicial Review is also exercised on the judiciary. In the Scottsboro Boys Case[25], the U.S. Supreme Court held that the trial court's denial of right to competent council of one's choice resulted in violation of the due process under the fourteenth Amendment Act. In Sheppard v. Maxwell[26] the U.S. Supreme Court has held that fair trial was denied to the defendant when there was circus like atmosphere in the court thereby violation of sixth Amendment. The court in a recent case has interpreted that the plea bargain made or rejected without the assistance of a counsel is violative of the sixth amendment to the constitution.[27] All these cases signify the power of the court to exercise Judicial Review over each branch of the government.

(D) Judicial Review of Constitutional Amendment

The constitutional amendments are beyond the scope of judiciary in the USA on both substantive and procedural grounds viz the constitutional amendments are unreviewable. This represents a rigid scenario with respect to Judicial Review. The landmark case of Coleman led to this approach of the courts. Prior to this case the Supreme Court had decided around seven cases, wherein the constitutional validity of amendments was challenged. These cases are

[20] Arizona v. United States, 567 U.S. 387 (2012).
[21] *Id.*
[22] Miller v. Alabama, 567 U.S.460 (2012).
[23] Roper, Superintendent, Potosi Correctional Center v. Simmons, 543 U.S. 551 (2005).
[24] Loving v. Virginia, 388 U.S. 1 (1967).
[25] Powell v. Alabama, 287 U.S. 45 (1932).
[26] 384 U.S. 333 (1966).
[27] Lafleur v. Cooper, 566 U.S. 156 (2012) , Missouri v. Frye, 566 U.S. 134(2012).

Hollingsworth v. Virginia. 3 Dall. 378 (1798) (11th amendment); Hawke v. Smith 253 U.S. 221 (1920) (18th amendment); National Prohibition cases 252 U.S. 350 (1920) (18th amendment); Dillon v. Gloss 256 US 368 (1921) (18th Amendment); United States v. Sprague 282 U.S. 716 (1931) (the 18th Amendment); Hawke v. Smith 253 U.S. 231, 232 (1920) (19th amendment); and Leser v. Garnett 258 U.S. 130 (1922) (19th amendment).[28] Even though the court upheld the validity of the amendments, it did not refuse the exercise of Judicial Review. It was in Coleman v. Miller[29] that the court held constitutional amendments to be political question and hence unreviewable.[30] The court observed the following –

1. The power to give finality to questions of political branch of the government rests only with the congress and amendment is one such issue. [31]
2. The judiciary is not competent to deal with the questions relating to amendments as they involve.[32] A consideration of variety of conditions which can be political, social and economic. The examination of these considerations does not fall within the ambit of the court. These considerations are relevant for consideration by the political branch of the government. The court held that these questions are political in nature and hence are not justiciable.
3. There was no basis for the power to exercise Judicial Review of amendments "either in the constitution or any statute for this judicial action."[33]

(E) Limits to the Power Of Judicial Review In USA

The power of Judicial Review is not absolute and is subject to certain limitations.

- The courts in USA exercise the power of Judicial Review only when strict necessity compels it to do so.
- The courts follow the doctrine of Clear Mistake which means that a law can be annulled when it is unconstitutional beyond all reasonable doubts. This is explained by Professor James Bradley Thayer to mean the statute can be declared unconstitutional "only when the legislature has made a mistake so clear that it is not open to rational question."

[28] Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process* 97 Harvard law Review 403-404 (1983).
[29] 307 U.S. 433; 59 S.Ct. 972.
[30] Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?* 42 Wayne Taw Review 1692 (Spring 1996).
[31] Coleman v. Miller, 307 U.S. 433, 447–56 (1939).
[32] *Id.* at 454-455.
[33] *Id.* at 450.

- The courts can only deal with constitutionality of the legislature and are not concerned with the motives, policy or wisdom of the law makers. Hence the courts follow the principle of exclusion of extra constitutional tests.
- There is always a presumption in the favour of constitutionality of the statute.
- The Doctrine of Stare Decisis is followed by the courts. The adherence to earlier decisions of the court helps to limit the approach of the case before it.

IV. JUDICIAL REVEW UNDER THE INDIAN CONSTITUTION

In India the constitution is considered as the supreme law of the land. The Indian society is based on the rule of law and hence the "supremacy of law is the spirit of the Indian constitution". Under the constitution the Supreme Court as well as the various High Courts of the court are vested with this power. The supreme court and the various high courts ensure that the powers vested under the constitution are not violated and abused. The doctrine of Judicial Review is considered as the basic feature of the constitution . In L. Chandra Kumar v. Union of India[34] the Supreme Court expressly held "that the power of Judicial Review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure." Since the power of review is considered as the basic structure of the constitution, it cannot be taken away by way of an amendment to the constitution. The provisions of the Constitution of India providing for this power are Art. 13, 32, 131-136,141,143,226,227,245, 246, 372.

(A) Origin

The concept of Judicial Review in India is very old. It can be said it existed prior to the existence of the Indian constitution. The concept of Judicial Review was present in India prior to Independence also. However, there was no express provision dealing with it and hence reliance is placed on the decision of the High courts and Privy Councils. In Emperor vs. Burah[35] the High Court and the Privy council held that the courts in India had power of Judicial Review however with limitations and hence an aggrieved person could challenge a law enacted by the governor general if it is in excess of power given by the Imperial Parliament. In Secretary of State vs. Moment[36] the court held "the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e., Government of India Act

[34] (1997) 3 S.C.C. 261.
[35] [1877] 3 ILR 63 (Cal).
[36] [1913]40 ILR 391 (Cal).

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of 1858". The Madras High Court held that the Indian legislature was delegated law making power by the Imperial Parliament and if any enactment of the Indian legislature transgresses the limits it will be null and void.[37]

Post-independence the Constitution of India,1950 has expressly incorporated the doctrine of Judicial Review. Dr B.R Ambedkar, Chairman of drafting Committee of the Indian Constitution has called Judicial Review as the " heart of Indian constitution". The Indian constitution provides this power under Articles 13,32,131-136,143,226,227,245,246,372. The importance of Judicial Review has been explained by various judges. In S.S. Bola v B.D.Sharma[38],Ramaswami J emphasised the importance of Judicial Review as, "the founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of Judicial Review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and Fundamental freedoms and to help to create a healthy nationalism, the function of Judicial Review is a part of the constitutional interpretation itself, it adjusts the constitution to meet new conditions and needs of the time." In Kesavananda Bharti case[39], Khanna, J held: As long as Fundamental Rights exist the power of Judicial Review is to be exercised in order to secure the protection of these rights. "The Judicial Review has thus become an integral part of our Constitutional system." C.J Chandrachud in Minerva Mills v Union of India[40]observed; "It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the Fundamental Rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled." According to Justice Syed Shah Mohammed Quadri, Judicial Review, under Indian constitution can be classified under three heads:[41]

1. Judicial Review of Constitutional Amendments.-This has been the subject-matter of consideration in various cases by the Supreme Court;

2. Judicial Review of legislation of Parliament, State Legislatures as well as subordinate legislation.-

Judicial Review in this category is in respect of legislative competence and violation of

[37] Annie Besant v. Government of Madras [1913]40 ILR 391 (Cal).
[38] A.I.R. 1997 S.C. 3127, 3170.
[39] Kesavananda Bharti v. Union of India A.I.R 1973 S.C. 1461.
[40] A.I.R. 1980 S.C. 1789.
[41] Justice Syed Shah Mohammed Quadri, *Judicial Review of Adminstrative Action*, 6 SCC (Jour) 1 (2001).

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fundamental

rights or any other Constitutional or legislative limitations;

3. Judicial Review of administrative action of the Union of India as well as the State Governments

and authorities falling within the meaning of State.

V. THE EXERCISE OF JUDICIAL REVIEW IN INDIA

(A) Judicial Review of Administrative Action

The power of Judicial Review of the courts also extends to administrative or executive actions. There are two main conditions in which court shall interfere- failure to exercise discretion and abuse of discretion. Apart from the two mentioned conditions the Judicial Review of administrative action can be exercised on the following grounds:

- Illegality
- Irrationality
- Procedural impropriety
- Proportionality
- Unreasonableness

Doctrine of proportionality also provides for the Judicial Review. This doctrine stipulates that the measures adopted by the administration should not be too drastic or harsh and should commensurate with the wrong done. It is applicable in substantive as well as procedural law. Therefore, the administrative authority has to establish that a balance was maintained in proportion to power conferred. The court in Ajai Hasia vs Khalid Mujib[42] struck down the rule prescribing allocation of high percentage of marks for oral interview for securing admission in Reginal Engineering college on the grounds that it was arbitrary, unreasonable and violative of Art 14. In Air India v Nargesh Meerza[43], the regulation of Air India provided for retirement of service of corporation upon attaining age of 35 years, or on marriage, if the marriage took place within four years of service or on her first pregnancy, whichever happened earlier. The court struck down this regulation as being violative of the constitution and being violative and arbitrary.

[42] A.I.R 1981 SC 487.
[43] (1981) 4 S.C.C. 335.

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(B) Judicial Review of Legislative Action

1. **Judicial Review of Union Law and State Law**

The court exercises the power of Judicial Review by virtue of Article 245 and 246. Art 245(1) provides that "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 use of the word subject to "the provision of the constitution" impose limitations on the powers of the Parliament and State Legislatures. This is the basis of Judicial Review- it provides scope for judicial intervention and interpretation. Article 141 further strengthens the position of Supreme Court as a court of review by incorporating the doctrine of Precedent. It states that the decision of the Supreme Court shall be law and will be binding on all the lower courts of the Country. Further according to Art 13(1) and Art 13(2) law made by legislature before or after the commencement of the constitution shall be void if it is repugnant to Part III of the constitution. Kania C.J. in Gopalan v. State of Madras[44] held , "the inclusion of Art. 13(1) and (2) in Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, to the extent it transgresses the limits, is invalid." Hence under these provisions the Judicial Review is exercised by the court. Whenever the validity of a statute is in question the courts have to first see which legislature has enacted it viz the Union legislature or the State legislature. It then has to examine whether the legislature is competent to legislate on the given subject. This entails to check under which list of the VII Schedule the subject falls under – the Union list or the state list or the concurrent list. Further in case of state legislature it has to be seen whether the law has extra territorial operation beyond the boundaries of state. If all the above-mentioned tests are satisfied the court looks into whether limitation is imposed by any other part of the constitution. The impugned law has to pass all these tests to be declared constitution and hence enforceable.[45] In L Chandra vs. Union of India[46] the Apex court held that Judicial Review formed the basic structure of the constitution and hence cannot be taken away. In this case clause 2(d) of Art. 323-A and clause 3(d) of Art.323-B of the Constitution of India was challenged on the ground that it took away the jurisdiction of the High courts in service cases. It was observed by the court, "the provisions which 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

[44] (1950) SCR 88 (100).
[45] State of Bombay v Chamarbaugwala, [1957]S.C.J 607.
[46] A.I.R. 1997 S.C. 1125.

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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." In I.R. Coelho v. State of Tamil Nadu[47] the Central as well as the State laws put in the Ninth schedule were challenged. The Apex court held that any law which was placed in the ninth schedule post 24th April 1973 that is after the decision of Keshavananda Bharti case was open to challenge in the court of law. If any law in the ninth schedule was violative of the fundamental rights such law was open to challenge on the ground that it destroys the basic structure of the constitution. It was held by the Supreme Court that Judicial Review of legislative actions is a part of the basic structure of the constitution.

(C) Judicial Review of Judicial Action

It can be said that the Indian Supreme Court undertakes the Judicial Review of Judicial action by virtue of exercising its appellate jurisdiction. The Supreme court is the highest court of appeal and hence while exercising its appellate jurisdiction it undertakes Judicial Review. The Supreme court exercises the power of appellate jurisdiction by virtue of Article 132(1), 133(1) or 134 of the Constitution in respect of any judgement, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. The provision for Special Leave Petition under Article 136 confers the court with wide powers of appellate jurisdiction. In Shafin Jahan v. Ashokan K.M.[48] the Supreme court overturned the decision of the Kerala High Court annulling the marriage of a young woman. The Supreme court observed that the High Court had wrongly exercised its Habeas Corpus jurisdiction, its *parens patriae* jurisdiction and transgressed on constitutional rights. The court exercises the power of Judicial Review through its constitutional bench whereby it can overrule the judgements given by a smaller bench of Supreme Court. For instance, in Joseph Shine v. Union of India[49] the constitutional bench of the Supreme Court held Section 497 of the Indian Penal Code, 1860 as unconstitutional thereby overruling its earlier judgments that is -Yusuf Abdul Aziz[50], Sowmithri Vishnu[51] and V. Revathi[52]. In Navtej Singh Johar vs. UOI[53] a five-judge Bench of the Supreme Court unanimously struck down Section 377 of the Indian Penal Code, 1860 to the extent that it criminalised same-sex relations between consenting adults. In doing so the court overruled its decision in Suresh Kumar Koushal & Anr

[47] A.I.R. 2007 S.C. 861
[48] (2018) 16 S.C.C. 368.
[49] (2019) 3 S.C.C. 39.
[50] Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930.
[51] Sowmithri Vishnu v. Union of India, A.I.R. 1985 S.C. 1618.
[52] V. Revathi v. Union of India, A.I.R 1988 S.C. 835.
[53] (2018) 1 S.C.C. 79.1

vs Naz Foundation & Ors[54] wherein the court had upheld the constitutionality of the said law.

(D) Judicial Review of Constitutional Amendments

The Indian constitution differs from the U.S constitution in this parameter. In USA the Supreme court cannot exercise the power of Judicial Review over constitutional amendments whereas in India it can. The Parliament has the supreme authority to amend the constitution but it cannot change its basic structure. The Supreme Court as a guardian of the Fundamental Rights has to scrutinise the constitutional validity of the said amendments. However, there was a conflict between the Parliament and the Supreme court regarding amenability of Fundamental Rights under the Art. 368. The issue was finally settled through a plethora of cases starting from Shankari Prasad v. Union of India[55], the first case on amenability of the constitution. In this case the validity of the Constitution (1st Amendment) Act, 1951, relating to "Right to Property" guaranteed by Art. 31 was challenged. The Supreme court held that the power to amend the constitution includes power to amend the fundamental rights. Therefore, the constitutional amendment will be valid even if it abridges the fundamental rights. In Sajjan Singh v. Rajasthan[56] the constitutional validity of the Constitution (Seventeenth Amendment)Act, 1964, was challenged. The court reiterated its decision of Shankari Prasad and held that constitutional amendments were outside the purview of the Judicial Review. Hence the validity of the Constitution (Seventeenth Amendment)Act, 1964 was upheld. However, in Golak Nath v. State of Punjab[57], where the validity of Seventeenth amendment act was challenged, the court overruled its decision in Shankari Prasad case. The court observed "An amendment is a 'law' within the meaning of Art. 13(2) which included every kind of law; statutory as well as constitutional law and hence a constitutional amendment which contravened Art. 13(2) will be declared void." The court observed that the parliament's amending power is derived Art.245, read with Entry 97 of list 1 of the Constitution and not from Art. 368 which only lays down the procedure for amendment of Constitution. The issue of constitutional amendment of fundamental rights was finally settled by the Supreme court in the famous case of Keshavananda Bharati v. State of Kerala[58] wherein it propounded the famous 'Basic Structure Doctrine'. In this case the court overruled the Golaknath case and held the parliament has the power to amendment the fundamental rights under Art.368 of the Constitution but cannot take away the basic structure of the constitution. In Minerva mills v Union of India[59] the

[54] (2014) 1 S.C.C. 1.
[55] A.I.R. 1951 S.C. 455.
[56] A.I.R. 1965 S.C. 845.
[57] A.I.R. 1967 S.C. 1643.
[58] A.I.R. 1973 S.C. 1461.
[59] A.I.R. 1975 S.C. 2299.

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constitutional validity of clauses (4) and (5) of Art. 368, introduced 42nd Amendment was challenged. The court struck down the said provisions on the basis that it destroyed the basic feature of the constitution.

(E) Limits to the Power of Judicial Review in India

There are certain limitations to the doctrine of Judicial Review in the context of Indian Constitution. First limitation exists in the constitution itself. For example, under Art. 100 (2) and Ar.t 189 of the Constitution the courts do not have the jurisdiction to invalidate the proceedings of a House of the Legislature on the grounds of procedural irregularities. However, no such immunity is given to the legislature where the proceedings are held in non-compliance of the mandatory provisions of the constitution. Secondly the Directive Principles of State Policy (DPSP) as given under Part IV of the Indian constitution is non justiciable. This means that an individual cannot approach the court for the enforcement of DPSP. However, in the recent times this position has been changed by courts wherein certain DPSPs were enforced in the support of the Fundamental rights. After the Maneka Gandhi V. Union of India[60] Article 21 of the Constitution has been construed broadly and liberally in the light of directive principles. Thirdly , provisions regarding the election of the President and Vice President cannot be called into question in the court of law on the grounds of existing vacancy in the electoral college as per Article 71(4). Furthermore, According to Article 74(2) "The questions whether any and if so what, advice was tendered by Minister to the President shall not be inquired into in any court." Fourthly, the provisions regarding delimitations of constituencies cannot be enquired by the court as per Article 329(a) of the Indian Constitution.

The Judiciary also has imposed certain restraints on itself while exercising the power of Judicial Review. These are as follows-

- The court does not determine the validity of a hypothetical or academic question. It does not question the constitutionality of an Act unless there is some practical effect of the same.
- Usually, the person deriving the benefit of the law cannot challenge its validity.
- There should not exists an effective alternative remedy to the law in challenge.
- The courts can refuse to tests certain legislative or executive actions by terming it to be 'policy matter' or 'political issue'.

[60] 1978 1 S.C.C. 248.

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- The presumption is always in the favour of constitutionality of law. The court can apply doctrine of severability whereby only a part of the statute is declared unconstitutional and not the entire statute.
- Doctrine of Stare decisis is followed.
- The court does not ascribe malafide intention to the legislature.

VI. CONCLUSION

In the USA there is a strict Separation of Power between the organs of the government. In India this separation is not rigid as there is a Parliamentary form of government. However, both the countries have an Independent Judiciary vested with the power of Judicial Review. The Comparative analysis of Judicial Review existing in USA and India shows certain similarities and differences. It is seen that the power of Judicial Review of legislative acts as well as executive acts exists in both countries. This power is derived from the respective constitutions of the countries. The limitation imposed on the exercise of this power is also similar in both the countries.

The Author has found difference of power Judicial Review exists on the ground of ' Judicial Review of constitutional amendments'. It is seen while the Supreme Court of India is vested with the powers of reviewing the Constitutional Amendments, the same is absent under the U.S. Constitution. The U.S. Supreme Court cannot, therefore, review amendments made to the constitution.

It is also observed that the scope of Judicial review is wider under the U.S. Constitution as compared to the India constitution. This is because of two reasons - under the Indian onstitution the fundamental rights are not broadly defined and the limitations to the rights are given under the constitution itself. This is not the case in U.S. Constitution and hence the Judiciary can exercise the power in a wider sense.

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VII. BIBLIOGRAPHY

(A) Table of legislation

1. U.S.A Legislation

- The Agricultural Adjustment Act,1933
- The Gun-Free Schools Zone,1990
- The Judiciary Act of 1789
- The Railroad Retirement Act,1937
- The Stolen Valor Act,2005

2. Indian Legislation

- The Constitution (First Amendment) Act, 1951
- The Constitution (Seventeenth Amendment)Act, 1964
- The Indian Penal Code, 1860

(B) Table of cases

- Air India v Nargesh Meerza(1981) 4 S.C.C. 335.
- Ajai Hasia vs Khalid Mujib A.I.R 1981 SC 487
- Annie Besant v. Government of Madras [1913]40 ILR 391 (Cal).
- Arizona v. United States, 567 U.S. 387 (2012).
- Coleman v. Miller 307 U.S. 433; 59 S.Ct. 972.
- Emperor vs. Burah [1877] 3 ILR 63 (Cal).
- Golak Nath v. State of Punjab A.I.R. 1967 S.C. 1643.
- Gopalan v. State of Madras(1950) SCR 88 (100).
- Hayburn's Case, 2 U.S. 409 (1792).
- I.R. Coelho v. State of Tamil Nadu A.I.R. 2007 S.C. 861
- Joseph Shine v. Union of India(2019) 3 S.C.C. 39.
- Kesavananda Bharti v. Union of India A.I.R 1973 S.C. 1461.
- L. Chandra Kumar v. Union of India(1997) 3 S.C.C. 261.
- Lafleur v. Cooper, 566 U.S. 156 (2012) , Missouri v. Frye, 566 U.S. 134(2012).
- Little v. Barreme, 6 U.S. 170 (1804).
- Lopez v. U.S., 514 U.S. 549 (1995) .
- Loving v. Virginia, 388 U.S. 1 (1967).
- Maneka Gandhi V. Union of India1978 1 S.C.C. 248.

 [ISSN 2581-5369]

- Marbury v. Madison, 5 U.S. 137 (1803).
- Miller v. Alabama, 567 U.S.460 (2012).
- Minerva Mills v Union of India A.I.R. 1980 S.C. 1789.
- Physician Hospitals of America v. Sebelius, No. 11-40631 (5th Cir., Aug. 16, 2012).
- Powell v. Alabama, 287 U.S. 45 (1932).
- Railroad Retirement Board v. Alton Railroad Co295 U.S. 330 (1935).
- Romer v Evans 517 U.S. 620 (1996).
- Roper, Superintendent, Potosi Correctional Center v. Simmons, 543 U.S. 551 (2005).
- S.S. Bola v B.D.Sharma A.I.R. 1997 S.C. 3127, 3170.
- Sajjan Singh v. Rajasthan A.I.R. 1965 S.C. 845.
- Shafin Jahan v. Ashokan K.M (2018) 16 S.C.C. 368.
- Shankari Prasad v. Union of India A.I.R. 1951 S.C. 455.
- Sheppard v. Maxwell384 U.S. 333 (1966).
- Sowmithri Vishnu v. Union of India, A.I.R. 1985 S.C. 1618.
- State of Bombay v Chamarbaugwala, [1957]S.C.J 607.
- State vs. Moment[1913]40 ILR 391 (Cal).
- U.S. v. Alvarez, 567 U. S. 709 (2012).
- U.S. v. Butler297 U.S. 1 (1936).
- U.S. v. Jones, 565 U.S. 400 (2012).
- V. Revathi v. Union of India, A.I.R 1988 S.C. 835.
- Youngston v. Sawyer, 343 U.S. 579 (1952).
- Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930.

(C) Bibliography of secondary sources

- E. F. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* 35 Harvard Law Review 151 (1921).
- Edward Conard Smith & Arnold Jhon Zurcher *Dictionary of America Politics* Barnes and Noble (1959) 212.
- Edward S. Corwin *A Constitution of Powers in a Secular State,* 46 American Political Science Review 898–898 (1952).
- Justice Syed Shah Mohammed Quadri, *Judicial Review of Adminstrative Action*, 6 SCC (Jour) 1 (2001).

- Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process* 97 Harvard law Review 403-404 (1983).

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 [ISSN 2581-5369]