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Judicial Review: A Comparative Study between USA, UK and India

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ABSTRACT

"If judicial review means anything, it is that judicial restraint does not allow everything"

- *Don Willett*

Indian democracy is based on the concept of supremacy of law. Law is considered to be the superior authority, and at the top of all lies the grundnorm, that is, the Constitution of India. It is the Indian Constitution from which every other law flows. No law and even no action of the bodies of this democracy, i.e., the Legislature, the Executive and the Judiciary, can go against what the spirit of the Constitution has to offer. Here, the role of the judiciary comes into play to maintain a system of checks and balances to ensure that no arbitrary action is given way under the garb of powers provided to these organs respectively. Though judicial review has not been expressly used in the Constitution, its presence can be seen in various laws and even before when the Constitution came into the picture. Not only in India but also in the United States of America, judicial review has been present impliedly. But on the other hand, judicial review is not a well-recognized concept in the United Kingdom, where the system is based on the concept of Parliamentary sovereignty and legislative supremacy. In this paper, the author intends to throw some light upon the concept of judicial review and intends to make a comparative analysis of the concept between India, the USA and the UK.

Keywords: *Article, comparative study, conclusion and suggestion, Judiciary, Judicial Review, USA, UK.*

I. INTRODUCTION

The concept of judicial review originated in the USA. This concept originated from the landmark case of Marbury v. Madison. However, we can trace back the origin of this concept in England in the year 1610 when Lord Cook discussed the horizons of judicial review for the first time in the case of Dr. Bonham v. Cambridge University. The concept of judicial review is covered under the concept of supremacy of law. The concept of judicial review gives power to the judiciary to review the actions of all the three organs of the state, that is, the legislature, the executive and the judiciary. Judicial review is that powerful weapon which has been given to

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the Court which can declare a law or order to be unconstitutional as well as unenforceable. Any law or order cannot be in contradiction with the basic law of the land. The judicial review ensures that the same is being followed. In this paper, I would like to discuss the concept of judicial review in India, the USA and the UK. Judicial review has been a source of various doctrines, which would further be discussed as a part of this paper. Also, the paper focuses on the ambit of judicial review on constitutional amendments, administrative actions and legislative actions. With respect to the UK, we have the concept of "Parliament Sovereignty", where the Court cannot review the act of the Parliament. However, the secondary legislation can be judicially reviewed. Further, I would like to throw some light on a comparative analysis of the concept of judicial review as follows in all three countries.

II. JUDICIAL REVIEW IN INDIA

In India, we follow the concept of supremacy of law. Judicial review has been one of the significant features which we have in the in Indian Constitution. Though the term judicial review has not been explicitly used in the Indian constitution but still it is omnipresent in it. Judicial review is an effective mechanism by which the Court keeps a system of checks and balance over the actions of the executive and the legislature. The main objective behind the theory of judicial review is to promote fair and just treatment and to prevent any abuse of power. If any law or enactment is found to be violative of the basic structure of the Constitution, thereby infringing the rights of the aggrieved party, judicial review comes to the rescue of such party and provides relief to the aggrieved party. But its real purpose is something higher that is, no statute which is repugnant to the Constitution should be made in foreseeable by the Court of law[2].

The concept of judicial review has emanated from the principle of supremacy of law or the rule of law. Judicial review, though was not a part of the Government of India Act, 1858 and the Indian Council Act, 1861, but its essence can be traced from the fact that the said Acts imposed restrictions on the power of the Governor General in Council in evading the laws. However, the Court only had the power to punish. The first case in which the concept of judicial review was recognized was back in 1877 in the case of Emperor v. Burah[3]. In this case, it was held that "if the Governor General Council enacts any legislative Act exceeding the power given by the Imperial Parliament in that respect, the aggrieved party has the right to challenge such

[2] JUSTICE CK THAKKAR & JUSTICE ARIJIT PASAYAT, DR. CD JHA JUDICIAL REVIEW OF LEGISLATIVE ACTS 116
(2d ed. Lexis Nexis Butterworths Wadhwa, 2009).
[3] Emperor v. Burah, (1877) 3 ILR 63 (Cal).

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legislation. The High Court and the Privy Council recognized that subject to some limitations, the Indian Courts did have the power of judicial review". Also, in the case of Secretary of State v. Moment[4], Lord Haldane held 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". Later, recognizing the basic difference between the legislative power of the Imperial Parliament and the delegated power given to subordinate Indian legislature, the Madras High Court, in the case of Annie Beseant v. Government of Madras[5] basing its decision on the decision of the Privy Council, stated that "any enactment formulated by the Indian legislature by way of delegation exceeding the power provided by the Imperial Parliament to legislate would be null and void."

We do not find any express provision for judicial review in the Government of India Act, 1935. Later, with time as and when the constitutional problems arose, the need of judicial review was felt and its scope was broadened. In the present scenario, we find traces of the doctrine of judicial review in various Articles of the Constitution of India, 1950 like Article 13, 32, 131 to 136, 143, 226, 227, 245, 246, 372, etc. Article 13 of the Constitution talks about "Judicial Review of Post constitution and pre-constitutional laws". The origination of several other doctrines can be traced from the doctrine of judicial review which includes the Doctrine of Colorable Legislation, the Doctrine of Pith and Substance etc. the supreme Court under Article 32 and he High Court under Article 226 of the Constitution have been given the power to judicially review any law or any specific provision and declare it unconstitutional or ultra vires, if it is found to be violative of Part III of the Constitution. Further, I would like to explain the doctrines and how they form a part of the Doctrine of judicial review.

1. Doctrine of Eclipse:

Doctrine of Eclipse applies to pre-constitutional laws. Article 13(1) provides that "any provision that was in existence before in the enactment of the Constitution would become unenforceable and unconstitutional after the Constitution is enacted." So, at the time of enactment of the statute, the statute was legal and operational but when the Constitution came into force, the statute got eclipsed or became invalid due to the presence of Article 13. This is the doctrine of Eclipse where the provision becomes invalid till the time there is a constitutional ban and when that ban is removed the statute again comes into operation.

In the case of Bhikaji Narayan v. State of M.P[6], the Court observed that "the doctrine of Eclipse

[4] Secretary of State v. Moment, (1913) 40 ILR 391 (Cal).
[5] Annie Besant v. Government of Madras, (1918) AIR 1210 (Mad).
[6] Bhikaji Narayan v. State of M.P., (1955) 2 SCR 589 (India)

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is applied in relation to a pre-constitution law, which was valid when it was enacted. Subsequently, when the Constitution came into force, a shadow falls on it because it is inconsistent with the Constitution. The Act is eclipsed. When the shadow is removed, the pre-constitutional law becomes fully applicable and is free from infirmity."

2. Doctrine of severability:

In the Doctrine of severability, the Court can severe the part that is unconstitutional from the rest of the legislation, that is, the unconstitutional part of that provision can be separated from the constitutional part. Also, the part which is constitutional remains operative. Traces of the Doctrine of severability can be seen from the words "to the extent of contravention". However, if the constitutional and unconstitutional part cannot be severed, then the entire statute or provision is deemed to be void.

In the case of A.K Gopalan v. State of Madras[7], "the Court struck down Section 14 of the Preventive Detention Act, 1950, as violative of the fundamental right under Article 22. The rest of the Act was held to be valid. The doctrine of severability has been applied by the Supreme Court in cases of challenge to the validity of a constitutional amendment**."**

3. Doctrine of prospective overruling:

In simple words, the Doctrine of prospective overruling focuses on the interpretation of an earlier decision in a manner in which it suits the present scenario but without disturbing the original parties upon whom the decision was binding. That is, the doctrine focuses on having an effect on all the future cases without disturbing the past events and the parties which are bound by earlier precedent. This doctrine came into play in the case of Golak Nath v. State of Punjab[8] in which the Court overruled its earlier judgement of Sajjan Singh v. State of Rajasthan[9] and Shankari Prasad v. Union of India[10] and laid down the doctrine of prospective overruling. The Court said that "the doctrine of prospective overruling is a modern doctrine suitable for a fast-moving society." "The Court upheld the validity of the 1st, 4th and 19th amendment and laid down that the decision of the Court would be operative prospectively."

To have a better understanding of the concept of judicial review, we would have to discover the following aspects where we see the use of judicial review:

- Judicial review of constitutional amendment

[7] A.K. Gopalan v. State of Madras, (1950) SC 27 (India)
[8] Golak Nath v. State of Punjab, AIR 1967 S.C. 1643 (India)
[9] Sajjan Singh v. Rajasthan, (1965) 1 S.C.R. 933 (India)
[10] Shankari Prasad v. Union of India, AIR 1951 S.C. 455 (India)

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- Judicial review of Parliament and state legislation
- Judicial review of administrative action of the executive

III. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

The Parliament has the power to make a law and also has the power to amend the Constitution but it cannot take away the basic structure. One of the key questions which arose in the past was whether the fundamental rights are amenable or not. Article 368 of the Indian Constitution provides the provision for amendment. The first case in this respect was Shankari Prasad v. Union of India[11]. "In 1951, within a year of the Constitution coming into force, the Constitution 1st Amendment Act was passed. This Act sought to curtail the right to property guaranteed by Article 31. So, its constitutionality was questioned in Shankari Prasad v. Union of India. The Supreme Court held that an Act passed in exercise of the powers conferred by Article 368 is not a law within the meaning of Article 13(2). The Court ruled that the law in that Article referred to an ordinary law but not a Constitution Amendment Act. The Court thus distinguished between the ordinary legislative power and constituent power. Fundamental rights are subject to the amending power of the Parliament under Article 368. In other words, ordinary laws cannot amend the fundamental rights but constituent laws can". "In Sajjan Singh v. State of Rajasthan[12], the Supreme Court adhering to its decision in Shankari Prasad case, held that the words 'amendment of Constitution' means amendment of all the provisions of the Constitution." In Golak Nath v. State of Punjab[13], "the Supreme Court by a majority of 6:5 overruled its decision in Shankari Prasad and Sajjan Singh cases and held that: Parliament cannot amend the fundamental rights, as these rights are assigned transcendental position under our Constitution. It refused to distinguish between legislative power and constituent power." Then, came the case of Kesavananda Bharati v. State of Kerala[14]. In this case, also known as Fundamental Rights case, "the question involved was as to what was the extent of amending power conferred by Article 368." The Supreme Court propounded the "doctrine of basic structure" in this case and held that "amending power is not unlimited and does not include the power to destroy abrogate the basic feature on the basic structure of the Constitution". "In other words, after Golak Nath case no fundamental rights could be taken away or abridged but after Kesavananda Bharati case it is for the Court to decide whether fundamental right is a part of the basic structure or not if it is so, it cannot be abrogated." Further, in Indira Nehru Gandhi v. Raj

[11] Id.
[12] Id.
[13] Golak Nath v. State of Punjab, AIR 1967 S.C. 1643 (India)
[14] Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India)

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Narayan[15], "the Supreme Court added the following features as a part of the basic structure laid down in Kesavananda Bharati case:

i. rule of law
ii. judicial review
iii. democracy which implies free and fair elections
iv. jurisdiction of Supreme Court under Article 32"

Thereafter, in Minerva Mills Ltd. V. Union of India[16], "the constitutional validity of Section 4 and 55 of 42nd amendment, 1976, which affected changes in the Article 31-C and Article 368 respectively were challenged by the petitioner. The Supreme Court by 4:1 majority struck down clause (4) and (5) of Article 368 on the ground that these clauses destroyed the basic structure of the Constitution and held that the following are the basic features of the Constitution:

i. limited power of Parliament to amend the Constitution
ii. harmony and balance between fundamental rights and directive principles
iii. fundamental rights in certain cases
iv. power of judicial review in certain cases."

Through these cases the Court exercise judicial review on the constitutional amendment.

IV. JUDICIAL REVIEW OF PARLIAMENTARY AND STATE LEGISLATIVE ACTIONS

Article 245 of the Constitution states that "subject to the provisions of the Constitution, the Parliament may make any law for the whole or any part of the territory of India and a state legislature may make a law for whole of the state or any part thereof." It is Article 245 and 246 of the Indian Constitution which provides for the legislative powers of the Parliament and the state legislature. In the above provision, by interpretation of the words "subject to the provisions of the Constitution" shows the limitation on the legislative power of the Parliament and the state legislature. This is where the concept of judicial review comes into play. These words show that the law legislated by the Parliament and the state legislature should be within the purview of the Constitution and should not be against it. The judiciary is empowered with the power to scrutinize any law framed by the Parliament or the state legislature. Through its various decisions, the Supreme Court, time in again gives its opinion upon the use of legislative powers of the Parliament and the state legislature, which have a binding force and operate as a precedent

[15] Indira Nehru Gandhi v. Raj Narayan, AIR 1980 S.C. 1789 (India).
[16] Minerva Mills v. Union of India, A.I.R. 1975 S.C. 2299 (India).

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for future cases. This power is affirmed to it under Article 141 of the Indian Constitution itself. "The constitutional validity of administrative tribunals was challenged in the case of SP Sampat Kumar v. Union of India[17] on the ground that the Administrative Tribunal Act, 1985, excluded the jurisdiction of High Court provided under Article 226 and 227 which thereby takes away the power of judicial review which forms in essential feature of the Constitution. The Supreme Court held that even if the power of judicial review has been taken from the High Court under Article 226, it is still available to the Supreme Court under Article 32 and 136." It further held that "A law passed under Article 323-A providing for the exclusion of jurisdiction of High Court must provide an effective alternative institutional mechanism of authority on 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."

Further, in the case of L. Chandra Kumar v. Union of India[18], "the impact of Article 323-A and 323-B on the power of judicial review and superintendence of the High Court under Article 226 and the Supreme Court under Article 32 was in question. Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B to the extent that they exclude the jurisdiction of the High Court and the Supreme Court were held to be unconstitutional. It was held that the jurisdiction conferred upon the High Court under Article 226 and 227 and upon the Supreme Court under Article 32 is a part of the inviolable basic structure of the Constitution of India. While this jurisdiction cannot be ousted, other Courts and Tribunal may perform a supplemental as opposed to a substitutional role in discharging the powers conferred by Article 226 and32 of the Constitution." Later, in the case of I.R. Coelho v. State of Tamil Nadu[19], various laws put under the Ninth Schedule including the Tamil Nadu Reservation Act was challenged. The Hon'ble Court held that "any law placed in the Ninth Schedule after April 24, 1973 when Kesavananda Bharati's case judgement was delivered will be open to challenge. The Court observed that even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to challenge on the ground that they destroy or damage the basic features or structure of the Constitution, for instance, if the fundamental rights are taken away or abrogated. Further, the power of judicial review which forms an integral part of the basic structure cannot be abrogated by any Act. The Parliament cannot, by inclusion in the Ninth Schedule, grant immunity and exclude examination by the Court, after the enunciation of the

[17] SP Sampat Kumar v. Union of India, (1987) 1 S.C.C. 124 (India)
[18] L. Chandra Kumar v. Union of India, A.I.R. 1997 S.C. 1125 (India)
[19] I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861 (India)

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doctrine of basic structure." The Supreme Court observed that "judicial review of legislative actions is the touchstone of the basic structure of the Constitution."

V. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

The concept of judicial review of administrative action has been borrowed from Britain and has gained a lot of momentum. Judicial review of administrative actions is aimed at protection of the rights of citizens from their arbitrary actions of the State. When certain responsibility is imposed on the administration by the legislature, it is the duty of the administrative authority to exercise that power judiciously and reasonable. So, if there is any abuse of power done by the administrative body, it must be kept another purview of the judiciary. The main function of the judiciary is to maintain checks and balances. Even if the judiciary does not have the power to interrupt the administrative bodies in the exercise of its discretionary powers, yet it does not give them a right to abuse their power. The judiciary can maintain a check on the exercise of their power in case of:

a. failure to exercise the discretion,

b. in case of excessive exercise or abuse of discretion.

There can be the following grounds for judicial review in case of administrative actions: Illegality, irrationality, procedural impropriety, proportionality, unreasonableness.

In the case of Council of Civil Service Unions v. Minister of Civil Service[20], Lord Diplock highlighted the grounds of 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 those administrative measures must not be more than drastic then 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 already being exercised in the 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."[21]

[20] Council of Civil Service Unions v. Minister for the Civil Service, 3 AII. E.R. 935, (1984).
[21] Supreme Court of India, (May 24, 2009), www.supremeCourtofindia.nic.in/speeches/speeches_2009/judicial_review_of_administrative_action_-_24-8-09.

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In Ajay Hasia v. Khalid Mujib[22], "the Regional Engineering College made admissions on the basis of oral interview after a written test. The Court held that allocation of 1/3rd of total marks for interview was plainly arbitrary and violative of Article 14. It should be resorted to only as an additional or supplementary test."

In the case of Air India v. Nagesh Meerza[23], the Court held that "the termination of service on pregnancy was manifestly unreasonable and arbitrary and was therefore, clearly violative of Article 14. Further, the provision for extension of service of Air Hostess 'at the option' of managing director confirms a discretionary power without laying down any guidelines or principles and liable to be struck down as unconstitutional."

The above cases clearly show how a system of check and balances is maintained by the exercise of judicial review on the arbitrariness of the administrative bodies.

VI. JUDICIAL REVIEW IN USA

The concept of rule of law is highlighted in the American constitution. They believe in the concept of separation of powers. Along with that, in order to maintain a system of checks and balances, judicial review is exercised so that the validity of laws is derived side by side. The judiciary there is empowered to keep an eye over the actions of the Congress and that of the President. If their actions are found in violation of the Constitution, it can be held to null and void. For judicial review, we do not find any express provision but under Article III and IV the concept is impliedly found. According to 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." Justice Frankfurter in Gobitiz[24] case laid down that "judicial review is a limitation on popular government and is a part of constitutional scheme of America." The Constitution is believed to be the supreme law of the land and that is where the roots of judicial review is found. In USA, the main objective of judicial review is:

a) Declare the constitutional validity of a law
b) to determine the validity of laws which are challenged to be unconstitutional in the Court of law
c) interpretation of the Constitution to maintain its supremacy
d) to prevent any encroachment on the legislative function of the Congress

[22] Ajay Hasia v. Khalid Mujib, A.I.R. 1981 S.C. 487 (India)
[23] Air India v. Nagesh Meerza, A.I.R. 1981 S.C. 1829 (India)
[24] Gobitiz 310 U.S. 586, 600 (1940).

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e) to keep a check on the power of delegation to the executive body or sub-delegation to state legislature.

The Chief Justice of the US Supreme Court, John Marshall, C.J., laid roots to the principle of judicial review in the case of Marbury v. Madison[25]. In this case "the Supreme Court asserted that it would review the constitutionality of Congressional Acts". Marshall, C.J., expounded the "theory of judicial review of the constitutionality of Acts of Congress" as follows: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." Therefore, the US Supreme Court very clearly and specifically claimed that "it had the power of judicial review and that it would review the constitutionality is of the Act passed by the Congress." The Court argued that "the Constitution seeks to define and limit the powers of the legislature, and there would be no purpose in doing so if the legislature could overstep these limits at any time."

This was a very first case where the actions of the Congress were declared unconstitutional by putting it under the ambit of judicial review. This case marked the expansion of the horizons of judicial review in USA.

In the case Youngstown Sheet Tube Co. v. Sawyer[26], the Court "kept a check on the legislative encroachment by the executive and held it to be unconstitutional. Further, the Court also held that presidential or military supervision or has not been given lawmaking power in the Constitution. In this case the then President, President Truman ordered for the seizure of steel in order to avoid the national adversity prevailing at that time. The President made a law to seal all the steel from the citizens."

In the case of Reed v. Town of Gilbert, Arizona[27] "an ordinance was passed in Gilbert town which entitled the use of only few types of outdoor signs which included political signs which were designed to influence the decision of the election, ideological signs which were designed to convey specific ideologies and directional signs which were designed to direct people to the church or to any other like event. The church and its priest challenged the ordinance. The Court

[25] Marbury vs. Madison, 5 U.S. 137, 12 (1803).
[26] Youngstown Sheet Tube Co. v. Sawyer, 343 U.S. 579, 32 (1952).
[27] Reed v. Town of Gilbert, Arizona, 13 US 502, 23, (2014).

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held that such signs were making distinctions which were not permissible. The Court further held that such laws require judicial scrutiny and attributed to the need of judicial review". The Court further held that "content-based laws 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 interest."

However, judicial review has also face certain criticism in USA. The main basis of the criticism lies on two grounds:

- The federal Court being the sole authority to exercise judicial review – it has been argued that no express provision has granted the power only to the federal Court to judicially review a matter. The Tenth Amendment provides the states those powers which have not been expressly delegated to the federal government.
- Secondly, to ratify the "supreme law" i.e., the US Constitution, the states alone have been given the power. Therefore, the amendment would mean different to each and every state making it necessary for the states to interpret the meaning of such amendment. Therefore, only allowing the federal Court the power of judicial review of any federal law would not contribute to a meaningful input.

Limitations on the Supreme Court in respect of Judicial Review

1) On political issues, the Court does not exercise judicial review.
2) If a law is to be declared unconstitutional or ultra vires, the Court can do so only by specifying the provisions which it violates under the Constitution and also state reasons for doing so.
3) The Supreme Court cannot initiate a suo moto process for cases. Judicial review is invoked only when a case is brought forth before the Court.
4) The decision of the Court declaring the law unconstitutional is prospective in effect. It does not affect the cases which have already been decided or does not operate retrospectively.
5) The Court has to furnish reasons for declaring a law to be unconstitutional and also specify the specific provision or part it is declaring unconstitutional.

VII. JUDICIAL REVIEW IN UK

The origin of the concept of judicial review in UK can be seen in 1610 by Lord Coke in the case of Dr. Bonham v. Cambridge University[28]. 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

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

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things that look pretty odd." This statement clearly shows that in UK, the Court does not have power to determine the legality of parliamentary actions. In UK, we have the concept of doctrine of Parliamentary sovereignty and legislative Supremacy. The concept of judicial review was not present in UK from the very inception. It came into light only after the creation of European Convention and Human Rights Act. The main aim of the Human Rights Act, 1998 is to empower the domestic Courts to secure and safeguard the rights of the people. In UK, there is "no written constitution" and the concept of "Parliamentary sovereignty" persists. In England, people are the main source of power. They are the sovereign power. The Parliament can legislate upon any matter and there is no limit on the power to enact in the Constitution.

- **'Parliamentary Sovereignty' and 'Primary and Secondary Legislations':**

The Parliament in UK has unlimited power and any Act enacted by them does not come under the scope of judicial review. The Act made by the Parliament is known as primary legislation whereas if the power to legislate has been delegated to the executive it is called secondary legislation which is primarily administrative nature-wise. It is this secondary legislation which is subject to judicial review there. Primary legislations are outside the scope of judicial review except in a few cases where there is encroachment on the law of the European Community. It is only after the European Union was formed and the Human Rights Act, 1998 was enacted, that in some cases even the primary legislation was subject to judicial review. But the secondary legislation is subject to judicial review, without any limitations. All the rules and regulations made by the administrative body is subject to judicial review and can be declared ultra vires.

"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:

- 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."[29]

In the case of R v. Secretary of State for Transport[30], it was held that "by relying upon the direct effect of community law, the individual may be able to challenge national measures can be challenge national measures and have declared unlawful. Further observed that all national measures can be subject to judicial review on the grounds of compatibility with Community

[29] Harry Woolf, Jeffrey Jowell, Andrew Le Suer, De Smith's Judicial Review, (6th Thomson Sweet & Maxwell,2007)226
[30] R v. Secretary of State for Transport, 2 A.C. 85, 34 (1990).

law, i.e., primary legislation, secondary regulations and administrative decisions."

Also, in the case of Les Verts v. European Parliament[31], 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."

Parliamentary sovereignty is not affected by secondary legislation. A secondary legislation which goes beyond the limit of the authority granted by the Parliament can be brought under the purview of judicial review and can be declared ultra vires. Even a secondary legislation has to be within the bounds of rule of law, separation of powers and Parliamentary sovereignty which forms a part of the golden trinity of the UK legal system.

- **Current Position in UK**

Recently, in the case of R v. The Prime Minister[32], popularly known as the "Miller Case", the Court "intervened in the decision of the Prime Minister to prorogue Parliament. This case was flashpoint vis-à-vis the powers of judicial review over parliamentary affairs."

"Post the Miller case, the process of judicial review has been subjected to intense scrutiny and assessment in the UK. On July 31, 2020, during the pandemic, the UK government constituted a panel of legal and academic experts to examine the scope of judicial review. In an unprecedented move, the UK government constituted an independent panel to determine 'whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government'. The panel has been tasked to consider and provide its findings on the following issues:

1. Terms of Judicial Review as a written law.
2. Applicability of Judicial Review on certain executive decisions.
3. Grounds and remedies available in claims brought against the government.
4. Any further procedural reforms including timings and the appeal process.

In other words, this essentially constitutes a political evaluation of the judicial review process"[33]

[31] Les Verts vs. European Parliament, 1 E.C.R 1339 (1986).
[32](2019) UKSC 41
[33] Saurabh Mishra, *Reservation in promotions: The ball is again in the governments court*, (Feb. 19, 2022), www.barandbench.com/columns/reservation-in-promotion-the-ball-is-again-in-the-governments-Court.

VIII. A COMPARATIVE STUDY OF JUDICIAL REVIEW: INDIA, USA & UK

- India has the wealthiest and lengthiest Constitution. The constitution of India is rigid as well as flexible at the same time. The scope of judicial review in India is the widest. On the other hand, USA has a very rigid constitution which makes it come second in order when we talk about the scope of judicial review. In UK, since we do not have a written constitution, the scope of judicial review is very limited.

- In India, though the term judicial review has not explicitly been used anywhere, but its manifestation can be seen under Article 13, 32, 131–136, 143, 226, 227, 246, 372. When we talk about USA, there judicial review is implicit under Article III, IV, V. The concept of constitutional supremacy prevails in USA and all the laws have to be made subject to the Constitution. Under UK, on the other side, where there is no written constitution, it is totally upon the discretion of the Courts. As a general rule, only secondary legislation is subject to judicial review and the primary legislations are subject to judicial review in selective cases only.

- In India, we have the concept of "judicial review of pre-constitutional and post constitutional laws" under Article 13 whereas in USA and UK we have no such provision.

- In UK, we have the concept of "Parliamentary sovereignty". Any law made by the Parliament cannot be questioned in the Court of law. But this is not the case in USA and India. Here the Constitution is considered to be the "supreme law of the land" and no law can violate or go against the Constitution.

- The scope of judicial review is the widest in India where the Courts exercise judicial review over constitutional amendments, legislative Acts and even over administrative acts. But in USA, the Constitution being rigid, the Supreme Court exercises judicial review majorly over legislative Acts and administrative act. Judicial review over constitutional amendments is a rare phenomenon. On the contrary, in UK the scope of judicial review is extremely narrow and can be exercised only on the legislative Acts and that too only over secondary legislations.

- In USA, on the basis of the "due process of law" clause, judicial review was exercised over the legislative Acts on procedural as well as of substantive grounds. However, in India we use the term "procedure established by law" which shows that a law which is against the Constitution can be declared ultra vires on substantive grounds. In India, there is an interpretation of the laws made by the Parliament by the judiciary whereas in USA there is huge

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dependency on the laws made by the judges. The judge-made laws are put under scrutiny in judicial review.

- One factor of commonality in all the three countries is the judicial review on administrative acts. The Courts can determine the administrative acts to be ultra vires if they exceed the powers and limitations prescribed to them.

- Also, with time, UK has expanded the scope of judicial review to not only scrutinize the laws under the ECHR and Human Rights Act but also incorporate the concept of judicial activism. This has not been the case in USA and India where the wide scope of judicial review includes scrutinization and determination of validity of a law.

- In India, various doctrines have been propounded from the concept of judicial review like the Doctrine of Severability and the Doctrine of Eclipse. These doctrines are implicitly found to be a part of the legal system of USA as well. But in UK, since judicial review has not gained full momentum, the scope of these doctrines does not exist.

IX. CONCLUSION AND SUGGESTIONS

The concept of judicial review has been very dynamic in the present times. Earlier, there was no concept of judicial review in the UK but with the expanding scope of judicial review, in UK also the Courts have been able to establish more strength. The concept of Parliamentary sovereignty still exists in the UK but now judicial review has also made its place. When we talk about India, the scope of judicial review is already very vast. Judicial review can be exercised on legislative acts, constitutional amendments and even on administrative actions. So, if there is any action which goes against the Constitution, it can be declared to be illegal and void. By judicial review, the Courts are able to scrutinize every piece of legislation and every action and keep a check on arbitrariness. In India, we have the concept of "separation of powers" which helps in maintaining a system of checks and balances. Each organ has a separate function to perform but the Courts have been entrusted with the responsibility to check whether any organ is acting arbitrarily or against the Constitution and establish a balance thereby. The Courts cannot, per se, question the executive and pass a decision until a matter comes before it. On the other hand, in USA and UK, we have the concept of "judicial legislation" as well. Also, when we talk about the concept of delegated legislation, the Courts by judicial review ensure that there is no delegation beyond the permissible limit and that any essential function is not delegated. Also, in the USA and in India, we have the concept of "principles of natural justice." Not only a law should not be violative of the Constitution, but also it should not violate the principles of natural justice.

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In a scenario, whether the judiciary is not empowered to make laws, judicial restraint in the form of judicial review forms a very key feature of the legal system. Federal law disputes like distribution of power, interstate trade etc. form a major issue and keeping in mind the concept of cooperative federalism, their constitutionality must be determined through judicial review. This would create a greater accord in a federal democratic state. Judicial review acts as a weapon for the interpretation and enforcement of laws that are valid. Also, when the judiciary is empowered with the authority of scrutinizing any law, the "independence of judiciary" is one of the major concerns because a just decision cannot be given if the judiciary is not independent. Also, the judiciary keeps a check that any delegated legislation is not beyond permissible limits and that is no essential functions are delegated.

In the present scenario, judicial review should be a key feature in every country. This would ensure that any organ does not work arbitrarily and it would further the ends of democracy. Ultimately, the aim of every Constitution is to protect the interests of every individual and thereby protect the collective interest also. Therefore, with the expansion of the scope of judicial review, this aim can be achieved in a better manner. Due to political agendas, judicial review is sometimes criticized in order to oust it from the legal system and make way to fulfil ulterior political motives. This is altogether a greater reason why judicial review should be brought in every country.

The Courts act as a guardian of the interest of the people and ensure that the supremacy of law prevails. Very recently, **Chief Justice of India, N.V. Ramana** while addressing the public at an event, said that "if the judiciary does not have the power of judicial review, the functioning of democracy in this country would be unthinkable." Also, he explained that the function of the judiciary is to review the legality of the other two co-equal organs, namely, the legislature and the executive. He said, "to brand judicial review as judicial overreach is a misguided generalization."

A massive exercise of the **power of judicial review on executive actions** has been seen in the past year, **2021**. As a result of the Court's intervention, the executive had the opportunity to rectify its decision in various instances. One of the best examples of positive judicial review could be seen when the Supreme Court highlighted several flaws in the vaccination policy which made the central government modify the Covid vaccination policy.

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