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# Judicial Review of Administrative Action: A Comparative Study of India and Australia

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SHATAKSHI SINGH<sup>1</sup>

## ABSTRACT

*The fundamental principle underlying judicial review in India is the primacy of the rule of law. The court has the authority to scrutinize the activities undertaken by the legislative, executive, and judicial branches. The court has a significant tool to declare any statute or order that contradicts the fundamental law of the nation as unconstitutional and unenforceable. The present study will focus on the examination of the Apex Court has created several theories via the exercise of judicial review. One such theory is the theory of Severability. The Doctrine of Eclipse and the Doctrine of Prospective Over-ruling are two legal principles that are often discussed in academic circles. Furthermore, this article focuses on the topic of Judicial Review and the discussion pertains to three key aspects of constitutional governance: constitutional amendments, judicial review of legislative actions, and judicial review of administrative actions. This article will examine the position of judicial review in India & Australia.*

*An examination of the significant jurisprudential advancements in India and Australia is essential for gaining a comprehensive understanding of the practice of judicial review in these respective nations. The analysis next examines the observed parallels and variances, enhancing our comprehension of the concept of Judicial review in a broader context. The comparison demonstrates the adaptable characteristics that are responsive to elements of the constitutional structure and diverse local circumstances, all while safeguarding essential institutional functions from external disruptions.*

*Constitutional democracy was characterized by the notion of "Parliamentary Sovereignty" as its dominant feature. The term "Parliament" refers to a legislative body that is responsible for making laws and the concept of parliamentary supremacy in the United Kingdom encompasses the expression of popular sovereignty, with the judiciary being precluded from subjecting parliamentary acts to scrutiny. The Parliament restricts the extent of judicial review to major legislation, with only a limited number of exceptions pertaining to human rights and associated matters.*

**Keywords:** Comparison, Judicial Review, Constitutional Structure, Parliament.

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<sup>1</sup> Author is a LL.M Student at The ICFAI University, Dehradun, India.

## I. INTRODUCTION

The spirit of the Indian Constitution is characterised by the principle of the Supremacy of Law. The Doctrine of Judicial Review has significant prominence in the Indian Constitution, serving as a fundamental characteristic and often regarded as its distinguishing attribute. While the Indian Constitution does not explicitly provide a provision for judicial review, it is still considered an inherent and essential component of the constitutional framework.<sup>2</sup> Judicial review is a constitutional authority vested in the courts, enabling them to establish and maintain an efficient system of checks and balances between the legislative and executive branches of government. The primary objective of Judicial Review is to prevent the misuse of power by the governing body and to guarantee that individuals are afforded equitable and impartial treatment. The concept of judicial review is often seen as a means to validate a purported entitlement of one party involved in a legal dispute, so providing redress to the injured party via the nullification of a statute, if it is legally invalid.

However, its true objective is of a loftier kind, namely, that no legislation that is contradictory to the Constitution shall be rendered enforceable by the judiciary. The user's text does not provide any information. The foundation of the notion of Judicial Review in India is rooted in the principle of the Rule of Law. The Government of India Act, 1858 and The Indian Council Act, 1861 introduced some limitations on the authority of the Governor General in Council to circumvent legislation, but, they did not include any mechanism for judicial review. The court had just the authority to incriminate. The case of *Emperor v. Burah*<sup>3</sup> was the first interpretation and establishment of the notion of Judicial Review in India. In the present instance, the court determined that the party who suffered harm had the legal entitlement to contest the validity of a legislative Act passed by the Governor General Council, which exceeded the authority granted by the Imperial Parliament. In this particular instance, the High Court and Privy Council espoused the perspective that Indian courts have the authority of Judicial Review, although subject to certain restrictions. Lord Haldane in, *Secretary of State v. Moment*<sup>4</sup>, remarked 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".

In the case of *Annie Besant v. Government of Madras*<sup>5</sup>, the Madras High Court made an

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<sup>2</sup> The judicial review of legislative acts conducted by Justice CK Thakkar, Justice Arijit Pasayat, and Dr. CD Jha is discussed in the book titled "Judicial Review of Legislative Acts 116" (2nd edition, Lexis Nexis Butterworths Wadhwa, 2009).

<sup>3</sup> *Emperor v. Burah*, (1877) 3 ILR 63 (Cal).

<sup>4</sup> *Secretary of State v. Moment*, (1913) 40 ILR 391 (Cal)

<sup>5</sup> *Annie Besant v. Government of Madras*, (1918) AIR 1210 (Mad).

observation, drawing from a decision made by the Privy Council. The court noted that there exists a significant distinction between the legislative powers held by the Imperial Parliament and the authority of the subordinate Indian Legislature. It further stated that any legislation passed by the Indian Legislature that exceeds the delegated powers or contravenes the limitations imposed by the Imperial Parliament will be rendered invalid. The Government of India Act, 1935 did not have a particular provision for Judicial Review. However, due to constitutional issues that arose before the court, there was a need to take a broader perspective on Judicial Review. The Doctrine of Judicial Review is officially established by the Constitution of India, 1950 via numerous Articles such as 13, 32, 131-136, 143, 226, 227, 245, 246, and 372, among others. Article 13 of the Constitution encompasses the concept of "Judicial Review of Post-constitutional and pre-constitutional laws." This article incorporates key principles of Judicial Review, such as the Doctrine of Severability and the Doctrine of Eclipse. The authority of Judicial Review has been bestowed onto the High Courts and the Supreme Court of India by Article 226 and 32 respectively. This authority enables them to render a statute unconstitutional if it is found to be in conflict with any of the provisions outlined in Part 3 of the Constitution. The courts have used the authority of Judicial Review to establish other theories, such as the Doctrine of Pith and Substance and the Doctrine of Colorable Law.

## **II. DEFINING ADMINISTRATIVE ACTIONS**

Administrative action refers to the residual activity that falls beyond the purview of both legislative and judicial functions. This inquiry pertains to the handling of a specific circumstance and lacks universality. The absence of procedural responsibilities pertaining to evidence collection and argument evaluation is evident. The decision-making process relies on subjective satisfaction, while policy and expediency serve as the determining factors. While it does not determine an inherent right, it has the potential to impact a right. Nevertheless, it is essential to acknowledge that the standards of natural justice cannot be entirely disregarded when an authority is using "administrative powers." In the absence of any contrary provisions within the legislation, it is essential to consistently adhere to the fundamental principles of natural justice, taking into account the specific circumstances of each individual instance.

In the case of *A.K. Kraipak v. Union of India*<sup>6</sup>, the Court opined that in order to ascertain whether the actions of the administrative authority are of a quasi-judicial or administrative nature, it is necessary to consider the bestowed power's nature, the recipient of such power, the framework within which the power is granted, and the resulting consequences.

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<sup>6</sup> AIR 1970 SC A

Administrative action may be categorised into two types: statutory, which has the authority of law, and non-statutory, which lacks such legal authority. The majority of administrative action is derived from statutory sources, since it is granted legal authority by either a legislation or the Constitution. However, there are instances when administrative action may be non-statutory, such as when providing non-binding directives to subordinates. Despite lacking the power of law, non-statutory actions may nonetheless result in disciplinary consequences if violated. Although administrative action is often discretionary and relies on subjective judgement, it is essential for the administrative power to exercise fairness, impartiality, and reasonableness.

The basis for the use of judicial review of administrative actions

- The concept of illegality refers to actions or behaviours that are in violation of established laws or regulations.
- The concept of irrationality refers to the state or quality of being irrational. It is characterised by a lack of logical reasoning or sound
- The concept of procedural impropriety refers to the violation or breach of proper procedures or protocols in a certain context. It encompasses instances when established rules, guidelines, or norms
- The concept of proportionality refers to the relationship between two or more variables, where changes in one variable are directly or indirectly related.

### **III. INDIA VIS A VIS AUSTRALIA: A COMPARISON OF JUDICIAL REVIEW**

Although the process of development of Judicial Review in India and Australia has followed distinct constitutional pathways, there are some common themes that may be identified. Both India and Australia have established Constitutions that use a functional approach to judicial review when considering their constitutional frameworks. It does not provide enough information to be rewritten in an academic<sup>7</sup> In contrast to Australia, the Indian Constitution exhibits a higher level of specificity in delineating the mechanisms of governance. The Indian Constitution establishes and regulates institutions of both the Union and state governments, while the Australian Constitution primarily concentrates on Commonwealth institutions. The numerical value provided<sup>8</sup>. The Kable doctrine of the High Court of Australia potentially exhibits a degree of convergence, since it extends some elements of the federal judicial review

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<sup>7</sup> The Constitution of India explicitly grants executive authority to both the Union and state governments in articles 53 and 154. Similarly, the Constitution of Australia grants legislative, executive, and judicial powers under sections 1, 61, and 71.

<sup>8</sup> The document in question, akin to the United States Constitution, has a similar characteristic of including all tiers of governance, but primarily emphasises federal establishments.

theory to the states. Significantly, India and Australia possess a shared legacy characterised by the adoption of the Westminster parliamentary system and the common law heritage. The enduring impact of this inheritance is evident in the ongoing effect it has on the judicial review theories of both nations, as seen by the scholarly discourse around this topic. The Westminster system serves as a constitutional stronghold for British legislative traditions and norms, while the common law has imported concepts from the English courts and their judicial powers. The aforementioned traditions have a significant place within the constitutional framework of both India and Australia, serving as the historical and cultural backdrop against which their respective Constitutions were formulated. However, it is crucial to note that both Constitutions also deviate from this historical legacy in significant ways, particularly with regards to federalism and the inclusion of constitutional review mechanisms. British traditions have thus emerged as a viable reservoir of constitutional law that may be modified and used by judges as necessary. However, finding a coherent or consistent approach to the judicial invocation of these principles in the Indian and Australian contexts might provide challenges.<sup>9</sup>

The use of British traditions by Indian and Australian courts is evident in their examination of fundamental inquiries about the roles and duties of institutions, serving as an initial framework for study. Despite occasional distinctions, the American tradition of judicial review continues to have influence in both India and Australia. Both the Supreme Court of India and the High Court of Australia have deemed it necessary to provide justifications for their deviations from the American precedent in significant instances pertaining to judicial review. The conflict between traditions gives a degree of freedom for the courts in India and Australia, enabling them to formulate their own understanding by incorporating elements from both traditions in order to justify their desired decision. Due to the inherent flexibility within their respective legal systems, as well as the constitutional recognition of a comprehensive judicial review doctrine that holds the status of supreme law, the judiciaries of India and Australia have been tasked with the responsibility of defining, overseeing, and enforcing the boundaries between different institutions and determining the extent of their powers. The Indian Supreme Court and the Australian High Court have played significant roles in shaping their respective constitutional frameworks. The user's text is too short to be rewritten in an academic manner. In the future, it is plausible to envision a scenario where one may refer to a judicial review that is not limited to

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<sup>9</sup> It is important to acknowledge that the Constitution of India exhibits a greater level of intricacy compared to the Constitution of Australia with regards to the allocation of responsibilities and duties among various governmental organisations. Despite potential limitations on the flexibility of the Indian judiciary with regards to the separation of powers principle, it is important to note that the Indian judiciary has extensive authority in this area, particularly due to its inclusion as an integral component of the Constitution's fundamental framework.

exclusively Indian or Australian concepts or characteristics, but rather has a distinctively Indian or Australian nature.

In a general sense, the judicial review processes in India and Australia aim to uphold the integrity of institutions by aligning their actions with their fundamental constitutional functions. The preservation of integrity is crucial in maintaining a power equilibrium and providing each institution with the opportunity to contribute within a framework of shared governance. The idea of power fragmentation may effectively enhance accountability by necessitating collaborative efforts across institutions to mutually oversee and achieve significant objectives. The unifying feature of the separation concept in both India and Australia is the preservation of institutional integrity. However, the approaches used by both nations to attain this purpose vary. Every doctrine has been carefully developed by the judiciary to specifically tackle problems that are of local significance. In the context of India, the primary purpose of judicial review is often used as a strategic mechanism for deflecting any challenges or criticisms. The Supreme Court invokes this mechanism to circumvent the need of addressing specific economic, political, or social inquiries that have undergone legal proceedings.<sup>10</sup> In instances of this kind, the Supreme Court relies on judicial review as a means to substantiate its deferential stance towards the other arms of government and its recognition of distinct institutional duties. The idea imposes restrictions on the otherwise extensive powers and jurisdiction of the Supreme Court, so preserving a level of institutional integrity, notably for the legislative and executive institutions. When implementing this self-imposed principle, the Supreme Court's motivation to preserve the integrity of other institutions may be overshadowed by its assessment of the areas where it might act and maintain its legitimacy.<sup>11</sup> It does not provide enough information to be rewritten in an The Indian understanding of judicial review thus serves to restrict the scope of adjudication. The argument posits a perspective whereby a robust Supreme Court is seen as potentially encroaching onto the roles and responsibilities of the executive and legislative branches. In contrast, the primary function of judicial review in Australia is to serve as a

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<sup>10</sup> The avoidance of jurisdiction is not due to any deficiency, as previously mentioned, since the Supreme Court of India has extensive authorities. The Indian approach diverges from the second leg of the Boilermakers doctrine, which restricts Parliament from assigning non-judicial responsibilities to federal courts, as well as the Kable doctrine, which mandates that any non-judicial activities performed by state courts must align with their judicial duty. The Australian concept places significant emphasis on the preservation of impressions about the impartiality of the judiciary. In the context of India, the issue may be more accurately described as a matter of strategic self-restraint. This pertains to situations when the Supreme Court has the authority to intervene, but determines that judicial action may be ineffective or perhaps compromise its credibility.

<sup>11</sup> To examine the discerning nature of the Supreme Court of India, one may refer to scholarly works such as Manoj Mate's articles titled "The Rise of Judicial Governance in the Supreme Court of India" (2015) published in the Boston University International Law Journal, volume 33, page 169, and "Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India" (2014) published in the Temple International & Comparative Law Journal, volume 28, page 361.

protective mechanism against alleged encroachments by the other branches of government on the federal judiciary's affairs.

Both the Indian and Australian judicial review ideologies have their own set of restrictions.<sup>12</sup> The Indian concept has a notable deficiency in terms of the predictability of its application. The Supreme Court of India demonstrates a judicious approach in recognising the boundaries of its jurisdiction. However, the application of the judicial review principle by the Court to redirect inquiries to other parts of government has challenges in terms of its predictability in specific instances. Enhancing the clarity and predictability of the circumstances in which the doctrine is likely to be used would be advantageous for the Supreme Court. One of the primary challenges faced by the Australian model is in the incongruity between the underlying principles of the judicial review and judicial independence, resulting in a rather uncomfortable alignment.<sup>13</sup> The principle of judicial review aims to preserve the integrity of all governmental institutions, not limited to the judiciary, while judicial independence specifically pertains to the courts and their ability to fulfil their role as unbiased arbiters in resolving disputes.<sup>14</sup> Australian separation doctrine's emphasis on the judiciary branch might be seen as self-interested and inattentive towards other institutions. The application of the judicial review principle in Australia, with the aim of safeguarding the independence of courts from external influence, has encountered significant obstacles in terms of definitions and technicalities, hence posing problems to its practical implementation. The application of this doctrine may also exhibit inconsistencies due to its many presumptions and exceptions, so necessitating courts to reexamine certain parts of the doctrine in cases that fall within its boundaries. Consequently, this process gives rise to further inquiries and new legal disputes. One crucial aspect to consider is that the judicial review is inadequately designed to safeguard judicial independence. The theory primarily revolves around the division of institutions, prioritising the mitigation of external challenges faced by the courts. A comprehensive understanding of judicial independence necessitates considering internal factors that pose risks to the autonomy of individual judges.<sup>15</sup>

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<sup>12</sup> Constitution of Australia, ss 72(ii) and 72(iii).

<sup>13</sup> Alexander Hamilton, "The Judiciary Department" Federalist Paper No 78 (McLean's Edition, 1778)

<sup>14</sup> Neudorf, "Judicial Independence: The Judge as a Third Party to the Dispute".

<sup>15</sup> In the case of *Beauregard v Canada*, [1986] 2 SCR 56 at 69, the former Chief Justice of Canada, Brian Dickson, made an observation regarding the principle of judicial independence. He stated that throughout history, the fundamental aspect of judicial independence has been the unrestricted autonomy of individual judges to preside over and render decisions in the cases presented to them. This means that external entities, such as the government, pressure groups, individuals, or even other judges, should not interfere, or attempt to interfere, with a judge's conduct of a case or the decision-making process. The aforementioned essential idea remains integral to the concept of judicial independence.



#### **IV. CONCLUSION**

By reflecting on the similarities and differences that have been observed in India and Australia, it is possible to understand the judicial review more generally and how it has the potential to take shape and work in different domestic legal systems. These case studies show us that we can learn more about legal principles by studying how they manifest themselves in particular jurisdictions. Contextualist comparative scholarship should be encouraged as the means to think through design choices and to better understand the contours and dynamics of legal principles. While there are a variety of judicial review models, including a trend toward greater functionalism in written constitutions, an entrenched doctrine will inevitably be shaped by courts through their jurisprudence, developing over time in individual cases. The purpose of the judicial review is the preservation of institutional integrity. Yet, what this means exactly in the nuance of any given legal system is open-textured, even with a detailed constitutional framework. The courts will be called upon to mould the judicial review to meet perceived local needs. Over time, the judicial review will become a product of each country's domestic tradition and be sewn into its legal landscape. One key attribute of the judicial review is its lofty rhetoric and tremendous flexibility, which makes it liable to become a constitutional gap-filler, inserted into the available spaces in the constitutional design. An important question to be asked therefore is: what is in the constitutional mix alongside the separation of powers? The composition of the mix will offer some clues as to how the doctrine will evolve. For jurisdictions like India, the judicial review may end up becoming a device for the judiciary to self-limit, while in others like Australia, it may become a way to preserve judicial power and the standing of the judicial institution. Given its flexibility, the doctrine can become unruly in a legal system that craves certainty and predictability. While courts will seek to provide clarity, they are unlikely to succeed in formulating a complete definition, resulting in continuing conceptual and practical challenges that require further litigation to resolve. This litigation will continue to adapt the doctrine to evolving domestic contexts and maintain its dynamism. Even in the United States, with the benefit of more than two centuries of jurisprudence, vigorous debates continue about the practical meaning of the judicial review and how it should be applied, in addition to its proper theoretical foundation. The real litmus test of any judicial review doctrine should be whether it is able to preserve a meaningful role for different state institutions, so that none is eclipsed by the others. It must be remembered that the institutional integrity protected by the judicial review does not derive its value solely from the mere existence of separation. Its value also comes from the doctrine working to enable that institution's ability to contribute, clearing a path for its participation in a model of shared governance that includes checks and balances

by others. In developing a constitutional judicial review doctrine, courts should pause to genuinely consider the perspectives of other institutions and obtain a better understanding of the contributions that they are best able to make.

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