DOCTRINE OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS BETWEEN INDIA, U.K. AND U.S.A

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1. INTRODUCTION:

Supremacy of law is essence of Judicial Review. It is power of the court to review the actions of legislative and executive and also review the actions of judiciary , it is the power to scrutinize the validity of law or any action whether it is valid or not. It is a concept of *Rule of Law*. Judicial Review is the check and balance mechanism to maintain the separation of powers. Separation of power has rooted the scope of Judicial Review. It is the great weapon in the hands of the court to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land.. The two principal basis of judicial review are "*Theory of Limited Government*" and *"Supremacy of constitution with the requirement that ordinary law must confirm to the Constitutional law*."Judicial Review is a mechanism and therefore the *Concept of Judicial Activism* is a part of this mechanism. So far as the, Indian constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of any validity of law and any executive action. Supreme Court of India formulated various doctrines on the basis of Judicial Review like *"Doctrine of Severability, Doctrine of Eclipse, Doctrine of Prospective Overruling"* etc. In India Judicial Review based on three important dimensions , these are" *Judicial Review of Constitutional Amendments", Judicial Review of Legislative Actions, "Judicial Review of Administrative Actions*".

To determine the unconstitutionality of legislative Acts is the fundamental objects of judicial review. It adjusts constitution to the new condition and needs of the time. To uphold the supremacy of constitutional law and to protect the fundamental rights of the citizens and also to maintain federal equilibrium between Centre and the States are the main concerns of objectives of judicial review in India. Legislative and administrative powers between Centre and the State of constitution are also the main concern of judicial review.

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It is the duty of the judiciary the constitution to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the Rule of Law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

The concept of Judicial Review is basically originated in USA in the historic landmark case ***Marbury vs. Madison.*** But originally ***Lord Coke*** decision in, ***Dr. Bonham vs. Cambridge University*** had rooted the scope of judicial review first time in 1610 in England. The US Constitution doesn't provide power of judicial review expressly but Article III of the U.S. Constitution as "the judicial power of the United States which includes original, appellate jurisdiction and also matter arising under law and equity jurisdiction incorporates judicial power of Court. Art. VI of the Constitution provides" All powers of government are exercisable only by on the authority of the organ established by the Constitution. Thus Art VI incorporates "Constitution of USA is the supreme law of the land". Judicial review is not expressly provided in the US Constitution, but it is the formulation by the Court. Supreme Court of US has power to check the action of Congress and State Legislatures from delegating the essential legislative function to the executive. The principle "***due process of law"*** creates a democratic balance in US by declaring the arbitrary and illegal laws.

But in UK, there is no written constitution. Earlier, there was no scope of judicial review in UK. The principle of "Parliamentary Sovereignty" dominated to Constitutional democracy in United Kingdom. There is Parliament Supremacy UK which incorporates the will of the people and Courts cannot scrutinize the actions of Parliament. In UK, Parliament prevents the scope of Judicial Review to Primary legislation (legislation enacted by Parliament) except in few cases related to Human Rights and individual freedom, therefore Primary legislation is outside the purview of judicial review . But, as regards to Secondary legislation (rules, regulation, act of Ministries) are subject to Judicial Review. Court can review the actions of administrative and executive actions in UK. Judicial Review in UK is basically on procedural grounds which is largely related to Administrative actions.

2. JUDICIAL REVIEW IN INDIA

"Supremacy of the law is the spirit of the Indian Constitution. In India, the "DOCTRINE OF JUDICIAL REVIEW "is the basic feature of the Constitution. It is the concept of Rule of Law and it is the touchstone of Constitution India. Though there is no express provision for judicial review in Indian Constitution but it is an integral part of our constitutional system, and without it there will be no Government of laws and Rule of law would become a mockery delusion and a promise of futility. In India, Judicial Review is a power of court to set up an effective system of check and balance between legislature and executive .Various provisions in Indian constitution explicitly provides for the power of judicial review to the courts such as Art. 13,32, 131-136,141,143,226,227,245, 246, 372.

The most prominent object of judicial review to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law.[76]

2.1 *Origin*:

The doctrine of Judicial Review of United States of America is really the pioneer of Judicial Review in other Constitutions of the world which evolved after the 18th century and in India also it has been a matter of great inspiration .In India the concept of Judicial Review is founded on the Rule of Law which is the swollen with pride heritage of the ancient Indian culture and society. Only in the methods of working of Judicial Review and in its form of application there have been characteristic changes, but the basic philosophy upon which the doctrine of Judicial Review hinges is the same. In India, since Government of India Act,1858 and Indian Council Act, 1861 imposed some restrictions on the powers of Governor General in Council in evading laws, but there was no provision of judicial review. The court had only power to implicate. But in 1877 **Emperor vs. Burah**[77] was the first case which interpreted and originated the concept of judicial review in India. In this case court held that aggrieved party had right to challenge

[76]Justice CK Thakkar , Justice Arijit Pasayat, *Dr. CD Jha Judicial Review of Legislative Acts* (2nd, Lexis Nexis Butterworths Wadhwa, Nagpur 2009) 116
[77] [1877] 3. ILR 63 (Cal)

the constitutionality of a legislative Act enacted by the Governor General council in excess of the power given to him by the Imperial Parliament. In this case the High court and Privy Council adopted the view that Indian courts had power of judicial review with some limitations. Again in, **Secretary of State vs. Moment[78],** Lord Haldane observed that "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 of 1858". Then, in **Annie Besant v. Government of Madras[79] ,** Madras high court observed on the basis of Privy council decision that there was a fundamental difference between the legislative powers of the Imperial Parliament and the authority of the subordinate Indian Legislature, and any enactment of the Indian Legislature in excess of the delegated powers or in violation of the limitation imposed by the imperial Parliament will null and void.[80]"

Though there is no specific provision of the Judicial Review in Government of India Act, 1935 and the constitutional problems arising before the court necessitated the adoption of Judicial Review in a wider perspective. Now, Constitution of India, 1950 explicitly establishes the Doctrine of Judicial Review under various Articles 13,32,131-136,143,226,227,245,246.,372.

2.2 Important Doctrines Formulated by Courts through Judicial Interpretations:

Art. 13 of constitution incorporates "Judicial Review of Post constitution and Pre-constitutional laws". This Article inherited most important doctrines of judicial review like *Doctrine of Severability*, *Doctrine of Eclipse.* Article 13 provides for the "judicial review" of all the legislations in India, past as well as future. This power has been conferred on the High Courts and the Supreme Court of India under Art. 226 and 32 which can be declare a law unconstitutional if it is inconsistent with any of the provisions of PART 3 of the Constitution. Some other doctrines are formulated by courts using the power of judicial review are *Doctrine of Pith and Substance, Doctrine of Colorable legislation*. These doctrines are originated by Supreme Court by using power of judicial review through interpreting various Articles. Doctrine of Prospective overruling is the doctrine to interpret the judicial decisions. These doctrines are enumerated through interpret the constitution provisions by Supreme Court. Judicial review in India is based on various dimensions like judicial review of legislative , executive and judicial acts which are explicitly provided in these doctrines :

[78][1913]40. ILR 391 (Cal)
[79] [1918] . AIR 1210 (Mad)
[80] Supra 2 ,p 501

2.3 *Doctrine of Severablity*:

Art. 13 of the Indian constitution incorporates this doctrine. In, Art. 13 the word" *to the extent of contravention*" are the basis of Doctrine of Severability. This doctrine enumerates that the court can separate the offending part unconstitutional of the impugned legislation from the rest of its legislation. Other parts of the legislation shall remain operative, if that is possible. This doctrine has been considerations of equity and prudence. It the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be void. This is known as "doctrine of severability"

In **A.K Gopalan vs. State of Madras**[81]**,** case section 14 of Prevention Detention Act was found out to be in violation of Article 14 of the constitution. It was held by the Supreme Court that it is Section 14 of the Act which is to be struck down not the act as a whole. It was also held that the omission of Section 14 of the Act will not change the object of the Act and hence it is severable. Supreme court by applying doctrine of severability invalidate the impugned law.

2.4 Doctrine of Eclipse:

This doctrine applies to a case of a pre constitution statute. Under Art. 13(1) of the constitution, all pre constitution statutes which are inconsistent to part 3 of the constitution become unenforceable and unconstitutional after the enactment of the constitution. Thus, when such statutes were enacted they were fully valid and operative. They become eclipsed on account of Art. 13 and lost their validity. This is called "Doctrine of Eclipse". If the constitutional ban is removed, the statute becomes free from eclipse, and becomes enforceable again.

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

[81] [1950] AIR 27 (SC)

2.5 Doctrine of Prospective Overrulling:

The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs, but in such a way that it does not create a binding effect upon the parties to the original case or other parties bound by the precedent . The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is laying down a new law for the future . This doctrine was propounded in India in the case of

Golak Nath vs. State of Punjab.[82]

In this case the court overruled the decisions laid down in *Sajjan Singh* [83] *and Shankari Prasad*.s[84] cases and propounded Doctrine of Prospective Overruling. The Judges of Supreme Court of India laid down its view on this doctrine in a very substantive way, by saying "The doctrine of prospective overruling is a modern doctrine suitable for a fast moving society." The Supreme Court applied the doctrine of prospective overruling and held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth Amendment will continue to be valid.

Our Indian Constitution , Judicial Review is explicitly provided in three dimensions such as " *Judicial Review of Constitutional Amendments* ", *Judicial Review of Parliament and State Legislation and also Judicial Review of Administrative actions of Executives* .These dimensions are summarized as follows:

2.6 *Judicial Review of Constittutional Amendments*:

In India, constitutional amendments are very rigid in nature. Although supreme court of india is the guardian of Indian Constitution , therefore supreme court time to time scrutinize the validity of constitutional amendment laws, parliament has the supreme power to amend the constitution but cannot abrogate the basic structure of the constitution. But, there was a conflict between Court and Parliament regarding Constitutional Amendment that whether fundamental rights are amendable under Art. 368 or not?

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[82] [1967] AIR 1643(SC)
[83] [1965] AIR 845(SC)
[84] [1951) AIR 458(SC)

The question whether fundamental rights can be amended under Art. 368 came for consideration of the Supreme Court in ***Shankari Prasad v. Union of India***[85] the first case on amendability of the constitution the validity of the constitution (1st Amendment) Act, 1951, curtailing the "Right to Property" guaranteed by Art. 31 was challenge .The argument against the validity of (1st Amendment) was that Art. 13 prohibits enactment of a law infringing an abrogating the fundamental rights, that the word 'law' in Art 13 would include" any law", then a law amending the constitution and therefore, the validity of such a law could be judged and scrutinized with reference to the fundamental rights which it could not infringe. It was argued that the "State in Article 12 included Parliament and the word "law" in Art. 13(2), therefore, must include constitutional amendment"". The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights is contained in Art. 368, and that the word 'law' in Art. 13(2) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges or takes any of the fundamental rights.

Again , In 1964 ***Sajjan Singh v. Rajasthan,*** the same question was raised when the validity of the Constitution (Seventeenth Amendment)Act, 1964, was called in question and once again the court revised its earlier view that constitutional amendments, made under Art. 368 are outside the purview of Judicial Review of the Courts. In this case the Constitution (17th Amendment) Act, 1964 was challenged an upheld.

After two years, after the decision of Sajjan singh , in 1967 in ***Golak Nath vs. State of Punjab,*** the same question regarding constitutional amendment was raised. In this case the inclusion of the Punjab Security of Land Tenures Act,1953 in the Ninth schedule was challenged on the ground that the Seventeenth Amendment by which it was so included as well as the First and the Fourth Amendments abridged the fundamental rights were unconstitutional. The Supreme Court overruled the decision of Shankari Prasad and Sajjan singh's case. The Supreme Court observed that "An amendment is a 'law' within the meaning of Art. 13(2) 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." Court further observed that "The power of

Parliament to amend the constitution is derived from Art.245, read with Entry 97 of list 1 of the Constitution and not from Art.368. Art. 368 only lays down the procedure for amendment of Constitution. Amendment is a legislative process."[86].

The minority view of five out of eleven judges was the word 'law' in Art. 13(2) refers to only ordinary law and not a constitutional amendment and hence *Shankari Prasad* and *Sajjan Singh* case rightly decided. According to them, Art. 368 dealt with only the procedure of amending the constitution but also contained the power to amend the constitution.[87]

Once again the Supreme Court was called upon to consider the validity of the Twenty .fourth, Twenty Fifth and Twenty Ninth Amendment in the famous **case *Keshavananda Bharti vs. State of kerela*[88]** which is also known as **"Fundamental Rights Case"**. In this case the petitioner had challenged the validity of Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Schedule by the Twenty Ninth Amendment Act. The petitioner was challenged the validity of Twenty Fourth, Twenty Fifth, and Twenty Ninth Amendment to the Constitution and also the question was involved was as to what extent of the amending power conferred by Art. 368 of the Constitution ? The Supreme Court overruled the Golak Nath's case and held that" *Under Art. 368 Parliament can amend the fundamental rights but cannot take or abridges the Basic Structure of the Constitution".* According to this judgment of largest bench in the constitutional history propounded the "*Theory Of Basic Structure: A Limitation on Amending Power."*
This theory formulated By Supreme court through Doctrine of Judicial Review..
In **, Indira Nehru Gandhi vs. Raj Narayan[89]**, the amendment was made to validate with retrospective effect the election of the then Prime Minister which was set aside by the Allahabad High Court. The Supreme Court struck down clause (4) of Art.329-A which was the offending clause an inserted in (39th Amendment) to validate the election with retrospective effect.. Khanna .J. struck down the clause on the ground that "it violated the free and fair elections which was an essential postulate of democracy which in turn was a basic structure of the constitution".

[86] MP SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA, (11th , Eastern Book Company,2008), 999
[87] DR. J.N. PANDEY, The Constitutional Law Of India,(49th , Central Law Agency ,Allahabad,2012)
[88] [1973]AIR 1461(SC)

[89] [1980] AIR 1789(SC)

Again in **Minerva Mills vs. Union of India**[90]**,** , the petition was filed in the Supreme Court challenging the taking over of the management of the mill under the Silk Textile undertaking (Nationalisation) Act, 1974, and an order made under S. 18-A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the constitutional validity of clauses (4) and (5) of Art. 368, introduced by Sec.55 of 42nd Amendment. If these clauses were held valid then petitioner could not challenge the validity of the 39th Amendment which had placed the Nationalization Act, 1974, in the IX schedule.

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

Through these cases Supreme Court scrutinize the validity of constitutional Amendment Law by using the Doctrine of Judicial Review. By scrutinizing the judicial decisions Supreme Court also interpreting the various provisions such as Art. 13,368 and also ensure the Supremacy of the Constitution which the basic feature of the Constitution.

2.7 *Judicial Review of Parliamentary and State Legislative Actions*

Art. 245 and 246 of the Indian constitution gives legislatives powers to Parliament and State Legislatures .Art. 245 (1) provides "subject to the provisions of the constitution , the parliament may make any laws for the whole and any part of the territory of India and a State Legislature may make a law for whole of the state and any part thereof". The word "subject to the provisions of the constitution" are imposed limitations to the Parliament and State Legislature to make legislation . These words are the essence of Judicial Review of legislative actions in India . It ensure that legislation should be within the limitations of constitutional provision. These words provides power to the Courts to scrutinize the validity of legislation. The Supreme

[90] [1975] AIR 2299(SC)

Court have supreme power under Art. 141 which incorporates "Doctrine of Precedent" to implement its own view regarding any conflicted issue and it's also have binding force. Supreme Court gives us some relevant observations through judicial decisions regarding the legislative actions of Parliament and State Legislatures.

In **SP Sampat kumar vs. Union of India**[91] the constitutional validity of Administrative Tribunal Act,1985 , was challenged on the ground that that the impugned Act by excluding the jurisdiction of the High Courts under Art. 226 and 227 in service matters had destroyed the judicial review which was an essential feature of the constitution. The Supreme Court held that though the Act has excluded the judicial review exercised by the High Courts in service matters, but it has not excluded it wholly as the jurisdiction of the Supreme Court under Art. 32 and 136.

Further held that" a law passed under Art. 323-A providing for the exclusion of the jurisdiction of the High Courts must provide an effective alternative institutional mechanism of authority of judicial review. The judicial review which is an essential features of the constitution can be taken away from the particular area only if an alternative effective institutional mechanism or authority is provided."

Again in **L Chandra vs. Union of India**[92]**,** clause 2(d) of Art. 323-A and clause 3(d) of Art.323-B was challenged on the ground that these clauses excludes the jurisdiction of High Courts in service matters. The Constitutional Bench unanimously held that "these provisions are to the extent they exclude the jurisdiction of the High Courts and Supreme Courts under Art.226/227 and 32 of the constitution are unconstitutional as they damage the power of judicial review. The power of judicial review over Legislative Actions vested in the High Courts and Supreme Court under Art. 226/227 and Art.32 is an inteegral part and it also formed part of its basic structure."

Then, in the recent scenario ,**I.R. Coelho vs. State of Tamil Nadu**[93] **,** the petitioner had challenged the various Central and State laws put in the Ninth Schedule including the Tamil Nadu Reservation Act. The Nine Judges Bench held that "any law placed in the Ninth Schedule after April 24, 1973 when Keshvananda Bharati's case judgment was delivered will open to challenge, the court said that the validity of any Ninth Schedule law has been upheld by the

[91] [1987]1 SCC 124(SC)
[92] AIR[1R7] ASC 1125
[93] AIR 2007 SC 861

Supreme Court and it would not be open to challenge it again , but if a law is held to be violation of fundamental rights incorporated in Ninth Schedule after the judgment date of Keshvanand Bharati's case, such a violation shall be open to challenge on the ground that it destroy or damages the basic structure of constitution". The Supreme court observed that " *Judicial Review of legislative actions on the touchstone of the basic structure of the constitution"*

2.8 *Judicial Review of Administrative Actions*:

The system of judicial review of administrative action in India came from Britain. Judicial Review of Administrative action is perhaps the most important development in the field of public law. The Doctrine of Judicial Review is embodied in the Constitution and the subject can approach High Court and Supreme Court for the enforcement of fundamental right guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action id mala fide, the same can be quashed by the ordinary courts of law .*All the rule, regulations, ordinances, bye-laws, notifications, customs and usages are "laws" within the meaning of Art.13 of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared ultra vires by the Supreme Court and by the High Courts* . Judicial review of administrative action aims to protect citizens from abuse of power by any branch of State.

"***When the legislature confers discretion on a court of law or on an administrative authority, it also imposes responsibility that such discretion is exercised honestly, properly and reasonably***"[94]This view of "**DE Smith**" clearly point out that discretion of administrative action should be used with care and caution. So, the abusive discretionary power of Administrative action must be review by judiciary. If judiciary founds any ground of illegality of any administrative action, it is the duty of the judiciary to maintain check and balance.

2.8.1 Grounds of Judicial Review of Administrative Action:

As a general rule, courts have no power to interfere with actions taken by administrative authorities in exercise of discretionary powers. But this does not mean that there is no power of court to control over the discretion of administration. In India, the court will interfere with the discretionary powers exercised by the administration in the basically on two grounds: i.e.

[94] De Smith, Judicial Review of Administrative Action (1995) p296-99, CK TAKWANI, Lectures On Administrative Law(, 4th , Eastern Book Company,2008) p276

failure to exercise discretion and *excess or abuse of discretion.* The judicial review of administrative action can be exercised on the following grounds:

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

But in the famous case ***Council of Civil Service Unions vs. Minister for the Civil Service***[95]**,** ***Lord Diplock*** highlighted the grounds by his observations "Judicial review has I think developed to a stage by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call '**illegality**', second '**irrationality**' and the third '**procedural impropriety'.**

Doctrine of proportionality' is another important basis for exercising judicial review. This entails that administrative measures must not be more drastic than what is necessary for attaining the desired result. The doctrine operates both in procedural and substantive matters. This principle contemplates scrutiny of whether the power that has been conferred on an executive agency is being exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred[96].

[95] (1984) 3 AII ER 935 (950)

[96] Seminar on 'Judicial Review of Administrative Action, address by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India, http://www.supremecourtofindia.nic.in/speeches/speeches_2009/judicial_review_of_administrative_action_-_24-8-09., accessed on 6/10/15, 10:32 pm

In, **Ajai Hasia vs. Khalid Mujib**[97] the Regional Engineering College made admissions on the ground that it was arbitrary and unreasonable because high percentage marks were allocated for oral test, and candidates were interviewed for very short time duration. The Court struck down the Rule prescribing high percentage of marks for oral test because allocation of one third of total marks for oral interview was plainly arbitrary and unreasonable and violative of Art. 14 of the Constitution. In **Air India vs. Nargesh Meerza**[98]**,** one of the Regulation of Air India provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage , if it took place within the four years of service or on first pregnancy , whichever is occurred earlier. The Regulation did not prohibit the marriage after four years and if an Air Hostess after having fulfilled the first condition became pregnant, there was no reason why pregnancy should stand in the way of her continuing in service. The Supreme Court struck down the Air India and Indian Air lines Regulations on the retirement and pregnancy bar on the services of air hostess as unconstitutional on the ground that the condition laid down therein were entirely unreasonable and arbitrary.

2.9 *Current Position of Judicial Review in India*:

The Supeme Court of India since the era AK Gopalan's case to the historic judgment in I.R. Coelho's case magnified the concept of Doctrine of Judicial Review. In the present scenario, Supreme Court plays a very crucial role to interpret the constitutional provisions and now the concept of Judicial Review became a fundamental feature of the Constitutional Jurisprudence . In its recent judgment in **Madras Bar Association vs. Union of India**[99] the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provisions ultra vires. In this case, the petitioner challenges the constitution of NCLT and NCALT and also challenges the formation of the Committee, the appointment of the judicial members as well as the technical members .Sec 409(3)(a), 409(3)(c), and Sec. 411(3) . 412(2) are the provision which incorporates Constitution of Board of company law administration. The Supreme court upheld the validity of NCLT and NACLT, but declared the above mentioned provisions ultra vires and held that these provisions are unconstitutional in nature on the ground that any institution performing a judicial function should be constituted of members having judicial experience and expertise and thus judicial member were to exceed the technical members so as to maintain the essential feature of that constitution.

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[97] AIR 1981 SC 487
[98] AIR 1981 SC 1829
[99] (2015) SCC 484

3. JUDICIAL REVIEW IN UNITED STATES OF AMERICA

The American Constitution, which is written and federal democratic in spirit, is based on the Rule of law and the individual liberty is protected. It provides "separation of powers with check and balances which are the heart and soul of the American Constitution". One of the fundamental process in the America to determine the validity of law is Judicial Review. In USA, the judiciary can check the actions of Congress and the action of the President, if it is contrary to the Constitution then the judiciary will declare null and void. The Constitution of the USA doesn't provide express provisions for Judicial Review. But, the power of judicial review to declare the laws unconstitutional and to scrutinize the validity of law implicitly incorporated in the Art.III and IV.

> According to the ***Bernard Schwartz*** "*The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America."*[100]

. ***Justice Frankfurter in Gobitiz***[101] ***case*** "*Judicial review is a limitation on popular government and is a part of the Constitutional scheme of America*."

American judicial review is a peculiar government feature among the nation of the world. The concept of judicial review has its foundation on the doctrine that the constitution is the Supreme law.

3.1 *Objects of Judicial Review in USA:*

The main objectives of Judicial Review in USA are as follows:

- To declare the laws unconstitutional if they are contrary to the Constitution.
- To defend the valid laws which are challenged to be unconstitutional.
- To protect and uphold the Supremacy of the Constitution by interpreting its provision.
- To save the legislative function of Congress being encroached by other departments of the Government.

[100] Bernard Schwartz, *The Powers of Government* (2nd, The Macmillan Company , New York 1963) 19
[101] ,(1940) 310 US 586 (600)

- To check the action of Congress and the State Legislature for them delegating the essential legislative functions to the executives or to check Congress from delegating its legislative function to the State Legislatures.[102]

3.2 *Origin:*

Doctrine of Judicial review in USA is a fundamental feature of the Constitutional system. ***Dr .Bonham's*** case is said to be great heritage to the American system of judicial review. ***According to Willis*** *" Dr. Bonham's case was soon repudiated in England , but the doctrine announced in Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the US Supreme Court in the decisions of cases coming before it."*[103] But, in 1794, ***United States vs. Tale Todd*** was decided by the Supreme Court of the USA in which Act of Congress was declared unconstitutional. It is said that this was the first case in which the Supreme Court a statute of Congress unconstitutional. Again, in 1796, in ***Hylton vs. United States ,*** Chief Justice Chase observed that " It is necessary for me to determine whether the court constitutionally possesses the power to declare an Act of the Congress void on the ground of its being contrary to and in violation of the Constitution, but if the courts has such powers , I am free to declare it but in a clear case.

In 1803, the power of judicial review was again used with *(en banc*) judicial authority to declare the Act of the Congress unconstitutional in the historic landmark case of ***Marbury vs. Madison.***

3.3 *System of Judicial Review in USA:*

There is no express provision in the US Constitution for judicial review. The system of judicial review were basically start in USA in the case : ***Marbury vs. Madison :***

Facts : In this case , When President John Adams did not win a second term in the 1801 Presidential Election , he utilized the last days of his administration to make a substantial number of political arrangements. At the point when the new president (Thomas Jefferson) took office, he told his Secretary of State (James Madison), not to convey the official printed material to the administration authorities who had been named by Adams. In this way the administration authorities, including William Marbury, were denied their new employments. William Marbury filed petition in the U.S. Supreme Court for a writ of mandamus, to compel Madison to convey the commission.

[102] Supra 2 , p 195
[103] Id , p 196

- **Issues:** Does the Supreme Court have original jurisdiction to issue writs of mandamus?
- Another issue was that can Congress expand the scope of the Supreme Court's original jurisdiction beyond what is specified in Article III of the Constitution ?
- Does the Supreme Court have the authority to review acts of Congress?

Held: On determining the issues the Supreme Court held that Supreme Court has no jurisdiction to issue Mandamus because to issuing writ of Mandamus, court should have the appellate jurisdiction. Further court held that Congress cannot expand the scope of the Supreme Court's original jurisdiction beyond the scope Article III of the Constitution. The Supreme Court observed that Supreme Court has the authority to review acts of Congress and determine whether they are valid or not. It is inherent power of the Supreme Court to determine the validity of any law. The Supreme Court declared Section 13 of the Judiciary Act of 1789 unconstitutional and dismissed the writ petition and hence Madison didn't get the commission.

In this way, Supreme Court of US formulated the concept of ***Doctrine of Judicial Review.*** This landmark judgment given by ***Chief Justice Marshal***.

In USA, before this judgment Supreme Court didn't declare any action of Congress unconstitutional ***en boc*** (with full judicial authority). This case provides the foundation of power of judicial review to the Supreme Court to determine the validity of any legislative action of Congress. It also provides great extent of power of judiciary to maintain check and balance.

Again in 1857 ***, Dred vs Scott*** the Congress enacted Missorie Compromise Act, 1820 which provides compensation to the owners of the slaves if they freeing the slaves. Dred Scott was an enslaved African American who had taken by his owners to free State. Due to the Act of the Congress he had attempted to sue for his freedom.The Court held that whether enslaved or free, could not be American citizens and therefore had no right to sue in federal court, and Federal Govt. had no power to regulate the slavery to the territories because the Fifth Amendment to the Constitution barred Congress from taking property without "due process. ***Chief Justice*** **Roger B. Taney** held that Act of Congress unconstitutional and denied the Scott request.

This judgment of Justice Taney was against the spirit of the nation and very much criticized by the American people.

3.4 Expansion of Judicial Review after Marbury 's Decision in USA:

After Marbury's judgment there expansion of judicial review was tremendously .The process of Judicial Review expanded the powers of the Federal .It increases the protection to civil liberties and personal freedom. Some of the relevant decisions are taken into consideration as follows:

McCulloch v. Maryland[104] is the historic case is related to the expansion of judicial review in US. **Facts-** In this case there was a dispute regarding the powers of Federal law and State law. The facts of the case that a bank was established by Federal law (by federal govt.) named Bank of America in the State of Maryland. Thereafter State of Maryland passed a tax legislation which imposes the tax on bank in relation to relative transaction. This was challenged on the ground that can State law imposes tax on bank which was established by Federal law?

Held- It was held by the Court that State cannot impose tax on Union authority, court creates immunity to the National Govt. According to this judgment US Supreme court formulate the doctrine of Immunity of Instrumentalities"

Youngstown Sheet Tube Co. vs. Sawyer[105]In this case , President Truman ordered the seizure of the steel in order to avoid the national adversity prevailing at that time. In this way President making a law to seize the steel of all the citizen. The Court on the opinion of Justice Black that" it is the instance wherein the legislative encroachment by the Executive was held unconstitutional and further observed that Constitution does not provide law making power to Presidential or Military supervision or control."[106]

In **Plessy vs. Ferguson**[107] the facts of the case that Plessy was a nigro has purchased a ticket entitling him to travel in a railway in Luisiana. He entered into a coach which was reserved for the white and he was ordered to sit in the coach separately allotted for the Negros, he refused to sit on that coach. Due to his action of refusal he was arrested and charged with the violation of Segregation laws . The federal court held that "Fourteen Amendment did not intend to abolish social inequality which is distinct and political inequality and coloured people could

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[104] 4 Wheaton 316(1819)

[105] 343 US 579 (1952)
[106]Supra 2 , p 222
[107] 163 US 537 (1896)

get equal facilities, but not equality in status. Court further observed that" Supreme Court cannot strike down a law which is not in violation of some specific constitutional prohibition."

3.5 *Current position of Judicial review in USA:*

After *Marbury's case* the expansion of judicial review in USA in very broad in nature,its widened scope of judicial review in USA in present scenario . The Supreme Court in the recent case of **Reed v. Town of Gilbert , Arizona[108].** In this case an ordinance was passed concerned with Gilbert town which prohibits the display of outdoor sign except some signs which are ***political signs*** which defined as designed to influence the outcome of an election, and ***ideological signs*** which defined as communicating ideas and another one ***directional signs*** which defined as directing the public to church or other qualifying event. This ordinance was challenged by a church and its priest.

Justice Clarence Thomas on behalf of the majority held that distinctions drawn by the ordinance were impermissible. It was held that all "content based law" requires the exacting form of judicial review and strict scrutiny. Court further held that content based law which are target speech based on its communicative content are presume to be unconstitutional and may be justified only if the Govt. proves that they are narrowly tailored to serve compelling State interests.

4. JUDICIAL REVIEW IN UNITED KINGDOM

4.1 *Origin:*

The Doctrine of Judicial Review was prevalent in England also**.** ***Dr. Bonham vs. Cambridge University*** was decided in 1610 by Lord Coke was the foundation of judicial review in England. But in the case of ***City London vs. Wood*** Chief Justice Holt remarked that "*An Act of Parliament can do no wrong , though it may do several things that look pretty odd". This remark establishes the Doctrine of Parliamentary Sovereignty which means that the court has no power to determine the legality of Parliamentary enactments*.[109] In UK there is a system which is based on Legislative Supremacy and Parliamentary Sovereignty. Earlier, there was no scope of judicial review in UK, but after the formation European Convention of Human

[108] US Reports Slip Opinion Volume 13-502 (2014**)**
[109] Supra 2 , p 186

Rights, the scope of judicial review become wider. The enactment of Human Rights Act 1998 also requires domestic Courts to protect the rights of individuals. In UK, there is no written Constitution and Parliamentary Supremacy is the foundation in UK. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in UK.

4.2 *Parliamentary Sovereignty in UK :*

In England, people are the source of all the powers and they are also the sovereign power. But ,the people snatching all essential powers from the Monarch respond to them in Parliament. This is the great constitutional fiction of the English Constitution. Thus, powers, originally vesting in the people, are the true sovereign powers. Due to this , Parliament can legislate any matter and Constitution assigns no limitations to enact any legislation. The Act of the Parliament cannot be answerable to any authority whether it is unjust or contrary, no matter how it is. There is unlimited power of Parliament in UK. There is no scope of judicial review of legislative Act in UK. The legislative Act of Parliament is also known as Primary Legislation and the delegation by the Parliament to the executive with adequate legislative guidance are known as Secondary legislation, secondary legislation are administrative in nature, therefore it is subject to judicial review in UK.[110]

4.3 *Primary and Secondary Legislations*:

There is two dimensions of legislation in UK, one is Primary legislation which are basically legislations enacted by Parliament and another one is Secondary legislation which provides rules, regulation, directives and act of Ministries. Primary legislation is outside the purview of judicial review except in few cases which encroaches the law of European Community law .After the formation of European Union and Human Rights Act 1998, Primary legislation is subject to judicial review in some cases. But on the other hand, Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions , rules , regulations .court can review any of the actions and may declare ultra vires and unlawful.

4.4 *Judicial Review Under European Community Law*

The United Kingdom's membership of the European has brought with it significant changes to the English legal system and the UK constitution. European Community law in judicial review

[110] Id p 73, 74

claims in England and Wales though that the needs to be set in general context of the European legal system. 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 on the validity of administrative decisions and legislations made by the institutions of the European Union.[111]

Community law has basic methods of work of national courts, including their approach to interpreting legislation, the procedures to be followed by litigants and the nature of the *remedies available to protect individual's rights under Community law*.

In **R vs. Secretary of State for Transport**[112] it was observed by the Court that "by relying upon the direct effect of community law, the individual may be able to challenge national measures 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 law ,i.e. primary legislation, secondary regulations and administrative decisions."

In,**Les Verts vs. European Parliament**[113]**,** 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."

4.5 *Judicial Review of Administrative and Executive Acts(Secondary legislation)*

In England , subordinate legislation(secondary legislation) is subject to judicial review, there is no exceptions to this. The Sovereignty of Parliament is not affected by such subordinate legislation .The *doctrine of ultra vires in the domain of subordinate legislation* which can be classified as procedural and substantive ultra vires. According to the European Convention, Parliament acting jointly with the Council, the Council and Commission making regulations, directives , take decisions, make recommendations or deliver opinions. Secondary legislation is *administrative*, or *executive*, legislation; it is valid only to the extent that it is enacted within the authority granted to the executive government by Parliament. judicial review of secondary

[111] Harry Woolf, Jeffrey Jowell, Andrew Le Suer, De Smith's Judicial Review ,(6th Thomson Sweet & Maxwell,2007)226
[112] [(1990) 2 A.C. 85]
[113] [(1986) E.C.R 1339

legislation is not only justified but mandated by the trinity of constitutional doctrines — the Rule of law, the Separation of Powers and Parliamentary Supremacy, that lie at the core of the UK legal system.[114]

In **R vs. The Medical Control Agency & Nephew Pharmaceuticals Ltd.**[115] the Medical Control Agency granting a market authorization to a company in respect of a proprietary medical product. This was challenged, the review proceedings were taken by a competing undertaking which held an original market authorization had been granted by the Agency contrary to the provisions of relative directives. The ECJ held that the competitor was entitled to rely on the directive for the purposes of challenging the validity of the authorization.

4.6 *Current Position in UK :*

Basically , in UK , present scenario is much deviated to the judicial review. The Courts in UK are strictly followed the principles of judicial review with regard to administrative actions and secondary legislations. So far as primary legislations, they are outside the purview of judicial review but with some exceptional cases. Judicial review of administrative actions which are executive in nature which are mostly subject matter in the present scenario in UK.

In, **R. (on the application of Drammeh) v Secretary of State for the Home Department**[116]

Facts: An immigration detainee who had failed to take his medication for schizo-affective disorder and had gone on hunger strike, but who did not lack mental capacity, failed to establish that his detention was unlawful by virtue of his pre-existing serious mental illness where the facts indicated that his actions were calculated to avoid deportation. The claimant applied for judicial review of the lawfulness of his immigration detention.

Held: There was no doubt that the effect of detention on a detainee's mental health was a very relevant factor in evaluating what constituted a "reasonable period" of detention. The secretary of state's policy in Chapter 55.10 of the Enforcement Instructions and Guidance in relation to the detention of the mentally ill imposed a duty to inquire into the relevant circumstances of a detainee to assess whether serious mental illness existed and whether it could be satisfactorily managed in detention. Further held that, where a detainee had capacity, his refusal to consent

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[114] Professor Mark Elliott, From bad to worse: Justice Secretary on Judicial Review, http://publiclawforeveryone.com/2015/01/14/the-justice-secretary-on-judicial-review-from-bad-to-worse/, accessed on 14/10/15, 10:12 pm

[115] [(1996) E.C.R I-5819

[116] [2015] EWHC 2754

to medical treatment put him outside the scope of the secretary of state's policy statements.

5. JUDICIAL REVIEW IN INDIA, USA, UK : COMPARISION

- The scope of judicial review is wider in India as comparison to US and UK because US Constitution is very concise in nature and the words and expression are used therein are vague and general in nature. US Constitution is the most rigid Constitution in the world, it is very tend our and in cumbered. Whereas Indian Constitution are rigid as well as flexible in nature, it has detailed provisions and it is wealthiest Constitution in the world. The words and expressions used in the Indian Constitution are specific and exact. On the part of UK , there is no written Constitution, therefore in UK scope of judicial review is very limited in nature.
- In India, there is specific and extensive provisions of judicial review in the Constitution of India such as Art. 13, 32 ,131-136 , 143, 226, 227 ,246, 372. Though the term "judicial review is not mentioned in these Articles but it is implicit in these Articles. Whereas US Constitution doesn't have any specific provision for judicial review, Art. III, IV, V incorporates judicial power of the Court, and constitutional supremacy and all the laws are subject to Constitution , therefore, it is implicit in nature. Judicial review in US is the formulation by court. In UK, there is unwritten Constitution, there is no express provision of judicial review , it is totally depend on discretion of the Court.
- In India, Art. 13 provides for "Judicial Review of Pre- constitutional as well as Post-Constitutional laws" whereas there is no such provision of judicial review of pre constitutional laws in US and UK.
- In India, power of judicial review can be used in three dimensions such as Judicial Review of Constitutional Amendments, Legislative Acts and Administrative acts. Whereas US Constitution is very rigid in nature therefore review of constitutional amendment in very rarely used, Supreme Court of US has power to scrutinize the Legislative Act and Administrative act which is contrary to Constitution. While in UK there is no scope to check the validity of Legislative acts of Parliament, but secondary legislations are subject to judicial review.
- In UK , Parliament Sovereignty dominated Constitutional democracy, Acts of Parliament cannot be challenged on any grounds in any Court. Whatever legislation enacted by Parliament whether it is just and unjust, it cannot be accountable to any

authority. Whereas in India and US, Constitution is supreme law of the land, all the laws are subject to Constitution. If any act are violated the provisions of the Constitution, court can strictly scrutinize the validity of law.

- The term" *Due Process of Law* "extends the power of judicial review in USA. By applying this Supreme Court of USA worked with strict caution in determining the constitutionality of legislative Act on the substantive grounds as well as procedural grounds .Whereas in India, the term " *procedure established by law"* expressly provided in the Constitution in Art which incorporates that Court can declare void acts on only on the substantive grounds. Court cannot make laws in India because it's not the role of judiciary, Court can only interpret and determine the law, but in US judges made law are exist, judges strictly scrutinize the law and they found invalid then they declare void and make a judge made law which is always existence in US.
- Judicial review of Administrative acts are very wider in nature therefore it s subject to judicial review in all the three countries. All the executives actions are can be determined by Courts if they are illegal, irrational, mala fide in nature. All the administrative and ministerial acts can be challenged if they exceeds his power, doctrine of ultra vires exist in all the three countries.
- Judiciary in India and USA has very wider power to scrutinize and determine the validity of law but in UK court has very limited power to determine the law before ECHR and Human Rights Act. But, in the present scenario the position has been changed, courts are subject oriented to judicial activism to making a body of principles. Unlike USA and India, UK courts are now widened the scope of judicial review.
- In India, courts formulated various doctrines like doctrine of severability and doctrine of eclipse etc, these doctrines are also implicitly incorporated in US. But in UK, there is no scope of these doctrines due to absence of judicial review of legislative Acts.

6. CONCLUSIONS AND SUGGESSTIONS:

To conclude this , in our point of view , the impact of judicial review strengthen the power of Courts in the present scenario like in UK. There was absence of judicial review in UK, but after the expansion of this doctrine , its now become exist very broadly . *Parliamentary Sovereignty* are still in existence in UK, but judicial review also make their place in the present scenario. Doctrine of judicial review is now become very dynamic concept in present

scenario. In various countries Judiciary performing as the guardian of Constitution by using the power of judicial review. In India, courts are very strictly scrutinized the validity of law or any administrative actions if they inconsistent and illegal in nature. The scope of judicial review in Administrative action are wider in the present scenario. Every organ must be within their limitation , is the spirit of judicial review.

Separation of power is the concept which correlated with all the organs , and it is the duty of the Court to maintain check and balance. But in India , Courts have no power to take cognizance suo moto and to declare the law void, courts can initiate only when matter comes before the courts. Courts cannot questioned to any political matter, but it cannot mean that the court would avoid giving its decision under a shelter of political question, its is not the duty of the court. Sometimes it seems to be that court evolves judicial legislations but it may not be correct in India. Parliament has authority to make law in India, but in USA and UK courts evolving judicial legislation. Judicial review checks the legislative power from delegating its essential functions and also sometimes discourages the legislature from enacting void and unconstitutional legislation. In India and US , there are various constitutional limitations implicitly and also explicitly, which incorporates limitations to the law making power of Legislature , such as legislature cannot go beyond its power to make law, it cannot make law against the *Principles of Natural Justice*. Legislation cannot violate the fundamental rights which is the basic structure of the Constitution.

Judiciary doesn't has power to make laws , therefore there is also existence of *Judicial Restraint*. Court has also some limitations. Court cannot anticipate a question of constitutionality in advance, court cannot declare void in a doubtful case. Court does not declare a law void merely on the grounds of sentiments and personal view.

In all the countries , Courts work as a guardian solve the issues through judicial review. The dispute regarding federal laws are the biggest problem like distribution of powers , inter state trade etc, therefore through judicial review the constitutionality of Acts has to be determined keeping in view the *courage of co-operative federalism* which creates greater accord in the federal democratic state. Judicial review are now a great weapon in the hands of the court to interpret and enforce the valid law. *Independence of judiciary* are also the main concern of judicial review because , it would be great injustice to giving decision to the invalid laws and actions, if judiciary not independent. Through judicial review , judiciary also exercises effective control on *delegated legislation*, where a law made by the executive is found to be

inconsistent with the constitution or ultra vires the parent Act from which the law making power has been derived , it will declared null and void by the court.

In our point view, there should be more *Expansion of judicial review* in all the countries in the world like UK , the power of judicial review of legislative Acts should be given to the Courts in UK, because it creates democracy in the minds of the people. *One organ should be accountable to some other organ in any manner, but it cannot encroaches its limits*. *It establishes the concept of Rule of Law*.

As Justice P.N. Bhagwati in his minority judgment in ***Minerva Mills case*** observed " *It is for the judiciary to uphold the Constitutional values and to enforce the Constitutional limitations, that is the essence the Rule of law, which inter alia requires that the exercise of powers by the Government whether it be the legislative or the executive or any other authority be conditioned* by the Constitution and the law"

It enables the court to maintaining harmony in the State. By declaring invalid laws, court protects individual as well as collective rights also. The basic feature is to protect the individual rights, therefore there is a need of expansion of judicial review. To strengthen judicial review will become strengthen the liberty and freedom of individual. The concept of judicial review are also criticized. By the strict behavior of the Courts, sometimes it is criticized in the political corridors. It should not be happen in any manner, because Supremacy of law prevails in the interpretations of the Courts, we the people cannot questioned to the actions of judiciary because Supreme Court performing as the guardian of the Law of the land.