JUDICIAL REVIEW FOR ADMINISTRATIVE ACTION IN INDIA

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MEANING OF JUDICIAL REVIEW

"One Cannot Incorrigibly Use a Term, Let Alone Preach about it, unless it is known what That Term refers to."[1]

Judiciary as one of the three branches of the Government was once considered to be the weakest amongst the three—lacking in energy and prestige once upon a time. But this was once upon a time: As the years went by, the power of judiciary increased to such extent that prestige of judges began to grow—the Judges who were regarded as a lion under the throne, soon became the lion over the throne. The reason behind this is attributed to the "power of judicial review entrusted to the judicial branch of the government."[2]

Judicial Review has been described as judicial power in action.[3]

Anirudh Prasad has explained the meaning of judicial review as exercise of judicial power in the following words:

"In discharging its functions, the courts have to decide the constitutionality of legislative and executive exercise of governmental power. And, when the courts find that the legislature or executive has exceeded the constitutionally prescribed limits, they declare the legislative or executive acts void or unconstitutional, devoid of any legal force."[4]

[1] Socrates in Plato: Early Socratic Dialogues, Penguin Classics, 1987 ed, p. 217.
[2] Anirudh Prasad and Chandrasen P. Singh, *Judicial Power and Judicial Review* (1st edn, Eastern Book Company), p. 3.
[3] Fazal Karim J.(R), *Judicial Review of Public Actions*, vol 1 (1st edn, Pakistan Law House 2006), p 5.
[4] Anirudh Prasad and Chandrasen P. Singh (n 2) 33.

The *Concise Oxford English Dictionary* defines the term "judicial review" in two senses—firstly, it means "a procedure by which a court can pronounce an administrative action by a public body"; and secondly, in the US it means "review by the Supreme Court of constitutional validity of a legislative act."

According to Lord Bingham MR, judicial Review is the "power of the court to see the public powers are lawfully exercised."[5]

Richard Gordon, in his book has defined 'judicial review' as *"the means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies. It is a specialized remedy in public law."*[6]

In *IRC v. National Federation of Self-Employed*[7], which was the first case wherein the House of Lords considered the changes to public law in England made by the new RSC Ord 53, Lord Diplock said that that Order "provides for judicial review of the legality of action or inaction by persons or bodies exercising governmental powers."

In this context, Lindley MR has observed that there is—

"no duty of the court which is more important to observe and no power of the court which is more important to enforce than its power of keeping public bodies within its rights."[8]

It can therefore, be well to define the meaning of judicial review in the following words whereby it is considered as a "Doctrine" according to which the courts become entitled, in the exercise of the 'judicial power' of the State, to examine and decide the following questions—

A. The first is the question of the Constitutional Validity of any law, be it the result of primary or subordinate legislation;[9]

[5] Foreword to Richard Gordon and Stephen Cragg, *Judicial Review: Law and Procedure* (2nd edn, BLACKWELL PUBL LTD 1996).
[6] id. p 1.
[7] (1981) 2 All ER 93, 101.
[8] Roberts Gwyfai v. District Council (1899) 2 Ch. 608, 614-15.
[9] Fazal Karim J.(R) (n 3).

B. The Second question is relating to Constitutional Validity or the lawfulness of any decision, action or inaction of a person or body in relation to the exercise of a public function.[10]

The implication of this doctrine of judicial review is that "the legal validity of acts of legislature may be challenged before and adjudicated upon, by a judicial body."[11]

The peculiarity of judicial review in the constitutional sphere is that this power is wielded by the judiciary, not over any inferior tribunal (which judicial review may literally mean), but over coordinate authorities, namely, the legislature and executive.[12] It has acquired a technical meaning in countries with a written constitution. Black's Law Dictionary defines judicial review as "the court's inherent power to review the action of the other branches or levels of government and, in particular, the court's power to invalidate legislative or executive action as being unconstitutional."

ORIGIN AND SIGNIFICANCE

The Origin of judicial review can be traced back to as early as 1609 in *Calvin's Case*[13] in England. Lord Edward Coke, while pronouncing his judgement had cited a work by the title of "Doctor and Student"[14] which said that the person cannot be deprived of his rights which are provided to him by nature itself or Natural Law, in the following words—

"Parliament could not take away that protection which the law of nature giveth unto him; and therefore, notwithstanding that statute, the king may protect and pardon him."

One year later, in the case of *Thomas Bonham v. College of Physicians*[15] (Bonham) Lord Edward Coke made the observation that, *"When an Act of Parliament is against common right*

[10] ibid.
[11] Anirudh Prasad and Chandrasen P. Singh (n 2) 3.
[12] Ibid, p 275-276
[13] (1609) 7 Co Rep 1a: 77 ER 377.
[14] 1518.
[15] (1610) 8 Co Rep 113b: 77 ER 646.

and reason or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."

Four years later, in *Day v. Savadge*[16] Hobart CJ said:

"Even an Act of Parliament against actual equity...is void in itself; for jura naturae sunt immutabilia, and they are leges legume."

Judicial Review "has limited application in countries with unwritten Constitutions and parliamentary supremacy like the UK. But, it fully applies in countries with written constitutions bringing all wings of government under constitutionally permitted limited powers."[17]

Judicial Review is the offspring of the concept of "limited government" arising out of a written constitution. Judicial review in the constitutional law of the countries with written constitutions means that courts of law have the power of testing the validity of legislative as well as other governmental actions with reference to the provisions of the Constitution, which is the paramount law of the country.[18]

The concept of Judicial Review in the United States of America (US) has been adopted from the British system in England. However, the judicial review of Legislation is a unique contribution to the Constitutional Jurisprudence by the US. Explaining the significance of this concept, Daniel Webster, who helped in shaping the US Constitutional Law, in his speech in the House of Representatives pointed out the significance of judicial review in maintaining the judicial power of judiciary.

Since the Supreme Court and High Courts derive their power of judicial review from the constitution, it cannot be taken away or abridges except in accordance with the Constitution. And the Supreme Court in India has held that the power of Judicial Review is part of the basic structure of the Indian Constitution, so that even a constitutional amendment cannot divest the Supreme Court and the High Courts of their power of judicial review.[19]

[16] (1614) Hob. 85, 97.
[17] Anirudh Prasad and Chandrasen P. Singh (n 2) 33.
[18] D.D. Basu, Tagore Law Lectures on Limited Government and Judicial Review (SC Sarkar and Sons Private Ltd., 1972) 275.
[19] L. Chandra Kumar's Case, AIR 1997 SC 1125.

Jenny S. Martinez has written in her Article that the term *Judicial Review*, *"describes the power of courts to declare legislation or actions of the executive in violation of the constitution."*[20] She also goes on to point out the importance of this practice of review of Legislation or Executive action for the sake of *"preserving constitutional structure and individual rights".*[21]

However, this very power of judicial review is subject to the criticism, one of them being that the power of judicial review *"is in tension with Democratic principles because it allows Judges to countermand the will of elected legislators and executive officers."*[22]

The power of judicial review, or the authority to declare legislative enactments void, it was said by Justice Iredell in 1878, *"Is of a delicate and aweful nature;"*[23] no tribunal can, said Chief Justice Marshall, *"approach such a question without a deep sense of its importance, and of awful responsibility involved in its decision."*[24]

It is a responsibility, so said Chief Justice Earl WARREN—

"that is made more difficult in this court because we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences. And conscience sometimes is a very severe task-master."[25]

DEVELOPMENT IN THE US

Marbury v. Madison

The concept of Judicial review, as we see today being practiced in the US has a common law origin. The written Constitution of the US does not explicitly spell out the power of judicial review and so one cannot seek to defend this doctrine by "mere reference to a relevant

[20] Jenny S. Martinez, 'Horizontal Structuring', *The Oxford Handbook of Comparative Constitutional Law* (1st edn, Oxford University Press) 569.
[21] *Ibid*
[22] *Ibid*
[23] Quoted by Justice Brandeis in Ashwander v. Tennessee Valley Authority 297 US 288(1936).
[24] McCulloch v. Maryland 17 US (4 Wheaton) 316.
[25] On the occasion of his retirement, Chief Justice Earl Warren Warren spoke of "the very awesome responsibility" the Justices bear to "speak the last word in great governmental affairs".

constitutional text"[26], but they have to "engage in other forms of constitutional interpretation."[27]

Two majorly cited "other forms of interpretation" in this regard were made by Alexander Hamilton in *The Federalist, No. 78,* and by Chief Justice John Marshall in *Marbury v. Madison (1803).*

In *The Federalist,* Hamilton syllogised that, because *"the interpretation of the law is the proper and peculiar province of the courts",* and because the Constitution is the *lex suprema,* the courts must interpret all laws of the land in the light of the Constitution. He further commented:

"It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[28]

The backdrop of *Marbury* can be recounted in the following manner:

The Judiciary Act of 1801 was passed in a hurry by the Federalist Congress which was in the final period of office. This was just before Thomas Jefferson, the newly elected President took office. The Act of 1801, expanded the organization as well as the jurisdiction of the federal courts. *Inter alia,* it had the effect of abolishing three already existing circuit courts which were set up by the Judiciary Act of 1789, and creating six new circuits as a replacement for the previous three. This had the effect of enabling the outgoing administration of John Adams to appoint sixteen new circuit judges (these came to be known as "midnight appointees"). This outgoing Congress had passed another legislation which created forty-two new Justices of Peace, for the District of Colombia. Marbury was one of these forty two Justices of Peace in Colombia, who had been appointed in the Adams regime but whose commission had not been delivered when Thomas Jefferson took charge.

The followers of Jefferson proposed the repeal of the Judiciary Act of 1801, the outcome of which would be the ousting of the forty two judges *en masse*. This was followed by extensive

[26] Ralph A. Rossum and G. Allan Tarr, *American Constitutional Law*, vol 1 (9th edn, Westview Press 2014) 49.
[27] *Ibid*
[28] The Federalist No. 78 (Alexander Hamilton) (Garry Wills ed., 1982).

debates in which the Federalists contended that the repeal would violate the constitutional provision guaranteeing the federal judges tenure during good behaviour.[29] The followers of Jefferson responded that since the Constitution gave Congress the power to establish lower federal courts, it also gave them the power to abolish them.[30] These "Jeffersonians" prevailed, and the Repeal Act was passed on March 8, 1802, the immediate effect of which was to restore the judicial system established in the Judiciary Act of 1789.

The Federalist predicted that the Supreme Court would declare the Repeal Act unconstitutional. Fearing that prospect and seeking to delay and perhaps even dissuade the displaced circuit judges from attacking the validity of the Repeal Act before the Supreme Court, the Jeffersonians enacted another law providing for annual rather than semi-annual sessions of Supreme Court; the effect of which was the postponement of the June 1802 term of the Court until February 1803.

Post the Marbury Judgement, the Supreme Court exercised its power of judicial review in other contexts, which led to further developments in the scope of this doctrine. The Court did the work of striking down state statutes as unconstitutional. Cases like *Fletcher v. Peck*[31], *Sturges v. Crowninshield*[32], *McCulloch v. Maryland*[33] and *Gibbons v. Ogden*[34].

After more than a century later, in 1958 the case of *Cooper v. Aaron*[35]

Case of Cooper:

Cooper v Aaron[36] took place in 1958, almost 150 years after Marbury judgment. The facts of this case were as follows:

"After the Arkansas governor Orval Faubus and state legislature openly resisted the Supreme Court's school desegregation of 1954 (Brown v. Board of Education), the Little Rock School Board petitioned the United States District Court for the Eastern District of Arkansas to suspend for two and a half years the implementation of the school board's plan for

[29] Ralph A. Rossum and G. Allan Tarr (n 26) 51.
[30] *Ibid*
[31] 10 US (6 Cranch) 87 (1810).
[32] 17 US (4 Wheat.) 122 (1819).
[33] 17 US (4 Wheat.) 316 (1819).
[34] 22 US (9 Wheat.) 1 (1824).
[35] 358 US 1 (1958).
[36] 358 US 1 (1958).

desegregation of a previously all-white's high school. It feared that the continuation of racial tensions and turmoil that had made it impossible for respondents to attend the high school until federal troops were sent there by the President Dwight D. Eisenhower. The District Court granted the petitioners' request. The Court of Appeals for the Eighth Circuit reversed, however, and the Supreme Court granted certiorari. In reasserting its supremacy to determine constitutional law, every justice signed the opinion as the author, thereby underscoring their unanimity. Justice Frankfurter also prepared a concurring opinion, which he released one week after the Court handed down its decision."[37]

Case of Young and Plaut:

After Cooper, came two landmark judgements in regard to Judicial review, worth discussing. The first was the judgement of *Young v, United States ex rel. Vuitton*[38]*;* the other case was that of *Plaut v. Spendthrift Farm, Inc.*[39]

In the case of *Young*, the following facts were laid out:

"In the settlement of a lawsuit brought by Louis Vuitton, a leather-goods manufacturer, against trademark infringers who manufactured and distributed imitations of its goods, the United States District Court for the Southern District of New York entered a permanent injunction against the defendants prohibiting them from further trademark infringing activity. Subsequently, however, the district court found, based on the submission of an affidavit by Louis Vuitton, that there was probable cause to believe that the defendants had continued to engage in conduct in violation of the injunction. The Court then appointed a private attorney employed by Louis Vuitton to serve as special Counsel and represent the United States in an investigation and possible prosecution of the defendants for criminal contempt. Although other issues were present (and ultimately proved controlling) when the U.S Supreme Court granted certiorari in this case, the edited passages below address only the question of whether the federal courts have the authority to appoint private attorneys to prosecute contempt-of-court actions. Justice Brennan argued that federal courts have do have this authority, even though

[37] Ralph A. Rossum and G. Allan Tarr, *American Constitutional Law*, vol 1 (9th edn, Westview Press 2014) 79.
[38] 481 US 787 (1987).
[39] 514 US 211 (1995).

he ruled against the appointment in this case on other grounds; Justice Scalia held that federal courts never have this authority."[40]

In the hearing of *Plaut v. Spendthrift Farm, Inc.*, the Facts were given as follows:

"In 1987 petitioners alleged in a civil suit action that the respondents committed fraud and deceit in 1983 and 1984 in the sale of stock in violation of the Securities Exchange Act of 1934. The District Court for the Eastern District of Kentucky dismissed the petitioners' action with prejudice following the Supreme Court's 1991 decision in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, which required suits such as the petitioners' be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. Once the district court's judgment had become final, Congress enacted Section 27A (b) of the Securities Exchange Act, which provided for reinstatement on motion of any action commenced before Lampf but dismissed thereafter as time barred, if the action would have been timely filed under application pre-Lampf state law. Although finding the statute's terms required that the petitioner's ensuing Section 27A (b) motion be granted, the district court denied the motion on the ground that Section 27A (b) was unconstitutional. The Court of Appeal for the Sixth Circuit affirmed. The Supreme Court granted certiorari."[41]

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN INDIA

To ascertain various aspects of judicial review of Administrative Actions, it is manifestly necessary to deal with the fundamental concept of the Constitution.[42] As said in the Mahabharata, the law of the Constitution combines all the knowledge and in it are centered all the worlds.[43] The Constitution is the life of a nation and by it a nation comes into existence. It is the offspring of Democracy and its wings are 'Freedom' and 'Liberty'. Freedom in a

[40] Ralph A. Rossum and G. Allan Tarr (n 36) 87.
[41] *Ibid*
[42] Dr Arijit Pasayat, J. and C.K. Thakkar, J., *Judicial Review of Legislative Acts* (2nd edn, Lexis Nexis Butterworths Wadhwa 2009) 1.
[43] The Mahabharata, Shanti Parva, LXIII—29(2).

Democracy is the glory of the State[44] and Liberty is the great companion of Freedom. To renounce once Liberty is to renounce the quality of being a man.[45]

In the modern Democracy the Court is the essential organ to maintain the Fundamental objects (as aforementioned) of the Constitution. To achieve these objects, the Court has to discharge two essential functions:

(i) To keep the Legislature within the limits assigned to its authority, and

(ii) To save the people from the dangers of Democratic tyranny.

Paul Eidelberg characterises the functions of the Supreme Court of the United States of America, which may be applicable equally to the Supreme Court of India:

"The court was designed, not to represent the changing wants and wishes of the people, but to be the permanent guardian of those ends and institutions of Government, without which the people would be nothing more than a mere aggregation of individuals. Hence, should the Legislature, in subservience to the will of the people, enact laws repugnant to the Constitution, it would be incumbent upon the Supreme Court to resist the 'Will of the People' by declaring those laws null and void."[46]

The Judicial Review as we see today, and as has been stated before, originated in England and travelled to common law countries. India too inherited the idea of judicial review from England. India had laid its structure on English prerogative writs, which were issued by the court of King's Bench with a view to exercise general superintendence over the due observance of law by officials or authorities, while performing judicial or non-judicial functions.

India has a firm Constitutional base and established constitutional mechanism running in the written Constitution with entrenched Fundamental Rights, whose enforcement is guaranteed in the Constitution itself. In *Election Commission v. Saka Venkata Subba Rao*[47], the Supreme

[44]Saul K. Padover, '*The Republic of Plato'* in *The Meaning of Democracy* (Frederick A Praeger, New York, 1967, p 114).
[45] Saul K Padover, '*The Social Contract of Jean Jacques Rousseau (1761)' in The Meaning of Democracy* (Frederick A Praeger, New York, 1967, p 115).
[46] Paul Eidelberg, *The Philosophy of American Constitution* (The Free Press, New York, 1968, p 244).
[47] AIR 1953 SC 210.

Court explained the purpose of the Indian Constitution in conferring the writ-issuing power in the following words:

"The makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new setup, which they called Fundamental Rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that prerogative writs which the courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the State-sphere, new and wide powers of the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc. 'for any other purpose' being also included."[48]

Prior to inauguration of our Constitution setup on 26 January 1950, only the three Presidency High Courts at Calcutta, Madras and Bombay exercised writ issuing powers. Now, all the 21 High Courts stand on the same footing and are armed with power to issue writs for the enforcement of Fundamental Rights and also "for any other purpose" under Article 226 of the Constitution. In addition to them, the Supreme Court has also been given the writ-issuing power for the enforcement of Fundamental Rights under Article 32 of the Constitution (the predecessors of the Supreme Court, the Federal Court, did not possess such power).

JUDICIAL REVIEW UNDER ARTICLES 32 AND 136

Since the doctrine of Judicial Review is inherited from the English system, Indian courts do follow the broad principles evolved there by the courts. But, Indian courts are not to bother about the technicalities developed in the course of time there. Delivering the unanimous judgement of the Supreme Court in *T.C. Basappa v. T. Nagappa*[49], B.K. Mukherjea J observed:

"In the view of the express provisions in our Constitution we need not now look back to the early history of the procedural technicalities of these writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of Certiorari in all appropriate cases and in

[48] *Ibid* AIR 212.
[49] AIR 1954 SC 440.

appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law."

Article 32, which in the words of Dr Ambedkar "is the very soul of the Constitution and the very heart of it[50], speaks in so many specific words that "the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto,* and *certiorari,* whichever maybe appropriate." The right to Constitutional remedies is itself guaranteed. It cannot be suspended except otherwise provided for by the Constitution.[51] It provides for an expeditious and inexpensive remedy for the protection of Fundamental Rights from the Legislative and Executive interference.[52] The Supreme Court's role is envisaged of a "sentinel on the *qui vive*"[53]

In *Minerva Mills Ltd. v Union of India*[54](Minerva Mills), P.N. Bhagawati J characterised the power of Judicial Review, conferred by Article 32 and 226 as "part of the Basic Structure of the Constitution" and declared that "judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the Basic Structure of the Constituion"[55]. The potentiality of the provision is such that application under Article 32 cannot be dismissed simply because the proper writ or direction has not been prayed for.[56] Article 32 guarantees direct access to Supreme Court without being routed through the High Court.[57] A person aggrieved is entitled to the declaration of the invalidity of law under Article 32.[58]

Judicial review is the heart of the protection of Fundamental Rights and therefore, any attempt to weakening of the judicial review is not warranted. Section 14 of the Preventive Detention Act, 1950 had prohibited detenus, on threat of prosecution, from disclosing to the courts the grounds of their detention communicated o them by the detaining authorities. The provision

[50] Constitution Assembly Debates, Vol VII, 953. Dr Ambedkar uttered: "If I was asked to name any particular Article in this Constitution as the most important—an Article without which this Constitution would be a nullity—I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it."

[51] Art 32(4). Such provisions are Art 358, 359.

[52] Dr (Mrs) Alice Jacob, "Right to Constitutional Remedies" in M. Hidayatullah (Editor-in-Chief), *Constitutional Law of India, Vol. 1* Bar Council of India Trust 1984*)* 612-32, 612.

[53] Patanjali Sastri CJ in *State of Madras v V.G. Row,* AIR 1952 SC 196, 199.

[54] (1980) 3 SCC 625: AIR 1980 SC 1789, 1826.

[55] Ibid, SCC 678, para 87.

[56] K.K. Kochunni v State of Madras, AIR 1959 SC 725.

[57] Romesh Thapar v State of Madras, AIR 1950 SC 124.

[58] K.K. Kochunni v State of Madras, AIR 1959 SC 725.

was held unconstitutional in *A.K. Gopalan v State of Madras*[59]because it intended to render the court's power under Article 32 ineffective.

In *Express Newspaper (P) Ltd. v Union of India*[60], the Working Journalist (Conditions of Service and Miscellaneous Provisions) Act, 1955 was declared unconstitutional as it did not require the Wage Board to give reasons for its decisions under the Act and thereby, render the task of judicial review nugatory. The Supreme Court does not recognise any limitation on review power to grant remedy under Article 32. Thus, the Suprme Court invalidated its own rules, namely, Order 35, Rule 12 of the Supreme Court Rules, 1966 which provided for furnishing security to petition the court under Article 32, as, it amounted to discrimination against the poor sections of society in the enforcement of Fundamental Rights.[61]

Article 136 is another Article which provides for judicial review of Administrative Action. It is in the nature of a residuary reserved power of judicial review in the area of public law. Article 136 allows Supreme Court to entertain appeals from an award of a Tribunal. In the very beginning, in *Bharat Bank Ltd v. Employees*[62](Bharat Bank), the Suoreme Court had to pronounce upon an appeal from the order of the Industrial Tribunal. The Supreme Court refused to give a restricted meaning to the expression "Tribunal", which was understood to bear the same meaning as the word "Court". The Rukes by which the proceedings before the Tribunal are regulated observe the following:

1. The proceedings before the Tribunal must start on an application in the nature of a Plaint.
2. It possesses the power of a civil court in matters compelling attendance of witness, discovery and inspection.
3. It allows cross-examination and legal representation.
4. It decides on the basis of evidence and according to law.
5. Its members are qualified to be a judge.[63]

[59] AIR 1950 SC 27: 1950 SCR 88.
[60] AIR 1958 SC 578.
[61] Prem Chand Garg v Excise Commissioner, UP, AIR 1963 SC 996.
[62] AIR 1950 SC 188.
[63] Ibid.

While discussing the nature of the power of judicial review under Article 136, the Court observed:

"the power given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of Special Leave, against any kind of Judgement or Order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other Laws."[64]

JUDICIAL REVIEW UNDER ARTICLE 226

As we have seen the Supreme Court has equated the power of judicial review of the High Courts under Article 226 with that of the Supreme Court under Article 32 of the Constitution. As Article 32 (2) speaks of the writ-issuing power of the Supreme Court, so speaks Article 226(1) of the Constitution about the powers of the High Courts. The High Courts' powers remain uninfluenced and unaffected by the power of Supreme Court under Article 32.

Looking into the Higher position of the Supreme Court, clause (4) of Article 226 says, "the power conferred on a High Court by this Article shall not b in derogation of the power conferred on the Supreme Court by clause 2 of Article 32."

Article 226 makes clear that the High Court's enjoy writ-issuing power on the pattern of Crown Court's prerogative power. It is wider than the power of the Supreme Court, as it authorises the High Courts to issue writs for the enforcement of Fundamental Rights plus any other purpose. Normally the High Courts' powers are exercised against public authorities. But it may also be exercised against private individuals for the enforcement of fundamental rights with human rights dimensions. The Indian Constitution has changed the earlier position—first, the position of the King's Bench writ-issuing powers has been changed by our written Constitution; second, now all High Courts equally enjoy the power to issue writs(before the Constitution came in force, such power was limited to the Chartered High Courts of Bombay, Calcutta and Madras);

[64]Durga Shankar Mehta v Raghuraj Singh (1955) I SCR 267.

and third, the procedure to issue writs is now governed by the Civil Procedure Rules relating to Judicial Review.

The power of High Courts is wide, but some guidelines have been chalked out for its exercise. For example, an exercise of power or jurisdiction based on irrelevant and extraneous consideration shall be invalid;[65] if a petition does not carry substance, it may be dismissed at the hearing stage;[66] a High Court cannot order police investigation merely on the basis of suspicion[67] nor shall it interfere with examination matters[68] and sensitive issues relating to religion.[69]

However, the power of High Courts under Article 226, are supervisory and not appellate. Courts have to decide illegalities.

HIGH COURT'S POWER OF SUPERINTENDENCE—ARTICLE 227

The power of superintendence of the High Court under Article 227 is a power in addition to the controlling power of the High Courts over inferior Courts or Tribunals through writs under Article 226.[70] It is also in addition to the power of revision under any Legislation.[71] In *State of Gujarat v Vakhatsighji Vajesinghji Vaghela*[72], the Supreme Court explained the power of Judicial Review under superintending capacity and said that the supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and ensuring that they obey the law. The superintending power of High Court under Article 227, is an admixture of administrative and judicial powers.[73]

[65] Union of India v W.N. Chadha, 1993 Supp (4) SCC 260.
[66] Union of India v S.P. Anand, (1998) 6 SCC 466.
[67] State of Karnataka v Arun Kumar Agarwal (2000) I SCC 210.
[68] Madhyamic Shiksha Mandal v Abhilash Shiksha Prasar Samiti (1998) 9 SCC 236.
[69] Syed Ashraf Hussain v State of U.P. (1998) 3 SCC 167.
[70] Amitabh Bacchan Corporation Ltd v Mahila Jagran Manch, (1997) 7 SCC 91.
[71] Baby v Travancore Devaswom Board, (1998) 8 SCC 310.
[72] AIR 1968 SC 1481.
[73] Ram Roop v Vishwanath, AIR 1958 All 456, 459.

Citing *L.Chandra Kumarv Union of India*[74] *(*Chandra Kumar*)*, Quadri J said that the ouster clause under Art 227 is a restriction for the ordinary Civil Court, but it does not apply to the extra-ordinary jurisdiction of the High Courts and the Supreme Court[75].

The broad contour of judicial review of administrative actions was clarified by Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service*[76] in the following words:

"...one can conveniently clarify under three heads the ground upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality', and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not, in course of time add further grounds."

It means that judicial review of administrative actions will be based on the grounds of:

i) Illegality,
ii) Irrationality,
iii) Procedural Impropriety,

having chances of further addition according to the need of the hour. Illegality covers the main substantive areas of ultra vires; Irrationality may be equated with the Wednesbury unreasonableness; and Procedural Impropriety embraces both aspects of procedural wrong doing—failure to follow prescribed statutory procedure or the rules of Natural Justice.[77] From the point of view there are three standards of review:

1. Wednesbury Test.
2. Heigtened scrutiny test, when fundamental rights are in issue.
3. "Proportionality test", where European Community or European Human Rights Law is in issue."[78]

It is to be emphasised that this ground of judicial review in the UK has been evolved against the backdrop of the concept of British Parliamentary Sovereignty or Supremacy, which does

[74] (1997) 3 SCC 261: 1997 SCC (L&S) 577.
[75] Syed Shah Mohammed Quadri J, *Judicial Review of Administrative Action, 4.*
[76] 1985 AC 374: (1984) 3 WLR 1174.
[77] V Sudhish Pai , 'Is Wednesbury on the Terminal Decline', (2008) 2 SCC J-15, 16.
[78] Anand Byrareddy, 'Administrative Law', (2008) 7 SCC J-29.

not accommodate Constitutional Review[79], and is applicable to the cases of executive action and administrative discretion. Thus, in countries with written Constitution, like the US and India, in the Judicial Review of Constitutional actions, the courts will travel beyond the Wednesbury test. Judicial review has also added dimension in view of Bill of Rights. Judicial review of both the Legislative and Administrative Action is permissible.

CONCLUSION

The significant role played by judiciary through exercise of its judicial power is well-established. The courts have been able to solve the variegated problems of different countries. The process of Judicial Review has also served the cause and aspirations of the people of India, with more activist vigour, with the most comprehensive constitutional document covering 251 pages at the time of its coming into force on 26th January 1950 along with addition of amendments carrying more than a centurion score. It has asserted, successfully, to create not only the law but the Constitution itself by sharing the constituent power (amending power) along with parliament and state legislatures—that is to say, by making the basic structure of the Constitution unamendable, and in the appointment of honourable Justices to the Supreme Court and the High Courts by mandating the consultation of the Chief Justice of India, based on the Collegium, binding on the President.

The doctrine of Judicial Review is a special characteristic of the Indian Constitution based on the fact that the Constitution is *suprema lex.* This doctrine means that the courts have been given the power to scrutinise laws, executive acts, test their conformity and strike them down, if they are found to be inconsistent with it.

The Judiciary in India has the power to declare a law as unconstitutional, if it is beyond the competence of the legislature or it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution.[80] However, the Judiciary in India does not possess any power of judicial review of the wisdom of legislative policy. The Judicial Review in India is based on the assumption that the Constitution is the

[79] Anirudh Prasad and Chandrasen P. Singh, *Judicial Power and Judicial Review* (1st edn, Eastern Book Company Publishing (P) Ltd, Lucknow 2012) 251.
[80] Article 13(2), Constitution of India, 1949.

supreme law of the land and all organs, which owe their origin to the Constitution and derive their power from it, must function within the framework of Constitution and must not do anything inconsistent with the Constitution. Under the Indian Constitution, the specific provisions under Article 13(2) give the power to the court to examine the constitutionality of law, on grounds of infringement of fundamental rights also, giving a person a fundamental right to approach the Supreme Court and the High Court. In *Maneka Gandhi v. Union of India*[81], judicial review acquired wider dimensions as in the US. The procedure established by law as envisaged under Article 21 of the Indian Constitution would mean a fair, just and reasonable procedure. Also by incorporation of the basic structure, Judicial Review has gone far beyond that existing in the US.[82]

[81] (1978) I SCC 248: AIR 1978 SC 597.

[82] Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225; S.P. Gupta v. Union of India, (1981 Supp SCC 87; S.P. Sampath Kumar v. Union of India, (1987) I SCC 124; I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.