JUDICIAL REVIEW - A COMPARATIVE STUDY

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"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

- Chief Justice John Marshall

Supremacy of law is the essence of Judicial Review. It is the power of court to review the actions of legislature, executive and also of the judiciary. It is the power to scrutinise 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 functions. Judicial Review is meant to uphold the constitutional sanity over the popular will, where the popular will transgresses the constitutional limitations.

The Constitution is intended to operate as a limitation upon the powers of the various organs of the State. The question which naturally arises is by what machinery or means these limitations are to be enforced and maintained against inroads or encroachments by those organs. Under those Constitutions where Judicial Review exist, this guardianship of the Constitution belongs to the Courts. Judicial Review power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.

HISTORY

The concept of Judicial Review was recognised for the first time by Lord Coke in Dr. Thomas Bonham v. College of Physicians,\(^ {123}\) where he observed that "in many cases, the common law will control Acts of Parliament”, he intended the kind of Judicial Review. The concept thereafter has truly come into force when it was expounded in Marbury v. Madison\(^ {124}\) by Marshall C.J., where he asserted, “it is emphatically the province and duty of the judicial department to say what the law is.” The power of the courts to invalidate a law made by the

\(^{123}\) See 8 Co. 114a, 77 Eng. Rep. 646 (1610).
\(^{124}\) (1803) 1 Cr. 137.
Legislature in case it conflicts with the mandate of the Constitution emanates from the other part of the juristic nature of the Constitution, namely, that it is the ‘supreme law of the land.’

COUNTRIES FOLLOWING JUDICIAL REVIEW DOCTRINE:

• United Kingdom:
The Doctrine of Judicial Review was prevalent in England. Dr. Bonham Case\textsuperscript{125} was decided in 1610 by Lord Coke was the foundation of judicial review in England. But in the case of City of London v. Wood\textsuperscript{126} 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. In U.K. there is a system which is based on Legislative Supremacy and Parliamentary Sovereignty. Earlier, there was no scope of judicial review in U.K., but after the formation of European Convention of Human Rights, the scope of judicial review became wider. The enactment of Human Rights Act, 1998 also requires domestic Courts to protect the rights of individuals. In U.K., there is no written Constitution and Parliamentary Supremacy is the foundation. Principle of “Parliamentary Sovereignty” dominates the constitutional democracy in U.K.
The two dimensions of legislation in U.K., are:
I. Primary legislation, which are basically legislations enacted by Parliament. 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.
II. Secondary legislation, which provides rules, regulation, directives and act of Ministries. Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions, rules, regulations can be reviewed by Courts and any of the actions can be declared as unlawful which is ultra vires to the Constitution.

In Les Verts v. European Parliament,\textsuperscript{127} 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

\textsuperscript{125} Supra p.1.
\textsuperscript{126} (1701) 12 Mod. 669,687.
\textsuperscript{127} (1986) E.C.R. 1339.
review of the question whether the measures adopted by them are in conformity with the basic constitutional character.”

**Current Position of Judicial Review in U.K.:**

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

In, **R. (on the application of Drammeh) v. Secretary of State for the Home Department,** 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. It was held that 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, it was held that, where a detainee had capacity, his refusal to consent to medical treatment put him outside the scope of the secretary of state’s policy statements.

* **United States of America:**

The Constitution of U.S.A. didn’t expressly vest this function of guardianship in the judiciary. But the common law doctrine of ultra vires, according to which courts had the power and duty to invalidate the act of an inferior body which transgressed the mandate of a superior authority which is binding on the inferior or subordinate body. One of the fundamental process in the U.S. to determine the validity of law is Judicial Review. The power of judicial review to declare the laws unconstitutional and to scrutinise the validity of law implicitly incorporated in the Art.III and IV of the Constitution of United States of America.

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As early as 1803, *Marbury’s Case*, 129 Marshall C.J., placed the doctrine upon a sure footing by saying that since the Judges, as directed by the Constitution itself, took oath to support the Constitution, which constitutes the paramount law of the nation, it was the duty of the Judges to annul any law made by the Legislature which violated the Constitution or was repugnant to it.

According to the Bernard Schwartz, 130 “The decision on the question of constitutionality of a legislative act is the essence of the judicial power under the Constitution of America.”

In *Minersville School Dt. v. Gobitis*, 131 Felix Frankfurter J. observed, “Judicial Review as limitation on popular government and is a part of constitutional scheme of America.” In *Cooper v. Aaron*, 132 the federal basis of judicial review was emphasised by the Court that Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land’. In *Baker v. Carr*, 133 Brennan J. for the majority said, “Deciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise of constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.”

**Current position of Judicial Review in U.S.A.:**

After *Marbury’s case* 134 the expansion of judicial review in U.S.A. is very broad in nature, its widened the scope of judicial review in U.S.A. in present scenario. The Supreme Court in the recent case of *Reed v. Town of Gilbert, Arizona*, 135 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*

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129 Supra, p.2.
131 (1940) 310 US 586 (600).
133 (1962) 369 US 186 (211).
134 Supra, p.2.
which defined as directing the public to church or other qualifying event. This ordinance was challenged by a church and its priest.

_Clarance Thomas J._, 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 Government proves that they are narrowly tailored to serve compelling State interests.

• **India:**

The scope of judicial review in India generally speaking is done in three specific areas:
1. Judicial review of legislative action;
2. Judicial review of executive or administrative action;

Under Indian Constitution distribution of legislative powers between the Parliament and the Legislatures of the States is defined. Various heads of legislations are contained in the three lists - Union, State and Concurrent, contained in the 7th schedule to the Constitution. The enactments of Legislatures can be challenged on the ground that they are in conflict with Part III of the Constitution or are otherwise ultra vires the Constitution.

The foregoing proposition has been embodied in Art.13 of the Constitution, so far as the provisions guaranteed under Part III of the Constitution. Cls. (1) and (2) of Art. 13 lay down that any law made by any Legislature in India, whether before or after the commencement of the Constitution, shall be void if and in so far as it offends against any of the Fundamental Rights included in Part III.

_in Gopalan v. St. of Madras_136 Kania C.J., observed, “the inclusion of Art. 13(1) and (2) in Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, to the extent it transgresses the limits, invalid.” In _Re, Delhi laws Act_,137 Kania C.J. observed, as the paramount law, the Constitution creates the Legislature itself and confers upon it power to make laws subject to certain limitations, without which, of course, the power of the Legislature to make laws would have been plenary. It is because the limitations contained in Part III and other articles of the

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136 (1950) SCR 88 (100).
137 (1951) SCR 747 (765).
Constitution are imposed by a paramount or fundamental law, that a law made by the Legislature must give way whenever it transgresses the limitations imposed by the Constitution, and out of that arises the function of the Judiciary to invalidate such unconstitutional law. In Reference case, Gajendragadkar, C.J., observed, “... in a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the parliament, but that is possible because Art. 368 of the Constitution itself makes a provision in that behalf, and the amendment of the constitution can be validly made only by following the procedure prescribed by the said article…”

Since then the constitution being the paramount law is considered as “fundamental law of the land” or the “supreme law of the land” is firmly established in India. It would now be evident to take the holistic view of the Constitution. In that realm, there is one provision in Art. 254(1) which enjoins the courts to annul a State law which is repugnant to a Union law in List III under 7th Schedule. But even though there is no provision corresponding to Art. 13 or Art. 254(1) to invalidate a Union or State law which violates any of the other provisions of the constitution, it is now well settled that the same result would happen if the provision which has been violated is ‘justiciable’ and ‘mandatory’ in nature.

So far as India is concerned, there are various provisions;

- In the Constitution, the acts of the Legislature or any other organ are ‘subject to the provisions of the constitution’, e.g., Arts. 245, 309, 327, 328, which limits the power of the organs of the States set up by the Constitution. Of course, there are, on the contrary, certain provisions which give overriding power to the Legislature ‘notwithstanding anything in this Constitution’, e.g. the power to amend the Constitution itself, under Art. 368(1) also Art. 369, which power the legislature could not have exercised but for such express authorisation by the Constitution.

In St. of Rajasthan v. Union of India, Bhagwati J. for the majority observed, “So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so… the Constitution is the supreme lex, the paramount law of the land, and there is no department or branch of Government above or beyond it…”

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138 AIR 1965 SC 745.
139 AIR 1977 SC 1361.
Current position of Judicial Review in India:
The Supreme Court of India since the era of AK Gopalan’s case\textsuperscript{140} to the historic judgment in I.R. Coelho’s case\textsuperscript{141} 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 or a basic structure of the Constitutional Jurisprudence. In its recent judgement in Madras Bar Association v. Union of India\textsuperscript{142} the Supreme Court scrutinised 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. S(s).409(3)(a), 409(3)(c) and S(s). 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 NCALT, 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. In the case of Supreme Court Advocates on Record Association v. Union of India (popularly known as IV\textsuperscript{th} Judges case),\textsuperscript{143} the subject-matter of the challenge before the Court was an Amendment which was made to the constitution as 99\textsuperscript{th} Constitutional Amendment. The Supreme Court after carefully examining the validity of the said amendment struck down the amendment and the National Judicial Appointments Commission (NJAC) act by holding it ultra vires to the basic structure of the Constitution.

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  \item \textbf{Eire:}
  
  The Constitution of Eire, 1937 seeks to follow the American model, as closely as possible, through express provisions. Thus Art. 6 provides that;
  
  “All powers of government… are exercisable only by or on the authority of the organs established by the Constitution.”
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  \item \textsuperscript{140} Supra, p.7.
  \item \textsuperscript{141} AIR 2007 SC 861.
  \item \textsuperscript{142}Writ Petition (C) No. 1072 Of 2013.
  \item \textsuperscript{143} Writ Petition (Civil) No. 13 of 2015.
\end{itemize}
In Buckley v. A.G.,\(^ {144}\) this ensures the supremacy of the Constitution as the source of all power. How these powers are to be exercised by the different organs is prescribed by respective provisions relating to the Executive, Legislature and the Judiciary, which preclude the assumption of any inherent power apart from the terms of the Constitution. In Murphy v. Dublin\(^ {145}\) Arts. 6, 12(1), 15(2)(a), 28(2) have been held to involve the separation of powers. The Judicial Review is next provided for by the combined effect of Arts. 15(4), 34(3)(b), (4)(c)(d). In National Union v. Sullivan,\(^ {146}\) the Judiciary, “is clothed with the power and burdened with the duty of seeing that the Legislature shall not transgress the limits set upon its powers.”

Art. 15(4)(a) ensures the supremacy of the Constitution;
“(4)(a) The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.”

Art. 15(4)(b) says;
“(b) Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid.”

Thus the provisions above-mentioned, instals judicial review of legislation in a full measure.

**Japan:**
The Constitution of Japan adopts the American doctrine of Judicial Review by inserting an express provision in the Constitution Art. 81 says;
“The Supreme Court is the court of the last resort with the power to determine the constitutionality of any law, order, regulation or official act.”

In the Patricide case (1973) Tanaka, J., observed;
“Under the present Constitution, a legislative determination of constitutionality does not remove the authority of this court to investigate that question…Of course, it is proper for the Legislature to assume constitutionality, but final judgement must rest with this Court.”

**Canada:**
The volume of the federal Constitution litigation is lesser than in the U.S.A. because the Canadian Judiciary had not much to struggle for imparting strength to the federal Government

\(^ {144}\) (1950) Ir R 67 (81).
\(^ {145}\) (1972) IR 215.
\(^ {146}\) (1947) Ir R 77 (99).
which has become the inevitable need in all federal countries in the modern world owing to social changes and emergencies which could hardly be envisaged by the frames of these Constitutions in the 18th or the 19th century. The reason is, that while the American Constitution reserved residuary power to the States (10th Amendment), thus requiring judicial jugglery to inflate the enumerated powers of the National Government, the Canadian Constitution, though enumerating the particular powers of the Dominion and Provincial Legislatures, gives the residuary power to the Dominion Legislature by the opening words of S.91 which empowers the Canadian Parliament to make laws necessary ‘for the peace, order and good Government of Canada’, excluding the powers enumerated in favour of the Provinces, by S. 92.

Though Judicial Review of the federal provisions of the British North America Acts (B.N.A.) Act had to be undertaken by the Judiciary, even without any express provision for it in that Act because of the very nature of the Act being a paramount law enacted by the Imperial Parliament which rendered the Legislature in Canada to be a subordinate Legislature in the Dicean sense, there are hardly any other prohibitions in the B.N.A. Act to limit the powers of both the Dominion and the provincial legislatures, a such as the Bill of Rights in the American Constitution.

In R v. Drybones, Ritchie J., has made it clear that ‘every law in Canada’ in S.2 of the Bill of Rights refers to laws made by the Parliament of Canada and not by the Provincial Legislature. Though, in later cases, the majority of the Supreme Court has refused to apply the principles formulated in

Drybones’s case e.g. A.G. of Canada v. Lavell.

• Australia:

Like the Canadian Constitution, Australian Constitution Act (1900) contains no specific provision authorising judicial review.

The foundation of judicial review, however, is laid in the covering Art. V, which makes the Constitution Act binding on all organs of the Commonwealth and of the States “notwithstanding anything in the laws of any State and laws of the Commonwealth.”

In Australia, the judicial review has been imported by the Judiciary on two grounds;

That the Constitution Act is a statute of the British Parliament which is a paramount Legislature, so that any law made by the Australian Parliament must necessarily be

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148 (1975) 52 DLR (3d) 548.
hit by the doctrine of ultra vires in case it contravenes any provision of the Constitution Act.

In *Australian Apple Board v. Tonking*, Rich J., observed,

“The legislative powers of Parliament are not plenary, but are restricted to those conferred upon it by the Constitution. It cannot free itself from such limitations imposed by the Constitution. It cannot free itself from such limitations or conditions; only the process provided by S.128 of the Constitution can do that; nor can it decide for itself whether a purported exercise of a power is valid; and if an exercise of a power involves any legal consequences prescribed by the Constitution it cannot exempt itself from any of those consequences. The question whether an Act of the Federal Parliament is valid, and if so, whether it involves any and what legal consequences, can be determined only by an exercise of the judicial review…”

**EXCEPTIONS TO JUDICIAL REVIEW DOCTRINE**

*Judicial Review* is not a necessary concomitant of a written Constitution. It follows only when such Constitution is treated as legal instrument of a higher order than ordinary law, and is ordained to act as a legal limitation upon the powers of all organs of State which are set up by the Constitution, as in the U.S.A. or in India. There are indeed written Constitutions like those of *U.S.S.R.*, and *China*, which are drawn up in the form of a statute and yet do not constitute any legal limitation upon the political organ of the State, so that the Judiciary possesses no power to invalidate any executive or legal act done by such supreme body on the ground of contravention of any provision of the Constitution.

On the other hand there are written Constitutions which are intended to operate as a legal instrument, and, yet, the power of determining unconstitutionality of laws made by the Legislature is conferred not upon the Judiciary, but upon some non-judicial body or some authority other than ordinary courts. *The countries are;*

- **France**, it presents an instance of a country which regards the constitution as a *paramount law*, but yet does not seek to control the legislative sovereignty of the Legislature by providing post-enactment judicial review in American sense.

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149 (1942) 66 CLR 104.
• Ceylon, the Constitution of Ceylon (1972) has expressly barred judicial review, while adopting a statement at ‘fundamental rights and freedoms.’ Art.22 expressly says:
  “No institution administering justice nor any other institution, person or authority shall have the power to enquire into or pronounce upon the validity of any law enacted by the National Assembly.”

The fundamental rights are thus not enforceable by the Courts against the Legislature.

CONCLUSION

To conclude this, let me say that the Judicial Review makes the Constitution legalistic. Doctrine of Judicial Review is very dynamic concept in a present scenario. In various countries Judiciary is acting as a guardian of the constitution by help of the doctrine of Judicial Review. It enables the Court to maintain harmony in the State. Judicial Review is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. To perform this task, Constitutional Courts have been regarded as the most appropriate branch of government, and thus they currently possess legal monopoly to declare what the constitution must be. Despite the undeniable differences, in India, U.S.A., U.K. and some other countries, courts have been playing a very important role in the preservation of individual liberties. The need for an effective check on legislative majorities, thus seems to be the main force compelling different legal systems to confer upon their courts-constitutional or not the power to review legislation repugnant to the constitution.