# CHAPTER-2

# COMPARATIVE CONSTITUTIONAL STUDY OF JUDICIAL REVIEW BETWEEN INDIA, U.S.A AND U.K.

## 2.1 An Overview

Since the world's first modern, written national constitution was drafted for the United States of America in 1787, an explosion of new technology and science has almost obscured the equally astounding explosion of constitutions and constitutionalism throughout the world. In fact, in many countries more people are directly affected by the radical change in their relationship with those who govern them than they are by the trappings of technology and science so pervasive in post-industrial societies.

The countries that have adopted modern constitutions can exercise their fundamental human rights or enforce the popular sovereignty so grandiosely declared in constitutional documents and politicians' speeches. But what is clearly evident is the evolving desire in nearly all these nations to strive for a system of constitutional government that meets these expectations. In 1787, except in the United States, Britain, and perhaps a few other countries, the mere expectation of popular sovereignty, individual rights, or checks and balances on the absolute power of rulers was an absurd pipe dream, as foolish then as planning a trip to the moon or watching a live sports even being played halfway around the world.

Most written constitutions recite a list of fundamental rights of the country's citizens or inhabitants, analogous to the U.S. bill of rights, and many also include a list of duties of their citizens. Key fundamental rights include freedom of the press, religion, association, assembly, and petition of grievances against government authorities, as well as protections for private property and persons accused of crimes. But the fact that a right is not expressly provided for in a constitutional document does not always mean that it is not recognized in other law or by judicial rulings or tradition[1].

---

Robert L. Maddex, *Constitutions of the World,* CQ Press, 2001, 2nd Edition, p.xi.

Some constitutions expressly limit guaranteed fundamental rights. Regardless of whether such limitations are expressed, how well any guaranteed rights are implemented varies from country to country. In some extreme cases, violations of human rights in countries with express constitutional guarantees of fundamental rights are noted in the text[2].

Courts in many nations, to the extent that they choose to undertake the task, are often the ultimate guarantors of how well a constitution does its job. This is true also in many parliamentary systems that started out with no form of judicial or constitutional review.

In the United States the role of the federal courts in maintaining the integrity of the constitution was understood, if not expressly mentioned, by the framers. It took a specific declaration of the policy by the Supreme Court, however, to bring to life the principle of judicial review. Other countries like Germany have created a special court for the purpose of constitutional review; in France a constitutional council can implement constitutional review only when called on by other branches of the government.

In India Judicial Review based on three important dimensions, these are: Judicial Review of Constitutional Amendments, Judicial Review of Legislative Actions, and 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.

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

[2] *Ibid.*

Under the historic model of the parliamentary constitutional system, the supremacy of the legislature over the other branches of government theoretically precludes any form of judicial review of legislation for constitutionality, because the same parliament that can pass a law with a simple majority could also change the constitution just as easily. But in most countries with a parliamentary system of government, some form of judicial or constitutional review has developed. The parliamentary form of government in Norway, for example, did not impede the growth of judicial review, although the power is used sparingly.

### 2.2 Judicial Review in United States of America

#### 2.2.1 Origin of Judicial Review in United States of America

The early decades of the nineteenth century saw the U.S. Supreme Court beginning to map out its own role in the tripartite system of government provided for in the new Constitution. In a series of important decisions, the Supreme Court under the leadership of Chief Justice John Marshall not only established the principle of judicial review of federal legislative action but also gave meaning to important structural Constitutional provisions, such as the Commerce Clause, that defined the respective spheres of competence of the states and the new federal government[3].

In 1794, *United States vs. Tale Todd*[4]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*[5],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*[6]**.**

---

[3]Arthur T. von Mehran ,Peter L. Murray, *Law in the United States*, Cambridge University Press, 2nd Edition, p.134.

[4]Wilfred J. Ritz, *United States V. Yale Todd (U.S. 1794),* 15 WASH. & LEE L. REV. 220 (1958), http://scholarlycommons.law.wlu.edu/wlulr/vol15/iss2/5, visited on 22/9/17.

[5]3 U.S. 171 (1796)

[6]5 U.S. (1 Cranch) 137 (1803)

While it is not expressly stated in the constitution, the framers were aware of the concept of judicial review, in which independent courts determine whether legislation or government action is unconstitutional and therefore void. In 1776 Thomas Paine declared that in America the law, rather than a monarch, should be king. The foundation for judicial review was laid even earlier by the English jurist Edward Coke when he described Magna Carta as "being the fountain of all the fundamental laws of the realm [emphasis added]"[7]. But it was not until the case of *Marbury v. Madison*[8], at the beginning of the nineteenth century, that the U.S. Supreme Court declared invalid an act of the congress extending to the court authority that had not been granted by the constitution. Speaking for a unanimous court, Chief Justice John Marshall ruled: "Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions that law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

In the middle of the 1850s, a man named Dred Scott, held as a slave, brought a suit claiming that he had become a free man when his owner removed him into the northerly frontier territory, once part of French Louisiana. An act of the U.S. Congress had forever prohibited slavery in the territory. Scott's case ultimately reached the Supreme Court of the United States. The Court held not only that because of his slave ancestry, he was not a "citizen" and consequently was under certain procedural disabilities, but also that the Act of Congress purporting to abolish slavery in the northerly territory was beyond the constitutional powers of the central government. *Dred Scott v. Sanford*[9], was the second case in which the Supreme Court struck down federal legislation as incompatible with the Constitution.

The slavery issue proved to be too complex and difficult for judicial decisions to resolve. *Dred Scott's case*[10] became a rallying cry for antislavery sentiment in the North. The case played a role in the 1860 election of an antislavery President, Abraham Lincoln. Civil war between the northern and southern states broke out early in 1861.

---

Edward Coke, Institutes, 1628, 1:81

*Supra*, n.6.

[9] 60 U.S. 393 (1857)

[10] *Ibid*

The Civil War resulted in three amendments to the Constitution of the United States. The Thirteenth Amendment (1865) provides that slavery shall not exist within the United States or in any place subject to its jurisdiction. The Fourteenth Amendment (1868) is to the effect that all persons born or naturalized in the United States shall be citizens of the United States and of the state in which they reside, and that no state shall abridge the privileges or immunities of any citizen of the United States nor deprive any person of life, liberty, or property without due process of law, nor deny to any person equal protection of the laws. The Fifteenth Amendment (1870) provides that the right of citizens of the United States to vote shall not be denied or abridged by any state of the United States by reason of race, colour, or previous condition of servitude[11].

These three amendments furnish the basis on which the issue of the civil rights of racial minorities was later fought out in the courts[12]. In 1954, a long struggle was won; in *Brown v. Board of Education*[13], the Supreme Court held that "separate but equal" education did not satisfy the Fourteenth Amendment's injunction that no person shall be denied the equal protection of the laws. The Brown decision established the bases on which integration of state school systems was to proceed.

From the above discussion, it can be said that, the opportunity of as well as the responsibility for setting out the terms on which courts will deal with major issues rest with the Supreme Court of the United States in its role as interpreter and guardian of the Constitution of the United States and the Court also ultimately resolves ambiguities in federal legislation and supervises the legislation's application.

### 2.2.2Position of Judicial Review under Constitutional scheme of United States of America

The United States is a federal state, with a national government and governments in each of the fifty constituent states. According to the fourteenth amendment, persons born in the country or naturalized are citizens of the United States and the state in which they reside. The national government handles defence and foreign policy exclusively, while the states have individual militia and police power. At the national level power is divided among three coequal branches: the executive branch headed by

[11]*Supra,* n.1.
[12]*Ibid.*
[13]387 U.S. 483 (1954)

a president, who is head of state and government; the bicameral legislative branch with houses of basically coequal power; and the independent judiciary, which exercises judicial review.

The U.S.Constitution doesn't provide power of judicial review expressly but, the power of judicial review to declare the laws unconstitutional and to scrutinize the validity of law implicitly incorporated in the Article's III and IV. Article III of the U.S.Constitution provides "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". Article VI of the Constitution USA provides "all powers of government are exercisable only by on the authority of the organ established by the Constitution. Thus Article VI incorporates "Constitution of USA is the supreme law of the land".

The 5th Amendment (1791) of the U.S. Constitution says: "No person shall be deprived of life, liberty or property without due process of law". This momentous phrase has nearly for two centuries shaped the constitutional history of the U.S.A. and shown a remarkable capacity for adoption.[14] De facto, the 'due process' clause in the American jurisprudence has proved a handmaid of the American judiciary and its fight against the powerful executive there and inter alia this is the clause which gave the power of judicial review to the American judges. This clause which has its origin in the famous Petition of Rights (1628) sub-mitted to the King (James I) in England, was worded as follows:-

> *"Freemen be imprisoned or detained only by law of the land or by due process of law and not by the king's special command without any charge*"[15].

Picked up from here, the American constitution markers, realizing the value of life and personal liberty, included it in the first instance, in the Bill of Rights as the Fifth Amendment. Since this amendment was only available against the federal government, it was later adopted mutatis mutandis as the 14th Amendment in 1868 so as to make it applicable against the States also. Built up against the background of a

[14] A.G. Noorani, *A Bulwark of Liberty*, The Span, June, 1983.
[15] *Ibid.*

catena of compendious case law,[16] and supported by genuinely activist judges like Cardozo, Brandeis, Holmes, "this varitable revolution in due process……enabled the Supreme Court of the United States to test legislation – federal or State-on the touchstone of reasonableness and strike down unreasonable restrictions upon property rights and civil liberties".[17]

Judicial review is not expressly provided in the U.S. Constitution, but it is the formulation by the Court. Supreme Court of U.S. 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.

Among the drafters of the Constitution of 1789, various views were held respecting the role and function of the Supreme Court provided for by Article III, Section I, of the Constitution. Presumably few, if any, foresaw the full range and importance of the role that the Court would ultimately play[18].

The issue of judicial review is not directly implicated by federalism issues arising from state encroachment on federal authority. In such situations, an undisputed principle of intergovernmental hierarchy justifies the Court's exercise of authority.

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 ofAmerica[19]".*

In *Minersville School Dt. v. Gobitis*[20]**,**Felix Frankfurter J. observed, "Judicial Review as limitation on popular government and is a part of constitutional scheme of America." In *Cooper v. Aaron*[21], 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.

Thus, it can be said that, while 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

---

[16]*Barron vs. Baltimore,* (1833) 7 Pet 243*; Slaughter House Cases,* (1873) 16 Wal 36; Smyth vs. Ames, (1898) 169 US 466.
G.V. Subba Rao *, Revolution in due process,* AIR 1980 (J) 44.
*Supra,n.1.*
[19]Bernard Schwartz, *The Powers of Government,* 2nd Edition, The Macmillan Company, New York, 1963, p. 19.
[20](1940) 310 US 586 (600)
[21]358 U.S. 1 (1958)

delicate exercise of constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.

### 2.2.3 Foundation of System of Judicial Review in U.S.A.: Marbury v. Madison Case

The Court's power of judicial review was settled less than fifteen years after the Constitution of U.S.A. came into force in a case in which no federalism issue arose. In the famous decision of *Marbury v. Madison*[22], Chief Justice Marshall, writing for a unanimous Court, held that the Court had the power to strike down federal legislation that violated the Constitution.

Marbury arose out of the transfer of political power from the Adams administration to the Jefferson administration in the election of 1800. Following his election defeat, outgoing Federalist President John Adams made a number of appointments of federal officials. These were duly ratified by the lame-duck Federalist Congress. William Marbury was appointed a Justice of the Peace for the District of Columbia. Through oversight, not all of the commissions evidencing the appointments were delivered to the appointees before Adams left office. The incoming Republican Secretary of State, James Madison, found Marbury's signed commission undelivered on his desk. In hopes of thwarting the appointment, Madison declined to deliver the commission. Marbury brought suit in the U.S. Supreme Court, then under the leadership of newly appointed John Marshall, Adams' former Secretary of State[23].

The suit was brought pursuant to the Supreme Court's original or first-instance jurisdiction. The Judiciary Act of 1790, which established the structure of the federal judiciary, defined the original jurisdiction of the Supreme Court and authorized it to grant writs of mandamus[24].

On February 24, 1803, Marshall orally delivered the opinion of a unanimous Supreme Court to a packed audience. The genius of the opinion is the ordering of the reasoning and the remarkable twist at the end. Marshall first reasoned that Marbury had under the law a right to the commission. Withholding that commission was a violation of his legal right. The next question was whether the law provided a remedy for that violation of right. The answer was that the ancient writ of mandamus provides a

---

[22] *Supra*, n.6.
[23] *Ibid.*
[24] *Ibid.*

remedy for violations of the kind experienced by Marbury. The stage was set for the constitutional confrontation. Once the Court had determined that Marbury was entitled to the commission and that mandamus was the correct remedy to secure it, it seemed inevitable that the Court would have to face the question of whether it had the power to order its coordinate branch of government. Marshall avoided this constitutional confrontation and simultaneously established a principle of even greater importance to the power of the Court by posing the third major issue: Could the writ of mandamus be issued from the Supreme Court? This issue had not been seriously contested by the parties. After all, the Congressional statute clearly gave the Supreme Court first-instance jurisdiction to issue writs of mandamus[25].

Marshall noted that the Act of Congress clearly authorized the Court to issue the writ of mandamus running against the Secretary of State. However, this was not the end of the inquiry. The Court had to determine whether that Act of Congress was in conformity with the Constitution. Here was the twist. For although Article III, Section 2, of the Constitution described the judicial power of the United States in general terms, it spelled out the "original" or first-instance jurisdiction of the Supreme Court rather specifically as extending to "all cases affecting ambassadors, other public ministers and consult, and those in which a state shall be a party." In all other cases, the jurisdiction of Supreme Court was to be appellate. It was thus easy for the Court to determine that the Constitution did not authorize the jurisdiction conferred by the Act of Congress, and thus that the Act of Congress must be ignored as unconstitutional. Whereupon Marbury's case was dismissed as brought in the wrong court and the constitutional confrontation was averted[26].

The genius of the Marshall opinion is that the principle of judicial review is that the courts have the last word in determining the constitutionality of legislation and that the Court is the branch of government to determine whether all legislation is in conformity with the Constitution.

The principle established in *Marbury v. Madison*[27] has become and remained fundamental to the American theory and practice of constitutionalism.

---

[25] *Ibid.*
*Ibid.*
*Supra* n.6.

### 2.2.4 Scope of Judicial Review after Marbury's Decision in the United States of America

After Marbury's judgment the scope of judicial review was tremendously expanded in United States of America .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*[28]is the historic case is related to the expansion of judicial review in the United States. 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? 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. v. Sawyer*[29], presented the issue of whether the President's action was within his constitutional powers in the absence of authorizing legislation. The Supreme Court faced conflicting claims to authority by the executive and legislative branches. No express constitutional language granted seizure power to the President; can then authority be implied from the aggregate of the executive's powers under the Constitution? Six of the nine justices held – in six separate opinions (there was also one dissenting opinion) – that, as Justice Black wrote in the Opinion for the Court, "The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." The Supreme Court thus vindicated the exclusivity of the legislature's authority against a conflicting claim by the executive branch of the federal government.

*United States v. Nixon*[30], President of the United States, involved a clash between the President's claim of executive privilege for tape recordings and documents relating to his conversations with aides and advisors, on the one hand, and the need to use the aforesaid material as evidence in a criminal prosecution, on the other.

---

[28]17 U.S. 316 (1819)
[29]343 U. S. 579, 589 (1952)
[30]418 U.S. 683, 704-705, 713 (1974)

Two arguments were made in support of the claims of presidential privilege. The first was that the principle of separation of powers precluded judicial review of the president's claim of privilege. It was further contended that, in the circumstances, the need for confidential communication between the president and his advisors outweighed the claim of the criminal prosecution. In an opinion written by Chief Justice Burger for a unanimous Court, both arguments were rejected[31].

In the exercise of its constitutional responsibility, the Supreme Court went to hold that, the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. The Court has thus set aside what it considered improper legislative or executive claims respecting the constitutional division of functions among the legislative, executive, and judicial branches[32].

In *Immigration & Naturalization Service v. Chadha*[33], the Supreme Court for the first time considered the constitutionality of such an arrangement; the legislative veto was held unconstitutional in principle. Exercising a discretionary authority contained in the Immigration and Nationality Act (INA), an Immigration and Naturalization Service official – pursuant to a delegation of authority from the Attorney General – suspended deportation of an alien. The INA provided that either House of Congress could set aside such discretionary suspensions of deportation. Acting pursuant to this authority, the House of Representatives disapproved the suspension. The alien obtained judicial review of the deportation order and the matter ultimately reached the Supreme Court.

The Court considered the House's veto a legislative act; as such, Article I, Section 7, of the Constitution deprived the action of effect because the measure had not been passed by a majority of both Houses and presented to the president for his signature or veto. A concurring opinion took the position that the House's veto was

[31] *Ibid.*
[32] *Ibid.*
[33] 462 U.S. 919 (1983)

unconstitutional on a different ground because, in essence, an exercise of judicial power, it violated the principle of separation of powers[34].

Somewhat related issues respecting the allocation of federal powers were faced in *Bowsher v. Synar*[35], the Supreme Court in these case struck down a central provision of the Balanced Budget and Emergency Deficit Control Act of 1985. The Act, popularly known as the Gramm-Rudman Act after its principal Congressional sponsors, had been passed to bring the spiralling federal budget deficit under control. It placed a ceiling on the federal deficit for each fiscal year from 1986 to 1991.

The Court held that the provision in question assigned executive powers to a legislative agent – the Comptroller General – and thus violated the principle of separation of powers by allowing Congress to retain control over the execution of the Act. The Court's majority took the position that the Act's "reporting provision," which delegated to the Comptroller General the task of calculating and ordering budget reductions, required him to exercise independent judgment and to interpret the Act. By entrusting these functions – which constitute "the very essence of 'execution' of the law" – to an official subservient to Congress, the legislature impermissibly intruded into the executive function. Accordingly, the challenged provision was unconstitutional; the severability principle permitted the remainder of the Act to survive, however, and a fallback provision provided by Congress for the eventuality that materialized came into operation[36].

## 2.3 Judicial Review in the United Kingdom

### 2.3.1 Origin of Judicial Review in the United Kingdom

Origin of the Judicial review in the United Kingdom can be traced from 17th century. In 1610,*Dr. Bonham vs. Cambridge University*[37]case was decided by Lord Coke laid the foundation of judicial review in England. But in the case of *City of London v. Wood*[38]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 Chief Justice Holt

*Ibid.*
[35]478 U.S. 714 (1986)
[36]*Ibid.*
[37](1610) 8 Co. Rep.114
[38](1701) 12 Mod. Rep.669

establishes the 'Doctrine of Parliamentary Sovereignty' which means that the court has no power to determine the legality of Parliamentary enactments.

About a century later, in a Scottish case *Andrew v Murdoch* [39], Lord Hermand stated in the Court of Session that "there is a power paramount to acts of Parliament, and that is the power of right reason, to which Kings and Parliaments themselves must be subject". This may indicate a freer attitude towards parliamentary supremacy on the part of Scottish lawyers, but it is worth noting that these and other dicta of Lord Hermand were subsequently disapproved by Lord Holland in the House of Lords. The last case in this line is *Forbes v Cochrane*[40] , in which Best J stated that he would refuse to recognise a statute legitimising slavery, since it would be "against the law of nature and God".

Earlier, there was no scope of judicial review in United Kingdom., 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 United Kingdom, there is no written Constitution and Parliamentary Supremacy is the foundation. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in United Kingdom. In England, there was judicial review of administrative action but the courts do not have the power to review the acts of Parliament, since Parliament is supreme**.**

In England, for a long time there has been resistance against a written bill of rights because the English people are brought up on the faith that the liberty of the subject is sacrosanct and the courts will allow its infraction only if it is supported by a provision of law. The following celebrated quote form Lord Atkin amply demonstrates such faith. The learned judge said:[41]

> *In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.*

Over the years, even in England, parliamentary sovereignty has been considerably eroded in practice as well as in law. England has joined the European Convention on

---

[39](1806) Buch Rep 1

[40](1824) 2 B & C 448

*Eshugbayi v. Government of Nigeria (*1931) L.R. 670 (C.A.): 91931) AII E.R. 44, 49.

Human Rights and has accepted the jurisdiction of the European Court on Human Rights. Further, the house of Lords in England has held that a European Community law would prevail over an Act of British Parliament[42]. This has been provided by the European Communities Act, 1972 but the above decision of the House of Lords whereby an earlier statute of Parliament was held to prevail over a later statute was clearly a constitutional revolution and meant the virtual demise of the Dicey's theory of parliamentary sovereignty.[43] The United Kingdom has after a long hesitation enacted the human Rights Act, 1998, which contains a declaration of rights. These rights act as limitations upon the executive and though theoretically they do not limit the power of the British Parliament, they would indirectly do so because the courts would presume that the act of Parliament could not be contrary to the rights given by that Act. These developments have doubtless changed the nature of the judicial review in the United Kingdom.

### 2.3.2 Parliamentary Sovereignty in United Kingdom

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. 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 United Kingdom. There is no scope of judicial review of legislative Act in United Kingdom. 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 United Kingdom . In England, before the doctrine of Parliamentary Sovereignty came into eminence, legislative acts were subject to judicial control, though with a very little practical effect; but even after the emergence of the doctrine of parliamentary sovereignty, judicial review is permissible regarding violation of the rules of delegated legislation and also in the field of subordinate legislation.

---

*R. v. Secretary of State of Transport, ex. P. Factortame Ltd.* (No. 2) (1991) A.C. 603: 1991 ALL E. R. (3) p. 769..

See H. W. R. Wade*, 'Sovereignty-Revolution',* 112 L. Q. E. p. 568 (1996).

### 2.3.3 Primary and Secondary Legislations

There is two dimensions of legislation in United Kingdom., 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.

In more recent years, one gets the impression that judges have gone rather cool on the traditional doctrine. The last ringing reaffirmation of parliamentary sovereignty in the highest court of the land came over a generation ago, in *Pickin v British Railways Board*[44] . Vice-Chancellor Megarry reaffirmed the doctrine in *Manuel v Attorney General*[45] , but he expressly left out of account the consequences of membership of the EC. When *Manuel* reached the Court of Appeal, the appeal judges appeared to accept the traditional doctrine, but they curiously stopped short of affirming it in wholly clear, unequivocal terms. It may also be worth referring here to the case of *Oppenheimer v Cattermole*[46] , in which Lord Cross said, in reference to an anti-Semitic Nazi law:

> *To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all*.[47]

Most recently, parliamentary supremacy received a less than unqualified endorsement from the House of Lords in the *Jackson v Attorney General*[48], litigation brought by the Countryside Alliance following the enactment of the Hunting Act 2004. Lord Hope, in this case said that:

> *...Parliamentary sovereignty is no longer, if it ever was, absolute.... It is no longer right to say that its freedom to legislate admits of no*

[44][1974] AC 765
[45][1983] Ch 77
(1976) AC 249
*Ibid.*
[48][2005] UKHL 56

*qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified...*[49]

The rule of law enforced by the courts is the ultimate controlling factor on which constitution of United Kingdom is based.

### 2.3.4 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 U.K. Constitution. European Community law in judicial review claims in England and Wales though that the needs to be set in general context of the European legal system. In the Administrative Court the 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[50].Mostly, claims for judicial review may also on the validity of administrative decisions and legislations made by the institutions of the European Union.

In *R vs. Secretary of State for Transport*[51]**,**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*[52]**,**it was held that ,the European Union is a 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.

---

[49]*Ibid.*

Harry Woolf, Jeffrey Jowell, Andrew Le Suer, *De Smith's Judicial Review* , Thomson Sweet &Maxwell, 2007, p.226.

[51](1990) 2 A.C. 85

[52](1986) E.C.R 1339

### 2.3.5 Judicial Review of Administrative and Executive Acts (Secondary legislation)

In England, subordinate legislation (secondary legislation) is subject to judicial review, there is no exception 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 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 United Kingdom legal system[53].

In *R vs. The Medical Control Agency & Nephew Pharmaceuticals Ltd.* [54] 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.

### 2.3.6 Present Position of Judicial Review in United Kingdom

The Courts in United Kingdom, in present scenario, strictly follow 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 are mostly subject matter of judicial review in United Kingdom.

In, *R. (on the application of Drammeh) v Secretary of State for the Home Department*[55], where an immigration detainee who had failed to take his medication

---

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 27/7/17.

[54](1996) E.C.R I-5819

[55][2015] EWHC 2

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.

The Court in these case 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 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[56].

### 2.4 Judicial Review in France

#### 2.4.1 Origin of Judicial Review in France

The evolution of judicial review in France has seen many transformations throughout its history. The milestones in this process of transformation were, respectively, the period of the ancient regime, the Revolution of1789, the Fifth Republic of 1958 and the constitutional reform of 2008.[57]

In the ancient regime, the parlements[58] were performing regional legislative and judicial functions. Since the 16th century and in particular in the early18th century, parlements started their systematic opposition to monarchic power. They were opposed to all reforms that royalty tried to impose.

However they failed to become the representatives of the nation, they could not control governmental acts due to their ill-advised interventions[59].

Therefore, in the end, due to the infamous privileges and reactions caused by these parlements, they were removed from the scene of history just after the French

---

[56]*Ibid.*

Ziya Bekir Buğuçam , *Common Principles of Judicial Review of Administration in Europe: A Comparative Study of France, the UK, the ECHR and the EU*,Law & Justice Review,Issue:5,December,2012,p.19.

[58]Parlements were the French Ancien Régime institutions and wholly different from present-day (post-Revolutionary) institution, namely the French Parliament.

[59]*Ibid.*

Revolution of 1789. However they left behind an implication of loss of esteem and the notorious notion of "the government of judges.

The origins of judicial review date back to the period of the Curia Regis of the 13th century. At that time, Curia Regis (means the King's court) of France had different sections and the Conseil d'État was one of them[60].

Besides the Conseil d'État, there was another important council, namely the Conseil Privé, which was regarded as "the highest judicial court in the land" and representing judicial authority of the king. Even though the meetings of this council were held in the palace, the kings did not preside over them. This council was consisted of a number of prominent lawyers. The Conseil Privé, technically speaking, could definitely not be regarded as a Supreme Court of Appeal because its functions were deliberately left vague[61].

In the Revolutionary Act of 1789 and the Revolutionary Act of1790 the separation of the administrative and the judiciary was adopted as the self-evident aforesaid negative approach toward the judiciary. Andin tenth year of the Revolution, in 1799, the Conseil d'État was established. This body simultaneously was an advisory body on legal issues to the government, drafted significant laws and also had, although initially tosmall extent, a judicial organ empowered with the authority of judicial review of administrative acts.

In 1889, French Conseil d'État became officially the first instance court for the administrative justice system. This competence was going to be transferred to the newly established administrative tribunals in 1953. The final main reform was made in1987 in which the regional administrative courts were established[62].

After this reform, the function of appeal review was transferred to the regional administrative courts and the Conseil d'État became the last resort and the highest administrative judiciary organ.

### 2.4.2 The Scope of Judicial Review in France

France has had a dual judicial system since the Revolutionary Act of 1790on the separation of the administrative power and judiciary. The reaction to the courts of pre-Revolutionary led the leaders of the Revolution to have the perception that courts

[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*

should not interfere with the legislative and executive powers. Thus, in the post-revolutionary period, especially with the establishment of the Conceil d'État in 1799, ordinary judiciary and administrative judiciary have been structured separately.

The administrative judiciary is organized on three levels. From bottom to top, as of 2012, there are first instance administrative tribunals, regional administrative courts of appeal and finally the Council of State as the Supreme Court of administrative judiciary. The regional administrative courts of appeal may re-adjudicate on the judgments of first instances tribunals. However the Conceil d'État can only check the judgments of the regional administrative courts of appeal in terms of procedural rules and question of law, not question of fact. The very essence of the French administrative law is the principle of legality .According to this principle, administrative authorities must respect the law in all administrative acts.[63]

Administrative acts in France are two types; normative (obligatory acts) and non-normative acts. Also, normative acts are divided into two sorts; regulations and individual decisions. For normative acts, there are certain remedies in French administrative law. The first one is called "the remedy for abuse of power", namely an action for annulment (recours pour excesde pouvoir). In the second type of remedy, which is called "the remedy of full jurisdiction" (recours de plein juridiction), the plaintiff who has suffered from the administrative act can demand pecuniary compensation in administrative courts. However non-normative acts are not subject to judicial review because they are non-bindings".[64]

The limit of the government's acts has been gradually lowered by virtue of Article 13 of ECHR. At this point, the "detachable acts theory"[65]has become important. By means of this theory, French administrative judges have kept the right to judge these acts and to find the administration responsible for the infringements.[66]

According to the case law of Conseil d'État, the gravity of the exceptional circumstances and infringement level of administrative acts can be checked by judges and purely interpretative, informative or declaratory administrative acts or proposals and consultations are beyond the scope of judicial review. Thus, only administrative

---

[63] *Ibid.*

*Ibid.*

According the "detachable acts theory", judges can separate the unlawful part of an act in order to save the remaining legal part or parts of that act.

[66] *Ibid.*

acts producing or changing legal effects in natural or legal persons are subject to judicial review in France.

## 2.5 Judicial Review in Australia

### 2.5.1 Origin of Judicial Review in Australia

Australia's constitution draws on the parliamentary system of government in the United Kingdom as well as the U.S. Constitution, particularly the doctrine of enumerated powers in the allocation of authority between the federal and state governments[67].

Australia's basic constitutional document is contained in the ninth clause of the Common-wealth of Australia Constitution Act of 1900, a statute of the British parliament. Eight "covering clauses" present prefatory material. The first "whereas" clause of the act contains language similar to a preamble: "Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessings of almighty God, have agreed to unite in one indissoluble federal commonwealth. . . ." The sixth state, Western Australia, was added before the act became effective on January 1, 1901[68].

Written guarantees of fundamental rights in the Australian constitution are scant: section 116 of article 9 of the 1900 act, which applies to the federal government, guarantees freedom of religion; section 117 prohibits discrimination but limits the extent of protection; and section 51 requires just compensation for federal property acquisitions. The system of fundamental rights protection in Australia works, however, because any interference with civil liberties has to be justified to a court's satisfaction by showing that the action in question had some statutory or judicial authority. No presumption of authority is given to the federal government. States, on the other hand, are not so tightly restrained[69].

In Australia, a federal state, power at the national level is divided between the prime minister and the legislature, without a strict separation of the executive and legislative authority, and the judiciary, which exercises judicial review, although judicial matters may be framed as administrative matters by the government and the parliament. The

---

[67] *Supra*, n.1. at p.19.
[68] *Ibid.*
[69] *Ibid.*

federal government is given specifically enumerated powers by the constitution, but with certain exceptions, such as defence, they may be exercised concurrently with the states; federal law prevails in the case of any inconsistency[70].

While the court system in Australia is similar in some respects to that of the United States, its high court is the ultimate court of appeal even from state courts, which provides mire uniformity in the nation's laws. The acknowledged supremacy of the Australian constitution and the requirement of a referendum for amendments support the power of judicial review exercised by the Australian courts.

### 2.5.2 The Administrative Decisions (Judicial Review) Act, 1977

The enactment of the Administrative Decisions (Judicial Review) Act, 1977 ('ADJR Act') was an important milestone in the evolution of Australian administrative law. The ADJR Act was a central part of a series of sweeping reforms to administrative law at the federal level and a remarkable reform in its own right. The ADJR Act was the first Australian attempt to codify both the law and much of the procedure of judicial review in Australia. The Act introduced a unified and single test for standing and a right to reasons for decisions, codified the grounds of judicial review and contained a simple provision governing remedies. This new statutory avenue of judicial review provided a vastly simpler alternative to judicial review at common law and was for many years regarded as a great success.

A version of the Act was adopted without substantial modifications in the Australian Capital Territory, Queensland and Tasmania.[71] But the spread of the ADJR Act faltered. The introduction of ADJR Act-style legislation was proposed but ultimately rejected in Victoria in 1999[72] and Western Australia in 2002.[73] The adoption of any form of judicial review statute has never been publicly advocated by the governments

---

*Ibid* at p.20.

. See Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld); Judicial Review Act 2000 (Tas).

See Peter Bayne, *Judicial Review in Victoria* (Expert Report No 5, Victorian Attorney-General's Law Reform Advisory Council, 1999).

. Law Reform Commission of Western Australia, Report on Judicial Review of Administrative Decisions, Project No 95 (2002) 26.

or law reform agencies of New South Wales, South Australia or the Northern Territory.[74]

### 2.5.3 The Structure and Operation of the ADJR Act

The wider reforms to federal administrative law of which the ADJR Act was a part included the creation of the Commonwealth Ombudsman, freedom of information legislation and the Commonwealth Administrative Appeals Tribunal ('AAT').[75] It could be argued that the ADJR Act can only be fully understood by reference to the creation of the AAT. More particularly, the simplified form of judicial review introduced by the ADJR Act operates in tandem with the relatively simple right of merits review by the AAT. In many areas of administrative decision-making, particularly those such as social security, migration and taxation, in which a large number of administrative decisions are made, it is likely that people granted a right to seek both merits and judicial review of decisions would often exercise their right of merits review. Merits review is, after all, intended to provide a quicker, simpler and cheaper alternative to judicial review.[76]

The ADJR Act caused a sea-change in judicial review of administrative action. It introduced a uniform test for standing[77] and a streamlined remedy in the form of an order to review that could be invoked to perform the functions of one or more of the prerogative or equitable writs traditionally sought in administrative law proceedings.[78]

During the first decade after its enactment, the ADJR Act was the leading avenue of judicial review and clearly exerted great influence over Australian administrative law.[79]A problem which is outside the ADJR Act and which ultimately may prove to be the most significant challenge to the Act is the jurisdiction granted to the High

---

[74] Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action*, Lawbook, 4th ed, 2009, p.20.

.Mathew Groves, Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act,1977?,Melbourne University Law Review, Vol.34,2010, p.736.

Robin Creyke, '*Administrative Tribunals*' in Matthew Groves and H. P Lee (eds), Australian Administrative law: Fundamentals, Principles and Doctrines ,Cambridge University Press, 2007,p. 77&83.

. Under ADJR Act ss 5-7, judicial review is available to 'a person aggrieved', which is defined in s 3(4).

*Ibid*, s 16.

Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance*, Oxford University Press, 2008, p. 96.

Court by ss 75(iii) and (v) of the Constitution.[80] These provisions invest the High Court with a judicial review jurisdiction that parallels, and in many aspects, exceeds that of the ADJR Act. These avenues of judicial review have assumed a central role in federal administrative law proceedings following the increasing use of privative clauses in federal legislation.[81] The constitutionally entrenched right to relief in s 75(v) of the Constitution provides an entrenched minimum provision of judicial review' that cannot be narrowed or removed by legislation.[82] Accordingly, it applies to cases that fall outside the jurisdictional formula of the ADJR Act and instances where the ADJR Act has been expressly excluded. A parallel right of review is vested in the Federal Court by ss 39B(1) and (1A) of the Judiciary Act 1903 ('Judiciary Act').[83] A crucial part of the Federal Court's jurisdiction for judicial review of administrative action is the grant to the Court of original jurisdiction 'in any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.'[84]

### 2.6 Position of Judicial Review in Canada

Canadian courts have some powers of judicial review. They can determine which of the governments – federal or provincial – has the authority to legislate in certain instances, and they can declare laws unconstitutional if they do not meet the standards of the 1982 Charter of Rights and Freedoms. In fact, since the charter came into force, many individual rights cases have been filed with the courts. In addition to cases coming before the courts in the course of litigation, a constitutional question may be brought in a taxpayer's suit, or an opinion may be requested by the federal government or a province[85].

The Constitution of Canada is less federal in structure than the Constitution of India, United States of America and Australia. Canada was formed as a federal colony in 1608. It came under the British rule by conquest in 1760. The dominion Constitution of Canada is federal and is the legal creation of British North America Act passed by

---

*Supra*,n 70 at 29-52.

*In Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, 92 [18]*

*Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, 513 [103]*

*Alan Robertson, The Administrative Law Jurisdiction of the Federal Court – Is the AD(JR) Act Still Important?, (2003) 24 Australian Bar Review 89.*

Judiciary Act s 39B (1A)(c*).*

[85]*Ibid.*

the British Parliament, which came into force in July, 1867. It created the Dominion by uniting the four original provinces, namely – Queue, New Brunswick and Nova-Scotia. Later on six more provisions were added, making the dominion into a federation of ten provinces. The six more provinces added were. Prince Edward Island, Manitoba, Alberta, Saskatchewan, British Columbia and New Found land.

The British North America Act of 1867 is not a comprehensive constitutional document like the Federal Constitution of America. The federation has a Governor-General appointed by the Grown on the advice of the Canadian government. These are the Supreme Court of Canada. 'Its Constitution is, as a matter of law, not completely federal, it is quasi-federal. But is constituting in practice, its system of government is federal predominantly.[86]" "Federalism is the most distinctive venture of Canadian democracy and its most notable achievement, its success and virtues are manifest.[87]" The farmer of the Constitution of Canada (the British North America Act) had the example before them of the working of the federal constitution of America, which apparently lacked sufficient power in the Central Government, and this weakness created difficulties step by step and ultimately the federal Supreme Court had to come to the rescue. Therefore, in the British North America Act the framers had to provide for adequate powers to the centre and hence the Central Government is endowed with the authority not expressly given to the province.[88]

Judicial review has contributed tremendously in America to the strengthening of the national power. But this is not the case in the Dominion of Canada. Till 1940, the final authority of constitutional interpretation in Canada was the Privy Council in England, which had no national feeling and no clear realization of the Canadian national needs. In times of peace, federal Govt. was denied any substantial power and only in the event of great national emergency the Privy Council interpreted the residuary clause with some freedom and elasticity. Privy Council interpreted the residuary clause with some freedom and elasticity. Williams Eaton remarks – "It can be concluded that the judicial committee, whether by nature of its training and

K. C. Wheare, *Federal Government*, Oxford University Press, 1964, p.20.
Alexander Brady, *Democracy in the Dominion*, University of Toronto Press, p.65.
Harold Zink, *Modern Government*, D. Van Nostrand Co. Inc., New York, 2nd Edition, 1962, Reprinted, Dec. 1963, PP 671-672.

experience, or because of innate conservative inclinations, or for some other reason, was very much out of touch with Canadian political and social reality."[89]

Judicial review has not been specifically provided. Only a few rights are guaranteed by the Constitution and there is no strict separation of powers to operate as limitation on the legislative powers. But the violation of any terms of the British North America Act is a matter of judicial review." But the situation under a federal form of government powers, and there is thus a never-failing demand for the services of an austere and impartial arbiter to decide the question of jurisdiction. This function, the court can perform more acceptable than any other agency."[90]

### 2.7 System of Judicial Review Ireland

Modern Ireland dates from the beginning of the seventeenth century. Henry VIII had taken the title of king of Ireland as well as king of England, and although Irish rebels were routed in battle in 1601, various forms of "Irishness" were developing. Thereafter, distinctions between old and new English immigrants and the imposition of laws made by the British parliament, as well as religious differences, fuelled constant clashes; among them was the 1690 Battle of the Boyne, in which the Protestant King William defeated the Catholic James II. By the Act of Union, effective January 1, 1801, Ireland was to be represented in the British parliament, and the Roman Catholic Relief Act of 1829 allowed Catholics, who had previously been persecuted, to hold public office[91].

Support for the separation was not unanimous in Ireland, and the constitution of the Irish Free State, set in operation by a British royal proclamation on December 6, 1922, had to bridge the gap between independence and continued British influence. The constitution was tied to the 1921 treaty that limited Irish sovereignty, but after the Statute of Westminster in 1931 dominion states, such as Ireland, Canada, and

---

Hessel E. Yntema, *The American Journal of Comparative Law Reader*, Oceana Publicaiton, Inc., Dobbs Ferry, New York, 1966,P 122.

Robert McGregor Dawson, *The Government of Canada*, 3rd Edition, Revised Eleventh Printing, The University of Toronto, 1960, p.155.

[91] *Supra*,n.1 at 170.

Australia, were no longer subject to acts of the British parliament, thus paving the way for a new Irish constitution[92].

The basic prototype for the 1922 constitution was the British parliamentary model. Its influence carried over to the 1937 document, which added a list of fundamental rights, as in the U.S. constitution, and provision for judicial review. Article 6, section 1, defines the source of sovereignty: "All powers of government, legislative, executive, and judicial, derive, under God, from the people, whose right it is to designate the rulers of the state and, in final appeal, to decide all questions of national policy, according to the requirements of the common good".[93]

Ireland is a unitary state and power is divided among the president, as head of state; the prime minister, as head of government; the legislature; and the courts, which exercise judicial review.

The highest court of appeal is the Supreme Court, headed by a chief justice, which hears cases on appeal from the high court and other courts. It also rules on constitutional questions; in these cases concurring or dissenting opinions are not permitted. In addition to typical judicial review functions, the Supreme Court has the authority to give opinions on bills before they become law when so requested by the president.

Article 37 of the Constitution of Ireland states, that the constitution does not invalidate judicial functions by other bodies, which include the land commission and the adoption board. Article 38 authorizes special courts to be set up by law where ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.

## 2.8. Judicial Review in India

### 2.8.1 Origin of Judicial Review in India

The Constitution of the United States of America is regarded as one of the oldest democratic written constitutions in the world. It is well known that it has overwhelmingly influenced the constitutions of a great number of countries,

[92] *Ibid* ,at 171.
[93] *Ibid.*

particularly those of Asian countries.[94] India is no exception in this respect. Though India adopted the Westminster type of Government, yet since England has no written constitution, the members of Indian Constituent Assembly, particularly Shri B.N. Rau, the Constitutional Adviser to the Assembly and Sir Alladi Krishnaswamy Ayyar, in an effort to evolve comprehensive written constitution for India, relied heavily on the Constitution of the U.S.A. In fact, Shri Rau did have frequent deliberations with important American politicians, judges and academicians like President H. Truman, Justice Felix Frankfurter and Judge Learned Hand, to a name a few.[95]

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*[96]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 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*[97]**,** 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*[98]**,** Madras high court observed that, 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.

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.

---

*See, Lawrence Ward Beer (ed.), Constitutionalism in Asia,* University of California Press, 1979.

*Supra, n.14.*

AIR 1918 Mad. 1210

### 2.8.2 Judicial Review of Parliamentary and State Legislative Actions

Article 245 and 246 of the Indian constitution gives legislatives powers to Parliament and State Legislatures .Article 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 ensures that legislation should be within the limitations of constitutional provision.

In, *S. P. Sampat kumar vs. Union of India*[99]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 Court under Article 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 Article 32 and 136. Further held that, the judicial review which is an essential feature of the constitution can be taken away from the particular area only if an alternative effective institutional mechanism or authority is provided[100].

Again in, *L Chandra vs. Union of India*[101]**,** clause 2(d) of Article 323-A and clause 3(d) of Article 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 Article 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 Article 226/227 and Article 32 is an integral part and it also formed part of its basic structure.

Recently in *I.R. Coelho vs. State of Tamil Nadu*[102]**,** 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

[99](1987) 1 SCC 124
*Ibid.*
[101]AIR 1997 SC 1125
[102]AIR 2007 SC 861

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 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[103].

### 2.8.3 Judicial Review of Administrative Actions

Judicial Review of Administrative action is perhaps the most important development in the field of public law. In India, 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 is 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 Article 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. According to DE Smith:

"*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"*[104].

This view of "DE Smith" clearly point out that discretion of administrative action should be used with care and caution. So, if judiciary founds any ground of illegality of any administrative action, it is the duty of the judiciary to maintain check and balance.

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

---

*Ibid*.

[104]J.M.Evans, *De Smith's Judicial Review of Administrative Action* , Stevens& Sons Ltd., London , 1995,p.296-99.

administration in the basically on two grounds: 1) failure to exercise discretion and 2) excess or abuse of discretion.

In, *Ajay Hasia vs. Khalid Mujib*[105]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 Article 14 of the Constitution.

*Air India vs. Nargesh Meerza*[106]in this case 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 was entirely unreasonable and arbitrary.

### 2.8.4 Judicial Review of Constitutional 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 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*[107]the first case on amendability of the constitution the validity of the constitution (1st Amendment) Act, 1951, curtailing the "Right to Property" guaranteed by Article 31 was challenge .The argument against the validity of First Amendment was that Article 13 prohibits enactment of a law infringing an abrogating the fundamental rights, that the word 'law' in Article 13 would include "any law",

[105]AIR 1981 SC 487
[106]AIR 1981 SC 1829
[107]AIR 1951 SC 548

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 Article 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 Article 368, and that the word 'law' in Article 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[108].

Again , In 1964 *Sajjan Singh v. Rajasthan*[109]**,** 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 Article368 are outside the purview of Judicial Review of the Courts.

In 1967 in *Golak Nath vs. State of Punjab*[110]**,** 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 Article 13(2) included every kind of law, "statutory as well as constitutional law" and hence a constitutional amendment which contravened Article 13(2) will be declared void." Court further observed that "The power of Parliament to amend the constitution is derived from Article 245, read with Entry 97 of list 1 of the Constitution and not from Article 368. Article 368 only lays down the procedure for amendment of Constitution and amendment is a legislative process."

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*[111]which is also known as *"Fundamental Rights Case".* In this case the petitioner had challenged the validity of Kerala Land

[108]*Ibid.*
[109]AIR 1965 SC 845
[110]AIR 1967 SC 1643
AIR 1973 SC 1461

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 1extent of the amending power conferred by Article 368 of the Constitution? The Supreme Court held that Under Article 368 Parliament can amend the fundamental rights but cannot take or abridges the Basic Structure of the Constitution.

### 2.8.5 Doctrine of Basic Structure : Radical Change in the Indian Constitution

In *Keshavananda Bharti's case*[112], a largest bench in the constitutional history propounded the "Theory of Basic Structure" as a limitation on amending power of the legislature. This theory formulated by the Supreme Court through the Doctrine of Judicial Review.

In,*Indira Nehru Gandhi vs. Raj Narayan*[113], 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"[114].

Again in *Minerva Mills vs. Union of India*[115]**,** 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 were 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.

---

[112] *Ibid.*
[113] AIR 1980 SC 1789
*Ibid.*
[115] AIR 1975 SC 2299

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[116].

### 2.8.6 Current Position of Judicial Review in India

The Supreme Court of India since the *A. K. Gopalan's case*[117]to the historic judgment in *I.R. Coelho's case*[118] 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*[119] 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. 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.

Thus, it can be said that, the Supreme Court of India time to time scrutinizes the validity of law through the Doctrine of Judicial Review and now it is the foundation to ensure the Supremacy of Constitution of India.

---

*Ibid.*

[117]AIR 1950 SC 27

[118]AIR 2007 SC 861

Writ Petition (C) No. 1072 of 2013

## 2.9 System of Judicial Review in Certain Other Asian Countries

### 2.9.1 Judicial Review in Malasysia

In Malaysia, two Supreme Court judges, one of whom was the Lord President, were impeached and removed based on trumped-up charges in 1988. In Singapore, the judiciary was equally shaken after Parliament passed a series of constitutional and statutory amendments – which ousted the judicial review of executive decisions taken under the Internal Security Act – within a month of the Court of Appeal's ruling. In that decision, the judges held that they would henceforth objectively review the President's exercise of his discretion to detain persons under the impugned Act. Where legislative and executive power is consolidated by a semi-permanent party or coalition, the dominant political entity in question can display its displeasure more easily, either by eliminating judicial review or even ousting the judges themselves[120].

the Malaysian Court of Appeal in *Mat Shuhaimi bin Shafiei v Pendakwa Raya*[121] recently upheld the constitutionality of the Sedition Act, which imposes criminal liability on the sale and distribution of seditious publications, the judges were adamant that the draconian nature of the law was not suited for judicial resolution.[122] As observed by Justice Abdul Malik Bin Ishak for the unanimous Court: "The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament."[123]

The judicial bifurcation of principles/rights from policy, as examined above, rests on a questionable but common assumption that courts merely interpret legal principles or rights, while legislatures are supreme in their exercise of policy, in particular over social policy.

In Malaysia, since the Constitutional Crisis of 1988, which saw the removal of the Lord President and another Supreme Court Justice, the Federal Court (the nation's

---

Po Jen Yap, *Constitutional Fig Leaves in Asia*, Washington International Law Journal, Vol.25, No.3,June,2016,p.422.

[121][2013] M.I.J. 1342. 114

According to Section 3(1) (a) of the Sedition Act, a publication would have a seditious tendency if it would "bring into hatred or contempt or to excite disaffection against any Government" Sedition Act (Cap 290. 2013 Rev Ed) s 3(1)(a).

*Supra*, n.112.

court of final resort) has stopped exercising its prerogative to invalidate legislation deemed incompatible with the nation's constitutional bill of rights.[124]

Recently, in the ostensibly landmark *Malaysian Trade Union Congress v. Menteri Tenaga decision,*[125]the Federal Court of Malaysia held that an applicant, in the context of public interest litigation ( P.I.I.), merely had to show that he or she had a "real and genuine interest in the subject matter."[126] In so doing, the court overruled longstanding precedent that required applicants to establish the infringement of a private right or the suffering of special damages before they would have standing for P.I.L. cases.[127] In this instance, the Malaysian federal government (the Selangor state government) and a consortium had entered into a tri-partite Agreement allowing the consortium to raise tariffs on the water it was supplying by 15% if certain performance targets were met. The Malaysian Trade Union Congress, a society of trade unions, applied for judicial review when the Government refused to disclose a copy of the Agreement and the Audit Report that justified an increase in water tariffs. While the Federal Court laudably agreed that the Trade Congress had the locus standi to bring judicial review proceedings against the government, the Court quickly dashed all hopes that it was remotely interested in providing any substantive relief. The Court held the Audit Report could not be disclosed, as it was tabled and deliberated in a Cabinet meeting and was therefore an "official secret."[128]

### 2.9.2 Position of Judicial Review in Singapore

Singapore and Malaysia have a semi-permanent form of government in power, and where a dominant, disciplined political party or coalition is in control, the less space domestic courts have to operate. Where legislative and executive power is consolidated in a single party or coalition, the dominant government can display its displeasure easily by eliminating judicial review or even ousting the judges themselves.

---

[124]Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT'I 1. J. 669 (2016).
[125]. [2014] M. I. J. 92
[126]*Id*. At para. 58.
[127]*Government of Malaysia v. Lim Kit Siang*. [1988] 2 M.I.J. 12
[128]*Supra*, n.116 at para. 68.

An originalist understanding of the Singapore Constitution was explicitly endorsed by the Singapore Court of Appeal in *Yong Vui Kong v. Public Prosecutor*.[129] In that case, the accused was sentenced to death by the trial judge under the Misuse of Drugs Act for trafficking 47.27 grams of diamorphine, a controlled drug. On appeal, the accused argued that the mandatory nature of the death penalty (MDP) imposed by the impugned statute was not "in accordance with law" as required under Article 9(1) of the Singapore Constitution, as the expression "law" enshrined under Article 9(1) excluded inhuman forms of punishment. [130] Accordingly, he argued he could not be validly deprived of his life under the statute.

Specifically, counsel for the accused asked the Court to follow a series of Privy Council decisions from the Caribbean States where the Law Lords of the United Kingdom had overturned the MDP imposed by the respective State laws.[131] Nevertheless, the Court of Appeal flatly rejected these cases applicability. According to the Chief Justice for the unanimous court, Singapore's due process clause was based on its equivalent in the 1963 Malaysian Federal Constitution, which was likewise based on the 1957 Malayan Constitution drafted pursuant to the advice of the Federation of Malayan Constitutional Commission chaired by Lord Reid (the Reid Commission).[132] Unlike those foreign decisions, which involved constitutions that expressly prohibited inhuman punishments, the Chief Justice opined that the Singapore Constitution did not expressly include such a prohibition. In his view, the fact that the Reid Commission did not recommend an express prohibition against inhuman punishment, even though such a provision existed in the European Convention on Human Rights – an instrument that applied in all the British colonies (including Singapore and Malaysia) prior to their independence – clearly illustrated that the omission was deliberate and was not due to ignorance or oversight.[133] Furthermore, the Chief Justice noted that in 1969 the Singapore Government had unambiguously rejected a proposal by Singapore's Constitutional Commission to initiate a constitutional amendment that would have expressly prohibited the state

[2010] SING. C.A. 20

[130]Constitution of the Republic of Singapore, 1999 Art 9(1) ("No person shall be deprived of his life or personal liberty save in accordance with law.")

See, *Reyes v. The Queen*, [2002] 2 App. Cas. 235: *Fox v. The Queen*, [2002] 2 App. Cas. 284; *R. v. Hughes*, [2002] 1 App. Cas. 259.

[132]Singapore became a constituent state of Malaysia in 1963 and gained full independence as a sovereign republic in 1965.

[133]*Yong Vui Kong*. SING. C. A. 20 at [62].

imposition of inhuman punishment. Therefore, according to the Court of Appeal, it was "not legitimate for this court to read into Article 9(1) a constitutional right which was decisively rejected by the Government in 1969 especially given the historical context in which that right was rejected."[134]

However, the espousal of "hard originalism" as the preferred theory of constitutional adjudication in Singapore by the Court of Appeal in Yong Vui Kong is not unproblematic. First, the text of Singapore's fundamental Liberties Clause, which include the due process clause, was not deliberated upon by a Constituent Assembly of the independent state in question. Instead, upon gaining independence from Malaysia in 1965, the Singapore legislature simply made most Fundamental Liberties provisions found in the Malaysia Federal Constitution applicable to Singapore via the Republic of Singapore Independence Act.[135] Since the Singapore constitutional framers did not deliberate upon the phraseology of the Fundamental Liberties Clauses, but merely imported them as a matter of expedience from. Malaysia, one does wonder whether it is even possible to discern the original meaning they attached to those adopted provisions. At best, one can try to discern the original intent of the framers (and the members of the Reid Constitutional Commission) when the Malaysian Constitution was drafted and adopted, but it would be a very curious state of affairs for Singaporean judges in modern independent Singapore to give effect to and be fettered by the original intent of another nation state's constitutional framers.[136]

The Fundamental Liberties Clauses of the Singapore Constitution came into effect in 1965, the same year Singapore gained independence. Hence, it is unclear, even based on an originalist understanding of the Singapore Constitution, whether it was legitimate for the Court to discern the original intent of the constitutional framers in 1965 – when they imported the applicable Fundamental Liberties Clauses from Malaysia – from a Parliamentary decision made four years later to reject a proposal that would have proposal that would have provided for an express prohibition against inhuman punishment.

Given that the Singapore framers intentionally left the constitutional provisions enshrining terms like "in accordance with law" or "equal protection" ambiguously

---

. *Ibid* , at 72.

. *Supra*, n.111.

. See, Po Jen Yap, *Constitutionalising Capital Crimes: Judicial Virtue or Originalism Sin?* , SING. J. I. STUD. 281 (2011).

worded, fully comprehending that the language was not specific and could be interpreted in various ways, the choice to adopt a broader principle must thus be respected. After all, if a prohibition's reach is restricted to the practices that were thought to run afoul of the Constitution at the time the provisions were adopted, it would leave no room for reasoned adjudication of new practices that scientific and technological advancements or changed socio-economic circumstances bring about.[137]

Fidelity to the Constitution requires judges to respect the framers' choice of rules or standards in the bill of rights. Instead, the Singapore judiciary has placed dispositive weight on the expectations of the constitutional framers in deciding whether an impugned legislation is constitutional. Such attempts to shackle the Constitution to the framers' original, specific interpretation of the text ( as "hard originalism" would require) may indeed be inconsistent with their original intent of using vague, open-textured language to enact an enduring instrument with standards that allow future generations of lawmakers and judges to design and build over time through the processes of constitutional construction.[138]

Therefore, it is evident that judicial recourse to "hard originalism" in Singapore is not mandated by the text or history of the country's supreme law. Rather, it is a consequence of the judiciary's deliberate choice to defer to the contemporary policy choices of the dominant People's Action Party (PAP) government, which has ruled Singapore without interruption since the nation's independence and has not taken kindly to robust judicial review.

### 2.9.3 System of Judicial Review in China

The first provision for judicial review in China appeared in the Constitution Draft of the Temple of Heaven of 1913.The power of interpretation of the future Constitution belonged to the legislature[139] a conclusion drawn from the French model of government in which the legislature has full authority to interpret its own statutes. The 1919 Constitution Draft adopted a system that entitled only the leaders of the legislature and judiciary to compose a special conference handling the task of

---

[137]. Mark D. Greenberg & Harry ,*The Meaning of Original Meaning*, 86 Geo. I. J. 569, 580 (1998).
[138]. *Id.* at. 815.
Articles 112 & 113 of the Constitution of China.

interpretation[140]. Although the Constitution of 1923 still followed the principle of parliamentary supremacy with minor revision[141] it established that the Highest Court of Justice had the authority to pass judgment on conflicts between national law and provincial law.[142]

The 1925 Constitution Draft seemed to move a step toward the creation of a special constitutional court whose members included a chief justice, four other justices of the Supreme Court and four other persons nominated and elected by the legislature.[143] By explicitly providing in article 171 of the current Chinese Constitution that "laws that are in conflict with the Constitution shall be null and void," the principle of judicial review is firmly established. Article 173 vests the power of constitutional interpretation in the Judicial Yuan. In addition, Article 78 reiterates that "the Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders."

Since the National Government was guided by the Kuomintang during the political tutelage period, the Central Executive Committee of the Party had the final say on those conflicts between statutes and the "Provisional Constitution during the Period of Political Tutelage".[144]

However, it failed to decide whether the Supreme Court or another specialized court which it would create within the Judicial Yuan was to assume the task. Since the Judicial Yuan is the highest organ of the state and is charged with civil, criminal and administrative cases, it may appear that the American model of judicial review was followed. A specialized tribunal is thereby created above and outside the regular court structure. Accordingly, the Chinese Constitution not only recognizes the principle of judicial review, but also establishes a special court to pass judgment on constitutional questions.

### 2.9.4 Judicial Review in Pakistan

Like India and the US, Pakistan has a federal constitution, which distributes powers between the centre and the provinces. Under Article 142 of the Constitution of

---

[140] Article 101 of the Constitution of China.
By relaxing the quorum for passing a decision from two-thirds presence andthree-fourths concurrence to two-thirds presence and concurrence provided in article141.

[142] Article 28 of the Constitution of China.

[143] Article 94 of the Constitution of China.

[144] Article 85 of the Constitution of China.

Pakistan, the federal legislature or parliament can make laws on subjects enumerated in the federal legislative list and the concurrent legislative list. Similarly, provincial legislatures are competent to legislate on subjects falling within their sphere of powers. If we go by the book, neither parliament nor a provincial legislature can encroach upon the other's legislative powers[145].

The Constitution of Pakistan also places some restrictions on the powers of both federal and provincial legislatures. In the first place, no law can be made which is in conflict with any of the fundamental rights granted by the constitution to the citizens. In this respect, Article 8 of the constitution states "Any law, or any custom or usage having the force of law in so far as it is inconsistent with the rights conferred by this Chapter [Chapter 1], shall, to the extent of such inconsistency, be void".[146]

It is from these restrictions on the legislative competence of parliament that the power of judicial review follows. The superior judiciary can invalidate an act of parliament that is beyond its legislative competence for any of the four reasons mentioned in preceding paragraphs. In other words, parliament in Pakistan is not sovereign. Rather its powers are restricted by some written provisions of the constitution and if these powers are over-stepped, the judiciary can be moved to get the grievances of the aggrieved party redressed.

The Constitution of Pakistan, like India and USA, does not confer the power of judicial review on the judiciary in express terms. The constitution does not state that a high court or the Supreme Court can strike down a law passed by parliament or a provincial assembly. What the constitution confers on the superior judiciary is the power to interpret the constitution. It is from this function of the judiciary that the power of judicial review follows.

Articles 238 and 239 of the Constitution of Pakistan, 1973, vest the Constitution amendment power almost exclusively in parliament. The two houses of parliament can amend any provision of the constitution by a two-third majority and subject to the assent of the president.

---

[145] *The power of judicial review: scope and limits* - DAWN.COM,www.dawn.com/news/881082,visited on 27/7/17.

[146] *Ibid.*

While giving parliament the power to alter the Constitution, Article 239 uses the word "amend". The lexical meaning of the word "amend" is to make minor improvements in a document through addition or deletion. This clearly means that any amendment to the constitution has to be within its basic framework, otherwise it will not be minor. Thus parliament can introduce minor changes to the constitution; it cannot re-write or deface the constitution by changing its essential character. It is ultimately for the courts to adjudicate whether any constitutional amendment conforms to the fundamental character of the constitution, as this involves interpretation of the constitution. If the courts determine that a constitutional amendment has the effect of defacing the constitution, they can ask parliament to undo the amendment for being ultra vires to the Constitution.[147]

Though the courts have the power of judicial review, the same cannot be exercised in an arbitrary fashion. If the law-making power of parliament is not unlimited, the courts' power to review the laws passed by parliament is also not unlimited. Like other organs of the state, the judiciary derives its powers from the constitution and the judges are as much under the constitution as anyone else. They can interpret and invalidate laws but they cannot themselves assume the law making function; nor can they confer that function on any person or institution other than the federal or provincial legislatures. Nor can the courts make constitutional what is manifestly unconstitutional. Sovereignty is located neither in parliament nor in the judiciary but in the constitution itself.

### 2.9.5 System of Judicial Review in Bangladesh

The Constitution of Bangladesh, which is founded on the spirit of its great struggle for independence, guarantees the independence of the judiciary as well as the judges and magistrates[148] . The Prime Minister is the Chief Executive of the government, while the President is the ceremonial head of the state. The President acts mainly on the advice of the Prime Minister[149]. The Constitution provides that the judges of the Supreme Court will be appointed by the President in consultation with the Chief

---

*Ibid.*

Art. 94 (4) and Art.116A of the Constitution of Peoples Republic of Bangladesh. [149]*Ibid* Art.48 (3).

Justice[150]. Similarly the power of promotion, posting, leave and discipline of the judges of the subordinate judiciary and judicial magistrates are vested with the President and exercised by him in consultation with the Supreme Court[151]. Annual budget for the Supreme Court and the sanction for human resources, equipment and transports are processed from the executive organ of the state. Sometimes special budgetary allocation becomes necessary for the judiciary. Interaction or occasional dialogue between the Chief Justice and the Chief Executive has been proved to be helpful to settle above issues smoothly and justly.

The rule of law is a basic feature of the constitution of Bangladesh. It has been pledged in the preamble to the constitution of Bangladesh that "It shall be fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens." An independent, capable and proactive judiciary is indispensable for the protection and advancement of democracy and rule of law. In Bangladesh, the Judiciary, one of the three organs of the state, plays an important role for advancement of democracy and Human Rights. In *Masder Hossain case*[152], the Supreme Court issued 12 (twelve) directions inter alia declaring that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services. As per the direction, government separated judiciary from executive by making necessary rules and also set-up Judicial Service Commission for appointment of judges of the subordinate courts in the judicial service.

Article 26 of the Constitution makes all laws inconsistent with fundamental rights void to the extent of such inconsistency and further enjoins upon the state not to make any law inconsistent with fundamental rights. Article 102 of the Constitution vested the High Court Division with the competence of judicial review of administrative or legislative actions. The principle that only the 'persons aggrieved' can initiate a legal

---

*Ibid* Art.95 (1).

[151]*Ibid*, Article 116.

[152]*Secretary, Ministry of Finance v. Mr. Md. MasdarHossain*, 2000 BLD (AD) 104 29

action in all matters including the matters of great public concern virtually keeps the public functionaries beyond judicial scrutiny . This inaction of the judiciary may erode people's trust and confidence in the competence of the judiciary. In the above backdrop, the concept of Public Interest litigation (PIL) was formally recognized by the Supreme Court of Bangladesh in the case of *Dr. Mohiuddin Farooque*[153].

## 2.10 Judicial Review in India, USA, UK: Comparison

The scope of judicial review in India is not a wide as in USA. The American Supreme Court can declare any law unconstitutional on the ground of its not being in "due process of law", but the Indian Supreme Court has no such power. In India, outside the limitation imposed on the legislative powers, Parliament and State legislature are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature. Another reason is because the Indian Supreme Court has consistently refused to declare legislative enactments invalid on the ground that they violate the natural, social or political rights of citizens, unless it could be shown that such injustice was expressly prohibited by the Constitution.

In India, there are specific and extensive provisions of judicial review in the Constitution of India such as Article 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 Constitution United States of America doesn't have any specific provision for judicial review, Article 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 United States of America is the formulation by court.

In United Kingdom, there is no written Constitution, therefore the scope of judicial review is very limited in nature. Earlier there was absence of judicial review in United Kingdom, but after the expansion of this doctrine, its now becomes exist very broadly. Parliamentary Sovereignty is still in existence in United Kingdom and although this principle was absolute and indisputable a hundred years ago, it is no longer absolute

[153]*Dr. MohiuddinFarooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others*, 49 DLR (AD)(1997) 1

in today's modern British law. Indeed within the emerging new constitutional system in the United Kingdom, the courts may review legislation at least in certain extreme circumstances.

The doctrine of Separation of Powers which is a dominant features of the American Constitution, had helped the Supreme Court a great deal in this connection. In Canada, Australia and India the existence of a parliamentary government, which ensures the responsibility of the executive to the legislature, minimizes the possibilities of conflict between the various agencies of the government. However, the position of the judiciary in India is more or less the same and is similar, to a great extent, to that in the United States regarding constitutional interpretation.

American system established an independent judiciary, supreme in its decisions regarding constitutional matters. The American Constitution prohibits the legislative absolutism of a majority which might become the master of the Constitution, the judge of its meaning and application. Condition prevailing in India were such that it adopted some modified form of the American pattern to suit Indian needs. There were three important problems which faced the Indian constitutionalist emergence of an all India-judicature and this is a hall-mark in India constitutional history because of the valuable role that has been played by the Federal Court in the field of constitutional advancement in India.

### 2.11 A Sum Up

To conclude, it can be said that due to the impact of judicial review the power of Courts has been strengthen in the present scenario. 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 and the scope of judicial review is wider in India as comparison to United States of America. Because the Constitution of United States of America is very concise in nature and it is the most rigid Constitution in the world. 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.

The analysis of the Constitutional evolution in India, America, Canada and Australia reveals enormous powers of the court to review the constitutionality of the legislative Acts. In India, prior to the Government of India Act of 1935, the state was unitary and as such the constitutional documents imposed restrictions in framing laws in violation of the mandates of the English Parliament. The position of the law-making body was that of a subordinate legislature. There were other restrictions also in the pre-1935 Constitutional document. Federalism was introduced by the Government of India Act of 1935, though the Indian legislature remained a subordinate legislature even under this constitutional document and had no jurisdiction to frame laws in conflict with the English Parliamentary mandates. The legislative violations regarding distribution of powers and delegated legislation and certain other constitutional restrictions were the main topics of judicial interference. The Constitution of India of 1950 necessitated a massive field of judicial review. Legislative violations regarding fundamental rights, distribution of powers, delegated legislations, as well as other constitutional restrictions have occasioned enormous activities for judicial review.

Doctrine of judicial review has become very dynamic concept now. In various countries judiciary is performing as the guardian of the 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. In India and United States of America , 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 and cannot violate the fundamental rights which is the basic structure of the Constitution.

Although the American practice of judging the constitutionality of laws by regular courts has been followed by a number of countries, but an alternative system was also established in many countries like France and Australia. With the creation of a Constitutional Court that specializes in this function. There were several reasons for this structural change. Since the principle of stare decisis is not a part of the civil law system, at least in theory, courts are not generally bound even by the decisions of the highest court. Thus, there may theoretically exist a conflict among courts on the question of whether a statute is constitutional. Furthermore, the existence of a separate administrative court independent of the regular courts which occasionally had to apply the same statutes as the ordinary court aggravated the possible contradiction

among judicial organs. This is a significant development from the establishment of the system of judicial review, because it presents an alternative means of guarding the constitution.China has also adopted this alternative approach.

The position in Canada, Australia and India is much different from that of the United States or Switzerland. In these federations the judges of the federal judiciary are appointed by the federal executive as in the U.S. but there is no necessity of an approval by the federal legislature like the power exercised by American Senate. In fact, in these countries there is no chance of a friction between the federal executive and the legislature on this matter, as they have a parliamentary system of government which ensures harmony between the executive and the legislature.

With respect to principles of legislative supremacy and separation of powers divergence; the gist of the principle of separation of powers is "checks and balances". In other words, in order to establish and maintain a balance among all powers (legislative, executive and judiciary), not only should no power/branch of state be more powerful than any other power/branch, but also, each branch must have a check on the other branches. Accordingly, within the jurisdictions which are based on the separation of powers, in principle judicial review plays a very crucial role. However, since a number of jurisdictions which are based on the principle of legislative supremacy became aware of the potential pitfalls of unbounded legislative and executive branches owing to the painful lessons derived from history, judicial review have started to become one of the backbones of the rule of law in these systems as well.

Unlike the Constitution of the United States, which gave rights in unqualified terms and left it to the courts to define their limits and legitimatize restrictions on them, the Constitution of India enumerated the rights as well as the restrictions. The makers of the Indian Constitution were apprehensive of the wider role assumed by the Supreme Court of the United States through interpretation of the 'due process' clause of the Fifth Amendment to the constitution of the United States. They purposely avoided the use of the words 'due process of law' so as not to allow the courts to invalidate laws that might be disliked by the judges. The debates in the Constituent Assembly show that the maker's admirers of the Westminster model of democracy and wanted the courts in India to interpret the Constitution so as to cause minimum interference with the legislature. Many Indian leaders who had made sacrifices for national independence were of the view that the legislature should be supreme and the courts

should merely act as umpires to ensure that the parties played according to the rules of the games. The courts were supposed to interpret the Constitution not in terms of what it should be but in terms of what it is. The courts need not be concerned about what the effect of an interpretation would be but should state what the law is.

In America, though there is conspicuous absence of provisions for judicial review in the federal constitution, judicial review has been in practice since the beginning of the colonial rule; and the American judges and lawyers with the cooperation of the American people have evolved and developed the doctrine of judicial review to a great magnitude. By judicial decisions various objective standards of judicial limitations for judicial review have been evolved and affirmed. Canada and Australia are the offspring's of America in respect of constitutional evolution and in the adoption of the doctrine of judicial review. In these countries also, the violation of federal principles in law-making and of other constitutional restrictions, engaged the attention of the courts, and judicial review of legislative Acts became a fundamental feature of the constitutional jurisprudence.

In England, the courts have expanded their power through the process of interpretation. They have imposed greater restrictions on the executive by subjecting more and more of its actions to the principles of natural justice, critically scrutinizing the exercise of discretionary powers, and narrowly construing the ouster clauses that made the decisions of the administrative authorities or tribunals final and conclusive. Although courts in England cannot declare an act of Parliament ultra vires, they have subjected the administrative action to searching judicial vigilance. This is also judicial activism.

Thus, it can be said that, there should be more expansion of judicial review in all the countries in the world because it creates democracy in the minds of the people as the basic feature of the judicial review is to protect the individual rights, therefore there is a need of expansion of judicial review. Moreover to strengthen judicial review means to strengthen the liberty and freedom of individual.