
Judicial Review Of Federal Umpiring: A Comparative Analysis

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Abstract

The legal supremacy of the Constitution is essential for the existence of the federal system. Judicial Review is essential for maintaining supremacy of the Constitution and for checking the possible misuse of power. By invoking this power, judiciary acts as an umpire or an arbiter between the Centre and the states for maintaining the federal balance. Thus, this power enables the judiciary to secure the federal equilibrium of the country. In India, judicial review is a mechanism by which judiciary within the contours of Article 13 of the Constitution of India determines whether a law passed by the Legislature or any other public regulation having the force of law, is in consonance with the Constitution. However, the Constitution of USA did not expressly vest this function of guardianship in the judiciary. But the framers of the Constitution assumed that it would follow from the common law doctrine of 'ultra vires', according to which courts had the power to invalidate the act of an inferior body which transgressed the mandate of the superior authority which is binding on the subordinate body.

Keywords- *Federal, Judicial Review, Umpire, Checks & Balances.*

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I. Introduction

In a federal state, the legal supremacy of the Constitution is essential for the existence of the federal system. The nature of the federal system requires the division of powers between the Central government and State Government. It is essential to maintain a division of powers between the two levels of government and has to be done by an independent and impartial authority, above and beyond the ordinary bodies under the Constitution. Judiciary is such a body and has the power to interpret the Constitution and guard the entrenched provisions of the Constitution. As harmony between the different State governments and Federal government is an important part of it, the judiciary should be given a pivotal place. Aside from maintaining Centre-State relations, the judiciary also needs to maintain the balance between different organs of the government and the autonomy of units. Thus, the role of the Judiciary in the United States of America and India cannot be undermined.¹

In ancient times all authority was vested in the king. The onward march to modern constitutional polities saw the diversification of the state's functions. A written constitution, like ours, is intended to operate as a limitation upon the powers of the various organs of a state. This understanding of limited government maintains that government is internally limited by the system of checks and balances as well as the Constitution itself, which can be amended, and externally through the republican principle of electoral accountability. The question which naturally arise is by what machinery or means these limitations are to be enforced and maintained against encroachments by those organs. This necessitates the existence of a tribunal- the Supreme Court to maintain the idea of limited government and checks and balances which are the precept of constitutionalism. Under those constitutions where Judicial Review exists, this guardianship of the Constitution belongs to the courts.²

¹ Dr J.N.Pandey, *Constitutional Law of India* (Central Law Agency, Allahabad, 57th edn/2020).

² <https://www.mondaq.com/india/constitutional-administrative-law/20649/judicial-review-in-india> (visited on June 11, 2022).

Judicial Review is essential for maintaining supremacy of the Constitution and for checking the possible misuse of power by the legislature and executive. By invoking the power of judicial review, judiciary acts as an umpire or an arbiter between the Centre and the states for maintaining the federal balance. Thus, this power enables the judiciary to secure the federal equilibrium of the country. Judicial review is a mechanism by which judiciary determines whether a law passed by the Legislature or any other public regulation having the force of law, is in consonance with the Constitution. If it is not, the Court refuses to give effect to the statute. In short, the possibility of abuse is whittled down due to the presence of several checks.

II. Meaning Of Judicial Review

The word review in the phrase “judicial review” stands for something which is done by a court to examine the validity or correctness of the action of some other agency. Thus, the power of the judiciary to review and determine the validity of a law or an order may be described as the power of ‘judicial review’. It is the interposition of judicial restraint on the organs of the government. The concept has the origin in the theory of limited government and in the theory of two laws, an ordinary law and the supreme law, that is the Constitution. Any act of the ordinary law making bodies which contravenes the provision of the supreme law must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts as void. Judicial review has two important functions look upon-

- 1) Legitimizing the actions of the government.
- 2) The protection of the constitution if the government tries to encroaches in it.³

In the words of **Frankfurter, J**- “Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional system.” Judicial Review is the duty as well as the power of the court to not allow any act- whether legislative or executive, if it violates the constitution as defined by **Edward S. Corwin**⁴.

³ Subhram Rajkhowa and Stuti Deka, *Comparative Public Law* (EBH Publishers, Guwahati, 2016).

⁴ Edward S. Corwin, “A Constitution of Powers in a Secular State”, *American Political Science* 46 (1952) p 898.

As defined by **Professor Wade** “Judicial Review is a mechanism adopted to keep public authorities within bounds and upholding the rule of law.”

The Indian constitution expressly vests this power in the India Supreme Court under Art 32 and to the various High courts under Art 226 and 227. In USA there is no express provision for this Judicial Review however this can be interpreted to vest in the U.S. Supreme court by virtue of Art III and Art IV.⁵ In the case of **L. Chandra Kumar** ⁶ the Supreme Court held that “Henry J. Abraham’s definition of judicial review in the American Constitution is, subject to a few modifications, equally applicable to the concept as it is understood in Indian constitutional law. Judicial Review in India comprises of judicial review of legislative action, judicial decisions and administrative actions. While defining the scope of judicial review, it is ruled that the Court should not interfere with the administrative decision unless it is illogical, or suffers from procedural impropriety or is shocking to the conscience of the court.⁷

III. Origin Of Judicial Review

The concept of judicial review has a long and chequered history. It originated in the English legal system and became a very important principle in the systems of government based on Rule of Law. The concept of Judicial Review found express mention in the 1803 landmark case **Marbury v. Madison**⁸ in which the Supreme Court declared the Section 13 of the Judiciary Act of 1789 as unconstitutional. Prior to this case the Supreme Court did not declare any act of the congress unconstitutional with complete judicial authority. Therefore, this case laid the foundation of power of Judicial Review of Supreme Court to determine the legislative action. However, we can see that the concept did sprout in England for the first time in the year 1610 i.e. prior to the decision of Marbury. This is evident in the words of Lord Coke in the decision of **Dr. Bonham v Cambridge University**. It is evincible that in United Kingdom, common law country, there is dominance of parliamentary supremacy.

⁵ V.N.Shukla, *Constitution of India* (Eastern Book Company, Lucknow, 13th edn/ 2019).

⁶ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

⁷ *V Ramna v A.P.S,R,T,C*, AIR 2005 SC 3417.

⁸ *Marbury v. Madison*, (1803) 1 Cr. 137.

Therefore, judicial review of legislative acts is not permitted. However, a contrary position is seen in USA and India where supremacy of Constitution is established. From a comparative stand point one of the most important features of any system of judicial review is the State's choice of either a centralized or decentralized system.⁹ Again Marshall in **McCulloch case**¹⁰ declared the stature of Maryland as unconstitutional. Marshall expanded the powers of the federal government by invoking the doctrine of implied powers.

The doctrine established by chief justice Marshall in the case of Marbury is still vibrant and still stands unabated. After the Supreme Court's decision in the Marbury v Madison case, the power of striking down an act of Congress was not used till the **Dret Seot v Sanford** case in 1857. In this case, the court declared the 'Missouri Compromise of 1820' unconstitutional. The period of 1930 was a period of economic depression in America and Mr Roosevelt who over as president in March 1933 promised a 'New Deal' to steer the country out of economic chaos. Under his leadership, the Congress passed in quick succession laws and by 1935 these laws began to be brought before the Supreme Court. It declared five of the New Deal Statutes unconstitutional during the beginning in October 1935. After 1937, the Supreme Court manifested a change of mind and did not stand in way of social and economic legislations.¹¹ **Dr Finer** however, considers the judicial review as most distinct American contribution to be found in the Constitution. However, the power to judge the constitutional validity of the acts of the Congress and measures passed by the government shall not mean that it establishes the supremacy of the Supreme Court. The supremacy still belongs to the constitution.¹²

The concept of Judicial Review was present in India prior to Independence also. However, there was no express provision dealing with it and hence reliance is placed on the decision of the High courts and Privy Councils. In **Secretary of State vs. Moment**¹³ the court held "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.

⁹ *Dr. Bonham v Cambridge University*, 8 Co. Rep. 107 77 Eng. Rep. 638, 1610.

¹⁰ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹¹ Dr Vishnoo Bhagwan, Dr Vidya Bhusbhan, Dr Vandana Mohla, *World Constitutions –A Comparative Study*(11th revised and enlarged edition/2017).

¹² *Supra note 4.*

¹³ *Secretary of State vs. Moment* [1913]40 ILR 391 (Cal)

Post-independence the Constitution of India 1950 has expressly incorporated the doctrine of Judicial Review. The Indian constitution provides this power under Articles 13, 32, 131-136, 143, 226, 227, 245, 246, 372. The importance of Judicial Review has been explained by various judges. In **Kesavananda Bharti** case¹⁴, Khanna, J held: As long as Fundamental Rights exist the power of Judicial Review is to be exercised in order to secure the protection of these rights. “The Judicial Review has thus become an integral part of our Constitutional system.” C.J Chandrachud in **Minerva Mills v Union of India**¹⁵ observed; “It is the function of the Judges, may their duty, to pronounce upon the validity of laws.

If courts are totally deprived of that power, the Fundamental Rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled. In India, the power of the courts to invalidate a law made by the legislature in case it conflicts with the mandates of the Constitution emanates from the other part of the juristic nature of the Constitution, namely, that it is the ‘supreme law of the land’ which have been referred as “higher law concept” .¹⁶ It leads to the conclusion that if there is any conflict between the higher law and ordinary law, the former shall prevail over the other and the latter shall be struck down as unconstitutional. The power and duty of invalidating unconstitutional laws belongs to the judiciary which has to administer both laws. In India the proposition has been embodied in Article 13 of the Constitution, as far as the provisions guaranteeing the fundamental rights are concerned. Cls. (1) and (2) of this article lay down that any law made by the legislature in India, whether before or after the commencement of the Constitution, shall be void and in so far as it offends any of the fundamental rights included in Part III.¹⁷

¹⁴ *Kesavananda Bharti v. Union of India* A.I.R 1973 S.C. 1461

¹⁵ *Minerva Mills v Union of India*, AIR 1980 SC 1789.

¹⁶ *Marbury v Madison*, (1803) 1 Cr. 137.

¹⁷ *Mahendra v State of U.P.* , AIR 1962 SC 1019 (1029-1030)

IV. Judicial Review In India

In India, the doctrine of judicial review is preserved in its entire sanctity and the same is considered to be a part of the basic structure of our Constitution. It is a concept of Rule of law and the touchstone of the Constitution of India. In India, the power of judicial review is exercised by the Supreme Court and the High Courts. The power of the Court to declare legislative enactments invalid is expressly embedded within the contours of Article 13 of the Constitution of India. Justifying judicial review, in **S.S.Bola**¹⁸ case, Justice Ramaswami held that the founding fathers very wisely incorporated in the Constitution the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and freedoms guaranteed to the citizens and to afford a useful weapon for availability, an ailment and enjoyment of equality, liberty. **Emperor v. Burrah**¹⁹, this was the first case during which the court interpreted and originated the concept of judicial review in India in 1877. The Court held that the aggrieved party have right to challenge the constitutionality of a statute enacted by the governor general Council in way more than the power given to him by the Imperial Parliament. During this case, the high court and council adopted the view that Indian courts had power of review with some limitations. In **L. Chandra Kumar v. Union of India**²⁰ the Supreme Court expressly held “that the power of Judicial Review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure.” Since the power of review is considered as the basic structure of the constitution, it cannot be taken away by way of an amendment to the constitution. The provisions of the Constitution of India providing for this power are Art. 13, 32, 131- 136,141,143,226,227,245, 246, 372. In the case of **Gopalan v State of Madras**²¹, Kania, C.J., observed that “the inclusion of Art 13(1) and (2) in the Constitution appears to be a matter of abundant caution.

¹⁸ *S.S.Bola v B.D.Sharma*, AIR 1997 SC 3127

¹⁹ *Emperor v. Burrah* (1877) 3 ILR 63 (Cal).

²⁰ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

²¹ *Gopalan v State of Madras* 1950 SCR 88 (100).

Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the court always has the power to declare the enactment, to the extent it transgresses the limits, invalid". It is only in express constitutional provisions limiting legislative power and temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Justice Bhagawati in **Sampath Kumar**²² case held that judicial review is an essential feature of the Constitution and no law passed by the parliament in exercise of its constituent power can abrogate it or take it away. If it is abrogated the Constitution will cease to be what it is. In India, judicial review broadly covers three aspects; Judicial review of legislative action; Judicial review for due process, and; Judicial review of administrative action. Accordingly, the constitutional validity of a legislative enactment or an executive order may be challenged in the Supreme Court on the following grounds –

1. Violation of fundamental rights.
2. Outside the competence of the authority which has framed it.
3. It is repugnant to the Constitutional provisions.²³

(A) Judicial Review of Administrative Action

The power of Judicial Review of the courts also extends to administrative or executive actions. There are two main conditions in which court shall interfere- failure to exercise discretion and abuse of discretion. Apart from the two mentioned conditions the Judicial Review of administrative action can be exercised on the following grounds: Illegality, Irrationality, Procedural impropriety, Proportionality, Unreasonableness. In **Air India v Nargesh Meerza**,²⁴ the

²²*Sampath Kumar v Union of India*, AIR 1987 SC 386.

²³ <https://www.legalserviceindia.com/legal/article-7332-a-comparative-study-on-judicial-review-in-india-and-usa.html> (visited on 12 June, 2022).

²⁴*Air India v Nargesh Meerza* (1981) 4 SCC 335.

regulation of Air India provided for retirement of service of corporation upon attaining age of 35 years, or on marriage, if the marriage took place within four years of service or on her first pregnancy, whichever happened earlier. The court struck down this regulation as being violative of the constitution.

(B) Judicial Review of Legislative Action

By virtue of Article 245 and 246 the court exercises the power of Judicial Review. Art 245(1) provides that the parliament may make any law 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.” But at the same time imposes limitations on the powers of the Parliament and State Legislatures. This is the basis of Judicial Review- it provides scope for judicial intervention and interpretation. Article 141 further strengthens the position of Supreme Court as a court of review by incorporating the doctrine of Precedent. It states that the decision of the Supreme Court shall be law and will be binding on all the lower courts of the Country.²⁵ Further according to Art 13(1) and Art 13(2) law made by legislature before or after the commencement of the constitution shall be void if it is repugnant to Part III of the constitution. Whenever the validity of a statute is in question the courts have to see the competency of the legislature to enact it. This entails to check under which list of the VII Schedule the subject falls under – the Union list or the state list or the concurrent list. Further in case of state legislature it has to be seen whether the law has extra territorial operation beyond the boundaries of state. If all the above-mentioned tests are satisfied the court looks into whether limitation is imposed by any other part of the constitution. The impugned law has to pass all these tests to be declared constitution and hence enforceable.²⁶ In **I.R. Coelho v. State of Tamil Nadu**²⁷ the Central as well as the State laws put in the Ninth schedule were challenged. The Apex

²⁵ Dr Durga Das Basu, *Comparative Constitutional Law*, (Lexis Nexis, Lucknow, 3rd edn./2014).

²⁶ *State of Bombay v Chamarbaugwala*, [1957]S.C.J 607.

²⁷ *I.R. Coelho v. State of Tamil Nadu*, (AIR 2007 SC 861)

court held that any law which was placed in the ninth schedule post 24th April 1973 that is after the decision of Keshavananda Bharti case was open to challenge in the court of law.

If any law in the ninth schedule was violative of the fundamental rights such law was open to challenge on the ground that it destroys the basic structure of the constitution. It was held by the Supreme Court that Judicial Review of legislative actions is a part of the basic structure of the constitution.

(C) Judicial Review of Judicial Action

By virtue of exercising its appellate jurisdiction, the Supreme Court exercises the power of review of judicial action. The Supreme Court exercises the power of appellate jurisdiction by virtue of Article 132(1), 133(1) or 134 of the Constitution in respect of any judgement, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. The provision for Special Leave Petition under Article 136 confers the court with wide powers of appellate jurisdiction. For instance, in **Navtej Singh Johar vs. Union of India**²⁸ a five-judge Bench of the Supreme Court unanimously struck down Section 377 of the Indian Penal Code, 1860 to the extent that it criminalised same-sex relations between consenting adults. In doing so the court overruled its decision in **Suresh Kumar Koushal & Anr**²⁹

(C) Judicial Review of Constitutional Amendments

The Indian constitution differs from the U.S constitution in this parameter. In USA the Supreme court cannot exercise the power of Judicial Review over constitutional amendments whereas in India it can. The Parliament has the supreme authority to amend the constitution but it cannot change its basic structure. The Supreme Court as a guardian of the Fundamental Rights has to scrutinise the constitutional validity of the said amendments. However, there was a conflict between the Parliament and the Supreme Court regarding amenability of Fundamental Rights

²⁸*Navtej Singh Johar vs. Union of India* (2018) 1 S.C.C. 79.

²⁹*Suresh Kumar Koushal & Anr* A.I.R. 2007 S.C. 861

under the Art. 368. The issue was finally settled through a plethora of cases starting from **Shankari Prasad v. Union of India**³⁰, the first case on amenability of the constitution.

In this case the validity of the Constitution (1st Amendment) Act, 1951, relating to “Right to Property” guaranteed by Art. 31 was challenged. The Supreme court held that the power to amend the constitution includes power to amend the fundamental rights.

Therefore, the constitutional amendment will be valid even if it abridges the fundamental rights. In **Sajjan Singh v. Rajasthan**³¹ the constitutional validity of the Constitution (Seventeenth Amendment) Act, 1964, was challenged. The court reiterated its decision of Shankari Prasad and held that constitutional amendments were outside the purview of the Judicial Review. However, in **Golak Nath v. State of Punjab**³², The court observed “An amendment is a ‘law’ within the meaning of Art. 13(2) which included every kind of law; statutory as well as constitutional law and hence a constitutional amendment which contravened Art. 13(2) will be declared void.”. The issue of constitutional amendment of fundamental rights was finally settled by the Supreme Court in the famous case of **Keshavananda Bharati v. State of Kerala**³³ wherein it overruled the Golaknath’s case and held the parliament has the power to amend the fundamental rights under Art. 368 of the Constitution but cannot take away the basic structure of the constitution. In **Minerva Mills v Union of India**³⁴ the constitutional validity of clauses (4) and (5) of Art. 368, introduced 42nd Amendment was challenged. The court struck down the said provisions on the basis that it destroyed the basic feature of the constitution.

V. Limits To The Power Of Judicial Review In India ³⁵

The doctrine of Judicial Review in India is subjected to certain limitations. *Firstly*, under Art. 100 (2) and Art 189 of the Constitution, the courts do not have the jurisdiction to invalidate the

³⁰ *Shankari Prasad v. Union of India* A.I.R. 1951 S.C. 455

³¹ *Sajjan Singh v. Rajasthan* A.I.R. 1965 S.C. 845

³² *Golak Nath v. State of Punjab* A.I.R. 1967 S.C. 1643

³³ *Keshavananda Bharati v. State of Kerala* A.I.R. 1967 S.C. 1643

³⁴ *Minerva Mills v Union of India* A.I.R. 1975 S.C. 2299

³⁵ Prema Kurapati, A Comparative Analysis of the Doctrine of Judicial Review in India and the U.S.A, <https://www.ijlmh.com/paper/a-comparative-analysis-of-the-doctrine-of-judicial-review-in-india-and-the-u-s-a/> (visited on June 12, 2022).

proceedings of a House of the Legislature on the grounds of procedural irregularities. However, no such immunity is given to the legislature where the proceedings are held in non-compliance of the mandatory provisions of the constitution. *Secondly* as the Directive Principles of State Policy (DPSP) is non justiciable so an individual cannot approach the court for the enforcement of DPSP. *Thirdly*, According to Article 74(2)

"The questions whether any and if so what, advice was tendered by Minister to the President shall not be inquired into in any court." Fourthly, the provisions regarding delimitations of constituencies cannot be enquired by the court as per Article 329(a) of the Indian Constitution.

The courts can refuse to tests certain legislative or executive actions by terming it to be 'policy matter' or 'political issue'. The presumption is always in the favour of constitutionality of law. The court can apply doctrine of severability whereby only a part of the statute is declared unconstitutional and not the entire statute. The Supreme Court in **Narmada Bachao Andolan v Union of India**, the Supreme Court clarified that minimal interference is called from the court when a policy is the deliberation of technical experts. The question where the policy is evolved by the government, judicial review is thereof limited was examined in the case of Federation of Railway Officers Association v Union of India, on matters affecting policy and requiring technical experts, the Court would leave the decision of those who are qualified to address the issues. In judicial review matters, it is also necessary that the clarifications of rejecting legislation or an executive act must be clearly explicated. The invalidity of the law or the action taken should also be established in the judgment in just and cogent terms. A judicial review decision gets implemented or operative from the date of judgment which means that all activities that took place prior to the date of judgment and in consonance with the then law remain valid. ³⁶

VI. Grounds Of Judicial Review³⁷

- (a) Jurisdictional Error- The term jurisdiction simply means 'power'. In narrower sense, it means power to decide or power to determine. There are certain mistakes of fact which carry an administrative authority outside its jurisdiction. For its jurisdiction depends upon fact which is must exist objectively before the authority has power to act. These are called

³⁶ Prashant Gupta, Doctrine of Judicial review: A Comparative Analysis between India, UK. and USA, <https://thelawbrigade.com/wp-content/uploads/2019/05/prashant.pdf> (visited on June 12, 2022).

³⁷ Subhram Rajkhowa and Stuti Deka, *Comparative Public Law* (EBH Publishers, Guwahati, 2016)

‘jurisdictional facts.’ The decision of the authority may be challenged on jurisdictional grounds- absence of jurisdiction, exceeding jurisdiction, refusal to exercise jurisdiction or its erroneous exercise.

- (b) Lack of Jurisdiction- It would be a case of “lack of jurisdiction” where the tribunal or authority has no jurisdiction at all to pass an order. In the case of **R v Minister of Transport**³⁸, the Court held that the minister had no power to revoke a license. The order of the minister revoking the licence, was thus held to be passed without jurisdiction and hence ultra vires.
- (c) Excess of Jurisdiction- Where the tribunal has jurisdiction but it exceed its permissible limits, there would be a case of excess of jurisdiction. In the case of **J.K. Chaudhuri v R.K. Dutta**³⁹, the University could interfere in the decision of the governing body to reinstate him. The Court held that the university had exceeded its jurisdiction and issued certiorari to quash the decision of the University on the ground of excess of jurisdiction.
- (d) Abuse of Jurisdiction- A tribunal or an authority would be said to have abused its jurisdiction when it exercises its power for improper purpose or on extraneous considerations.

VII. Constitutional Basis For Judicial Review In USA

The Constitution of USA did not expressly vest this function of guardianship in the judiciary. But the framers of the Constitution assumed that it would follow from the common law doctrine of ‘ultra vires’, according to which courts had the power and duty to invalidate the act of an inferior body which transgressed the mandate of the superior authority which is binding on the subordinate body.⁴⁰ The language of **Article III Section 2** reads, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made or which shall be made under this authority. **Article VI Section 2** states “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, under the authority of the United States shall be the supreme law

³⁸ *R v Minister of Transport* (1934) 1KB 277

³⁹ *K. Chaudhuri v R.K. Dutta* AIR 1958 SC 459.

⁴⁰ M.P.Jain, *Indian Constitutional Law*, (Lexis Nexis, Lucknow, 8th edn, 2021).

of the land”. The Supreme Court faced the issue of judicial review for the first time in the case of **Marbury v Madison**⁴¹ which was decided in 1803. MARSHALL, C.J., placed the doctrine

upon a sure footing by saying that since the judges, as directed by the Constitution itself, took oath to support the Constitution, which constitutes the paramount law of the nation, it was the duty of the judges to annul any law made by the legislature which was repugnant to the Constitution. The following principles were established through his various constitutional decisions-

1. The Constitution clearly defines and limits the powers of government and a law repugnant to the Constitution is void.
2. Doctrine of implied powers can be invoked to expound the federal powers.
3. The Constitution is a fundamental law and superior to ordinary legislative enactment.
4. The Central laws have supremacy over the State laws.
5. The Court has power to determine the constitutionality of a legislative Act and declare it void when it is repugnant to the Constitution.

In the case of **Minersville School Dt v Gobitis**,⁴² FRANKFURTER, J. stated that “judicial review, itself a restriction on popular government, is a fundamental part of our constitutional system”. The federal basis of judicial review was emphasized by the court in 1958 in the case of **Cooper v Aaron**⁴³, which declared the basic principle that the federal judiciary is supreme in the exposition of law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system. In **Baker v Carr**,⁴⁴ BRENNAN, J., said “Deciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise of constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.

⁴¹ *Marbury v Madison*, (1803) 1 Cr. 137

⁴² *Minersville School Dt v Gobitis* (1940) 310 US 586 (600).

⁴³ *Cooper v Aaron* (1958) 358 US 5 (16-17).

⁴⁴ *Baker v Carr* (1962) 369 US 186(211).

Now it is an established fact that the Supreme Court determines the constitutional validity of federal and state laws whenever they are challenged before it in the process of litigation. When the Supreme Court of United States invalidates an act of Congress or of a state legislature on

the ground that it is not in conformity with the constitutional powers and provisions it is exercising the power of judicial review.⁴⁵ Since Marshall's time, the Supreme Court has emphasized repeatedly that it is not concerned with the policy, wisdom or expediency of legislation but only with its constitutionality. In its own words, it neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of the provisions of the Constitution, and having done that its duty ends.

The prestige of the doctrine is so great that a pronouncement of the Court is accepted as final even when the act declared unconstitutional is a popular one. As Bryce expressed it, the Supreme Court is the "living voice of the Constitution", and, as such, the country obeys, both by inclination and habit.⁴⁶

VIII. Judicial Review Comparison: India And USA

The Constitution of USA did not expressly vest this function of guardianship in the judiciary. Article III, IV, V incorporates judicial power of the Court, and constitutional supremacy and all the laws are subject to the Constitution, therefore, it is implicit in nature. Judicial review in United States of America is the formulation by court But the framers of the Constitution assumed that it would follow from the common law doctrine of ultra vires, according to which the courts had the duty and duty to invalidate the acts of an inferior body which transgressed the mandate of a superior authority which is binding on the subordinate body. In India, the proposition has been embodied in Article 13, 32, 131-136, 143, 226, 227, 246, 372 of the Constitution itself. Cls. (1) and (2) of this article lay down that any law made by the legislature in India, whether before or

⁴⁵ Dr Durga Das Basu, *Comparative Constitutional Law*, (Lexis Nexis, Lucknow, 3rd edn.,/2014).

⁴⁶ *Supra* Note 5.

after the commencement of the Constitution, shall be void if and in so far as it offends any of the fundamental rights included in Part III.

In the USA the Supreme Court has the power to declare any law unconstitutional on the ground of its not following due process of law. Courts have no authority to question the wisdom or policy of the law duly made by the appropriate legislature and can reject a law only on the basis of it being unconstitutional. Hence the courts follow the principle of exclusion of extra constitutional tests. There is always a presumption in the favour of constitutionality of the statute.

The Supreme Court in India has several times refused to declare legislative actions of parliament as invalid on the ground that unless it can be shown that the natural, social or political rights of citizens are violated and such injustice was expressly prohibited by the Constitution it refused to interfere with legislative functioning.⁴⁷

Another difference of power Judicial Review exists on the ground of 'Judicial Review of constitutional amendments. The Supreme Court of India is vested with the powers of reviewing the Constitutional Amendments, however the same power is absent under the U.S. Constitution as it cannot review amendments made to the constitution.

⁴⁷ Dr S.R.Myneni, *Comparative Constitutional Law*, (Allahabad Law Agency, Lucknow, 2022).

IX. Conclusion

The Supreme Court has developed a new normative regime of rights and insisted that a state cannot act arbitrarily but must act reasonably and in public interest on pain of its action validated by judicial intervention. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes, bye laws of municipal bodies which affect the life of a citizen. It extends to every governmental or executive action from high policy matters like the President's power to issue proclamation on failure of constitutional machinery in the States like in S.R.Bommai's case to the highly discretionary exercise of the prerogative of pardon like in Kehar Singh's case. Law which is beyond the power of the law making authority cannot be allowed to be in force as it vitally affects the rights of the governed. Besides vindicating the rights of the people, judicial review maintains democracy and uploads the supremacy of the Constitution. Judicial review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case. Constitutional adjudication and the exercise of the power of judicial review is a delicate task requiring balancing of different principles and values calling for vision, statesmanship, something which requires a measure of activism and a measure of self-restraint.