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Efforts from many quarters have gone into the successful publication of this Inaugural Issue of the Indian Journal of Constitutional Studies. We would like to express a deep sense of gratitude towards our blind peers who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributors for contributing extraordinary submissions to the issue which stood at par on the rigorous scrutiny.

EVOLUTION IS BETTER THAN REVOLUTION IN LIGHT OF HISTORY OF JUDICIAL REVIEW

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CONTENTS

I. INTRODUCTION

The topic evolution is better than revolution (in the light of history of judicial review in India) so for concerned, two words differ by just one letter, but just one letter could change the whole meaning of word, whereby one word meant for gradual development that is evolution and mean for the transformation of one thing into the new other timing that is revolution. The issue will be dealt in the light of history of judicial review.

Therefore the essay is segmented into various sub headings alive:

- What is judicial review?
- Dawn of judicial review
- Changing phase of judicial review
- Spreading concepts of judicial review
- Judicial review and contemporary word

II. JUDICIAL REVIEW

In very general terms and easy language, the total that the courts of law are made available by supreme Lex Loci that is the constitution of India, where the courts are endowed with the powers to examine and decide the constitutionality of the action either of legislature or executive, such powers are called the judicial review.

While in context of eminent jurist and thinkers it has been defined in myriad ways as in words of Smith and Zurcher, “The examination or review by courts in cases actually before them, of legislative statutes and executive or administrative acts to determine where or not they are

prohibited by a written constitution or in excess of powers granted by it, and if so , to declare them void and of no effects"[1]

While Edward S. Corwin says that judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government which in the courts opinion transgresses the constitution.[2]

Thus it would be no wrong statement, if it conclusively started that the courts of law in India, are the sentinel of the Individual's right which are guaranteed by the constitution of India, which is the supreme *Lex Loci*. The courts here act as a unique institution where it does the work of watch dog where it filters the legislative or executive actions with those actions which are coloured with the flaw of encroachment or impede over the fundamental rights guaranteed against the citizen of India.

The doctrine of judicial review itself draws out its strength from the constitutional mandates of Articles 13, 32, 131, 136, 143, 226, 145, 246, and 372. Therefore the powers of judicial review are not only conferred upon the courts by political theory but also texts of the constitution.

As the best ever paradigm is set up by Article 13(2) where the roots of judicial review is formally rooted as it says that "The state shall not make any law which takes away or abridges the right conferred by this part (part 3) and any law made in contravention of this clause shall be declared void "

Thus, the courts in India are under constitutional duty to interpret the constitution and declare any law unconstitutional if it transgresses the fundamental right of the citizen of India. The doctrine of judicial review it constitute the basic structure of the constitution which has been expressly laid in landmark cases where it serves as the benchmark to the constitution of India, alike Golaknath Bharti v. State of Punjab[3], Keshvanand Bharti v. State of Kerala[4], Shankari Prasad v. Union of India[5]

Whereby the courts have vehemently stated that the judicial review constitutes the basic structure of the constitution which cannot be derogated by any amendment under Article 368.

Therefore in the light of the aforementioned cases and discussed thereby in regard of constitutional mandates it can be clearly concluded that judicial review is vital power of the courts where it serves the sentinel purpose to the citizen of India that counterpoise the balance between the action of state and legislature with the individual's right guaranteed by constitutional law of India.

[1] Smith, Edward Conard and Zurcher, Arnold J Hen, Dictionary of America Politics, Barnes and Nobel , New York
[2] Corwin, Edward S. A Constitution of Powers in Secular State, The Michie Company, USA 1951 p. 3.4
[3] AIR 1967 SC 1643
[4] AIR 1973 SC 1461
[5] AIR 1951 SC 458

It has been unanimously well stated that the constitution is the *Lex Loci* in India, where all the legislative enactment must stand up the standards of mandates made by the constitution of India. Golaknath V. State Of Punjab[6]

Therefore, if the judicial review is to be compressed to one line we can say that, judicial review is the powers of Court's to act as the filter where it saviour the contradicting obstacle from the fair and good provisions of law.

As rightly observed by Chandrachud, CJ in Minarva Mill[7] is the function of judges, may their duty to pronounce upon the validity of laws. If courts are totally deprived off their duty to act as the sentinel, the right as guaranteed by PART 3 of the constitution will become infructuous and will fail in the surveying of the very purpose of right being enshrined in the constitution.

The Indian legal system finally works on the principle of check and balance, as per the separation of power being given by Montesquie, where it has been right unequivocal stated that where there is overlapping of powers there would likely to be greater chances of arbitrariness in state and leading to tyranny and heroic in the nation.

It also functioned on basis of well-known maxim *ubi jus ibi remedium* where it mean, FOR where there is right, there is remedy, however converse is equally applicable *ebi remedium ubi jus* where it meant for where there is remedy, there is right, both are complementary to each other absence of one would serve the other infructuous and futile.

That is why, the constitution of India is mean to be upheld supreme over all the laws as it is only the constitution that has the stockpile of all rights of the Indians where they are meant to be protected by the Courts or law.

As rightly assailed by Ahmadi, CJ in L Chandra Kumar V. Union Of India[8] the judges of the Supreme Court have been entrusted with the task of upholding the constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the judicial review is a great people in the hand of judged to prevent any overt act which tends to abridge the individuals from their rights which are meant for their overall well-being.

Therefore the power of judicial review of the Courts of law should not be taken for granted, as it prevents all types of overt acts which tend to encroach any right of the citizens of India.

III. DAWN OF JUDICIAL REVIEW

The origin of doctrine of judicial review can be traced back in the epoch of British India. The doctrine of judicial review of United State Of America that served the judicial review across the world as pioneer, the power of judicial review was acquired by the S.C. of U.S. in the case of Marbury v. Madison[9] in regards of judicial review the Indian constitution as much alike of U.S. constitution rather than Britain constitution, where the dogmatic supremacy of parliament is still

[6] AIR 1967 SC 1643
[7] AIR 1980 SC 1789
[8] AIR 1997 SC 1125,1150
[9] 1803

prevalent. Where no court is empowered to struck down any enactments by parliament. As per the matter of fact concerned about judicial review in India it has been considered as a great inspiration and welcomed reform in the field of Indian legal system foundational stones of judicial review is laid down on the basis of the Rule of Law which is swollen with matter of pride heritage.

In India, since the Government Of India Act, 1858 and Indian Council Act, 1861 impose some restriction on the power of governor general in evading laws, but at the time there no provision for judicial review was found.

But the picture has quite changed in India after the advent of the case of Emperor V. Burah[10] where for the first time the concept of judicial review originated in India. In this case the court held that aggrieved party have right to challenge the constitutionality of a legislative act by the Governor General Council in excess of the power given to him by the imperial parliament, the court for first ever unprecedented, adopted the concept of judicial review with limitation on exercise of power then after the case of Emperor V. Burah the concept of judicial review adopted unanimously in several of cases which serve the benchmark to the idea of doctrine of judicial review , in case of Secretrary Of State V. Moment[11] this lordship observed that "the government of India cannot be legislation abridge the fundamental power of court , whereby the court of law empowered to examine the action of the state an legislature which tends to encroach over the rights of citizen" then again in case of Annie Basant V. Government Of Madras[12] whereby the court on the basis of Privy Council observed the demarcation created between the Imperial parliament and subordinate legislature and the Indian legislature enacted by laws going beyond the power delegated, it will be null and void.

By the era of 19th century the Indian courts readily accepted the Doctrine of Judicial Review where there are myriad of cases where the court vehemently assailed that the judicial review is an extraordinary power where it construe the basic structure of judicial review which ought not to be deprived of via amendment under Art. 368 of Indian Constitution by the Parliament. It is only the lex loci which is the supreme in India i.e. THE INDIAN CONSTITUION.[13] There are several cases where it serves the benchmark to the judicial review in India.

At then, there were no specific provision, however how we have been provided with the explicit provision in the constitution of India which firmly establishes the judicial review.

IV. RECENT DEVELOPMENT IN JUDICIAL REVIEW

After the several of cases where the judicial review has been readily adopted by the Indian courts there has been wide recent developments have taken place in judicial review, where the courts have propounded major doctrine being applicable.

- **DOCTRINE OF SEVERABILITY**

[10] 1877
[11] (1913) 40. ILR 391 (cal)
[12] 1918; AIR 1210(Mad)
[13] Keshvanand Bharti v. State of Kerala.1973 SC 1461

Where the doctrine of severability talks about extracting the contradicting provisions from the act or any enactment passed by parliament. The doctrine flows from the Article 13 0f Indian Constitution which implies that where the provisions can be severed from the contradicting provisions of the Act, such contradicting provisions are liable to be declared void to the extent they show contravention with the mandates of Indian Constitution, and other remaining parts of the Act shall be enforceable this doctrine has been considerations of equity and prudence. If the offending provisions of the Act are so inextricably mixed up with the valid parts such that they cannot be severed the entire Act shall be declared void.

In landmark case of A.K. Gopalan V. State Of Madras[14] in this case SEC 14 of Preventive Detention Act was found be violation of Article 14. S.C. held that Sec 14 of Act to be struck down not the whole act. It was also held that the omission of Sec 14 of the Act would not change the Act thus if the Sec 14 can be severed there is no need to void the whole Act.

- **DOCTRINE OF ECLIPSE**

The doctrine of eclipse states that where the pre-constitutional provisions show the contravention Part 3 after the enforcement of Indian Constitution, 1950 such pre-constitutional laws are liable declared void.

But in regard of post-constitutional laws which shows inconsistency with part 3, it is said that they acquired the state of Moribund and a shadow prevails which can be removed by amendment in such in consistent provisions after which they will be valid and enforceable, the roots of eclipse are found in Art 13(1) of Indian Constitution.

- **DOCTRINE OF PROSPECTIVE OVERRULING**

The doctrine of prospective overruling was propounded in the case of Golak Nath V. State Of Punjab[15] where the judges opined that this the substantive need of dynamic society where it implies that the new decisions or enactments shall have prospective applications not retrospective.

In other words the parties before the new enactment or decisions shall be bound by the older precedent. The use of this doctrine overrules and earlier laid down precedent with effects limited to the future cases and all the events occurred before it are bound by the old precedent itself.

- **JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS**

The well-established fact is that Indian constitution possess the unique blend of rigidity and flexibility where the Indian Parliament is empowered to amend the Constitutional mandates under Article 368, but the first ever unprecedented question of whether the Constitutional amendments are inclusive in within the definition of “Law” under Art 13 of Constitution, was raised in case of Shankari Prasad V. Union Of India where the court held that the word law is confined only to the ordinary laws being passed by parliament not the constitutional amendments

[14] 1950 AIR 27(SC)
[15] 1951 AIR 458(SC)

and thus was not subjected to judicial review. The judgment was affirmed in the case of Sajjan Singh V. State Of Rajasthan where once again it was held that the Constitutional amendments are out of the scope of judicial review.

But the scenario has completely changed after the advent of case of Golak Nath V. State Of Punjab where the court of law has overruled the earlier judgments in Sajjan Singh And Shankari Prasad.

In this case the court positively affirmed that the Constitutional amendments are also constituted within the meaning of law under Art 13(2). Thus once again the courts revived the power of judicial review over laws passed by parliament either its statutory law or Constitutional law. The court further observed that the Constitutional amendments are also subjected to judicial review thus the court can scrutinise it.

- **JUDICIAL REVIEW IN ADMINISTRATIVE ACTIONS.**

The scope of judicial review is widened when it became applicable on the administrative actions, where the courts can scrutinise the executive actions of the government by comparing the governmental decisions with canons of the mandates of the constitution and struck down the decision if it found to be in the contravention with the standards set up by the constitution.

This aspect of the judicial review is discussed in detail in the following topic.

V. SPREAD OF JUDICIAL REVIEW

The system of judicial review of Administrative action has been inherited from BRITAIN. It is on this foundation that the Indian courts have built the superstructure of control mechanism. The whole law of judicial review of administrative action has been developed by judges on case to case basis and also based on the judge's discretion case to case. Administrative action is the residuary action which is neither legislative nor judicial.

The recent development that has already been discussed in earlier topic it can be conclusively inferred that judicial review has spread in major arenas of Indian legal system. Where nor the judicial review has expanded its wings of examination and regulation over the executive actions, where its serve the purpose of fairness, impartiality and proportionality, while maintaining effective checks against arbitrariness in discrimination. In other words it can also be said that it serve the function of curbing over the executive power.

The spread of judicial review has land the severe changes in administration of government where the judiciary empowered to examine and curved the arbitrary action of government department Administrative agencies, statutory corporation, regulatory authority and quasi-judicial authority and among others. Unequivocally defined in Black Laws Dictionary where the judicial review meant for court power to review action of other branches of government specially the court power to invalidate legislative and executive action as being unconstitutional.[16].

[16] BLACK's LAW DICTIONARY 8TH EDITION, PAGE NO 864

The examination is categorised broadly where the first to go for its enquiry of competency of a particular body to create laws, rules, regulation and guidelines next is Domain of Administrative law where a competency of administrative authority is checked whether at particular body is acting and taking decision within periphery of constitution mandate.

Therefore the higher courts of law in India is empowered to examine the legislative as well as administrative actions that effects right conferred in part 3 of Indian Constitution, thus, the maintenance of harmonious relationship between citizen and government to be done. Thus, in this manner the court of law behave sentinel to the personal liberty and right of citizens ensuring thereby the fairness, reasonableness and justice in Administration. This has been become concrete by inculcating principles of natural justice as in case of State Of Odissa V. Dr. Binapai Dai[17], whereby it was held the administrative orders which involve civil consequences must confirm with the Principle of Natural Justice the other cases of Maneka Gandhi And Brojo Nath Ganguly[18]serve the benchmark in this regard.

The other case which serves the same purpose is of Siemens Engg. And Mfg. Co. Of India Limited V. Union Of India[19] where the emphasis has been laid down on the following of principles of natural justice in all forms of government actions and diligent adherence to same.

Thus the judicial review ensure the Protection of Individual Liberty by curbing over arbitrariness and unreasonableness in Administrative action through laying down of proper guidelines to be followed and not to undue interference in Administrative actions.

The series of cases is not exhausted here only while the landmark of Lord Green in cases of Association Provinicial Picture Houses Ltd. V. Wednesbury Corporation[20] It was recognised that the court can indeed examine the administrative decision where the courts primary concern should be fairness of process by which and administrative decision but the WEDNESBURRY standards has often misunderstood but in its real sense it means that in the administrative action which is based on wholly irrelevant material or consideration or relevant material is absolutely ignored which should have been taking into consideration, lastly if it is such a decision that no prudent man would have ever arrived at there must be substantial unreasonableness involved there in administrative decision.

The another vital doctrine that flows for judicial review is “Doctrine Of Proportionality” where that entails administration measures must not be more restrict that is required it stresses on substantive and procedural matters the principle contemplates scrutinisation of the decision whether they are in proportion with the purpose required thereby. Thus any administration authority while exercising discretionary power establish that its decision is balanced and in proportion to the object which is sought, and not to jeoparadise individual liberty and right.

[17] AIR 1967 SC 1269
[18] 1966 SCC 156
[19] AIR 1976 SC 1785
[20] (1947) 2ALL ER 680

Lastly the lucid conclusion can be figured out that the judicial review has played the role of protagonist in assurance of fairness, reasonableness, Justice and Equity. Where the protection of individuals right and liberty.

VI. JUDICIAL REVIEW AND CONTEMPRARY WORLD

The judicial review under this head will be discussed in context of two broad headings:

- Judicial review in United State
- Judicial review English Law

JUDICIAL REVIEW IN UNITED STATE

The judicial review in United State plays a vital role invalidating contravention with the mandates of U.S. constitution. The power of judicial review is to be exercised by Supreme Court of U.S. where the court is interested with the responsibility to ensure the individuals liberty as enshrined in constitution of U.S. however the power is not confined only to the supreme court rather the every court is empowered to strike down any law that tends to infringe constitutional mandates of U.S.

The state courts have the power to review state action for compatibility with both state constitutional and federal constitution. The U.S. system of justice administration identically work on basis of check and balanced as established by constitution adopted 1789. The inclusion of fundamental right and its fusion with power or judicial review of court serve the purpose of protection of minority from laws that are created by slim majority.

This has been great impact upon the U.S. political system as S.C. has overturned more than 125 federal statutes 1200 state laws and Municipal ordinance however the same concept of judicial review has encountered several limitations since 1950 the court has decided several prominent cases that has overturned unconstitutional laws while some decisions of the court were contravential decision the restriction have been imposed on exercised of power of judicial review by court where the court turned down any law when cases are brought before them, they cannot issue SUO MOTO decision. The parties seeking review must have locus standi a person cannot ask the court to invalidate any law until and unless the law is applied on them. Thus in spite of several limitations the judicial review playing a significance role in individual’s liberty.

JUDICIAL REVIEW IN ENGLISH LAW

The judicial review in English law provides for supervision of government action. A person who feels that an exercise of such power by a government authority such as a Minister, Local Council or a statutory Tribunal is unlawful that tends to violate individuals rights can ask for review by applying to the administrative courts (a division of High Court) for judicial review of the decision and have it stateside and possibly obtain damages for the suffering. The judicial review of England identically works on the basis of judicial review in India as they are also the court is interested for the duty to protect individual’s right and liberty. The constitutional theory of judicial review is dominated by doctrine of ultra vires under which a decision can only be

stateside when there exorbitant manner as delegated by parliament. There also court serves right and liberty therefore it seems that today the constitution position of judicial review is dictated by the need to prevent the abuse of power by executive as well as to protect individual's right.

VII. CONCLUSION

After the aforesaid discussions over the issue of Evolution is better than Revolution discussion in the light of judicial review, the meaning thereby the gradual developments which are taken place in the dogmatic theory of judicial review are proved to be pioneer in the field of Indian Legal system whereby, the various Reformative theories arisen leading to efficient and appropriate impartment of justice to the citizens of India.

The concept of judicial review possess the procedural and substantial reforms such as, the Principles of Natural Justice that enables courts of law in India to act as a an institution that guard the Fundamental Rights of the citizens being enshrined in the Indian Constitution and proved to be boon in maintenance of harmonial relationship between the government and citizens of India. If, it is considered that evolution is meant for gradual developments taken place in judicial review that led the dawn of Doctrinal theories of Severability and Eclipse has unanimously effectuate better protection of individuals liberty and helped out in elimination of arbitrariness and usurpation of individuals rights it also undoubtedly created an apprehension that judiciary is there to act as absolute sentinel to the citizen that could invalidate any unconstitutional actions or decisions of the government, there is no need for revolution which meant for complete change, because evolution is better than revolution. But several other reforms yet to be bring in judicial review.