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JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS: KEY FEATURES OF CONSTITUTIONALISM

Priyanka Choudhary*

“Within limits, no Judge, and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of entire community.....if it comes in the way, ultimately the whole Constitution is a creature of Parliament.”

—Shri Jawaharlal Nehru¹

ABSTRACT

The term, “constitution” consists of a set of rules or norms creating, structuring and defining the limits of the government, powers and authority. Our constitution, a unique document, is not a mere pedantic legal text; it embodies human values, cherished principles and spiritual norms. It upholds the dignity of man in Bachan Singh Vs. State of Punjab, AIR 1982 SC 1325. Before the advent of democracy, a single authority exercised sovereign powers encompassing legislative, executive and the judicial functions, however, with the advent of democracy, the need for the constitution was felt. Belief in the limited and accountable Government is raison-d-etre of a written constitution. The distinction between the legislative, executive and judicial functions was an important feature of a written constitution. Legislature enacts laws, enforced by the

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1. Constitutional Assembly Debates, 1195 Vol. IX, No. 31.

executive, while the Judiciary interprets and implements these laws. The author in the present submission attempts to analyze and investigate the conceptual context of the term constitutionalism, followed by the narration of its most important features i.e. fundamental rights and judicial review. The subsequent aspect deals with the significance and impact of fundamental rights and judicial review on functioning of the government and intervention by judiciary to protect these rights.

Key Words: Constitutionalism, Fundamental Rights, Judicial Review, Limited Government

INTRODUCTION

IN some minimal sense of the term, a “constitution” consists of a set of rules or norms creating, structuring and defining the limits of the government, power and authority. Our constitution, a unique document, is not a mere pedantic legal text; it embodies human values, cherished principles, and spiritual norms. It upholds the dignity of man in *Bachan Singh Vs. State of Punjab*.²

Before the advent of the democracy, a single authority exercised sovereign powers encompassing legislative, executive and judicial functions. With the advent of democracy, which implies governance with the consent of the governed, the need for the constitution was felt. Belief in the limited and accountable Government is *raison-d-etre* of a written constitution.¹ The Distinction between the legislative, executive and judicial functions was an important feature of a written constitution. Legislature enacts laws, which are enforced by the executive, while the Judiciary interprets and implements these laws.

CONCEPT OF CONSTITUTION AND CONSTITUTIONALISM

A constitution is “[a] charter of government deriving its whole authority from the governed”.³ The constitution sets out the form of the government. It specifies the purpose of the government, the power of each department of the government, the state-society relationship, the relationship between various governmental institutions, and the limits of the government.

2. AIR 1982 SC 1325.

3. Black's Law Dictionary.

However, constitutionalism is the idea, often associated with the political theories of John Locke and the “founders” of the American republic, that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. Constitutionalism, as prescribed by a constitution, is the limitation of government to create a balance between the powers of the government on the one hand and the right of individuals on the other.⁴

The fundamental essence of a constitution is to prevent both tyranny and anarchy. To achieve this, it must sufficiently empower the government to enable it to be strong enough to operate effectively while imposing reasonable restraints on it that do not make it too weak and create the risk of anarchy. Hence, a constitutional government is a government controlled by rules as opposed to an arbitrary government; a government actually limited by the terms of the constitution and not a government limited only by the desires and capacities of those who exercise power.⁵ The absence of meaningful restrictions therefore made it almost impossible for many countries to practice constitutionalism.⁶

PRINCIPLE OF CONSTITUTIONALISM

Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited govt. is the central point of constitutionalism.⁷ It is the anti-thesis of arbitrary powers.⁸ The underlying difference between the ‘Constitutionalism’ and ‘Constitution’ is that a Constitution ought not merely to confer powers on the various organs of the Government but also seek to restrain those powers.

The central principle in constitutionalism is the respect for human worth and dignity. It is by no means a static principle and the core

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4. Varun ChhaChhar and Arun Singh Negi, Constitutionalism- A Perspective, available at:<http://ssrn.com/abstract=1527888>
 5. Keeneth Wheare, *Modern Constitutions*, 137 (Oxford university Press, London, 1966).
 6. Charles M. Fombad, “Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa”, 55 *AJCL* 6 (2007).
 7. Barry R. Weingest and Donald A. Wittman, *The Oxford Handbook of Political Economy*, 289 (Oxford University Press, London).
 8. Giovanni Sartori, “Constitutionalism: A Preliminary Discussion”, 56 *Am. Pol. SC Rev.* 853 (1962).

elements identified are bound to change as better ways are devised to limit government and protect citizens, it is the institutionalization of these core elements that matter. Nevertheless, constitutionalism needs to be distinguished from both democracy and the rule of Law.⁹

FUNDAMENTAL RIGHTS AND CONSTITUTIONALISM

“Fundamental rights should be such that they should not be liable to reservation and to changes by Acts of legislature”

—**Begum Aizaz Rasu**¹⁰

Fundamental rights represents the modernized version of the traditional natural rights. In a much narrower sense, the aim of having declaration of Fundamental Rights is the certain elementary freedom of the individual such as his right to life, liberty, freedom of speech etc, and should be regarded as inviolable under all conditions and that the shifting majorities in the Legislatures of the country should not be able to temper with them.¹¹ In other words, the basic aim of fundamental rights is to impose fetters on the states and establish a limited government that has been called a *government of laws not of men*.¹² It is to preserve certain basic human rights against interference by the State.¹³

In United States of America

Ever since the halcyon days of French revolution and declaration of rights of Man, the concept of bill of rights, constitutionally defined and guaranteed, has become an article of faith for liberalism. The Supreme Court of U.S.A. observed in the same vein that “the very purpose of Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and establish the as legal principles to be apply by the Courts. One’s right to life, liberty, to free speech, a free press and other fundamental rights may not be submitted to vote; they depend on outcome of no election.”¹⁴

9. *Supra* Note 6 at 8.

10. Constitutional Asembly Debates, 264 Vol. VII, 1948.

11. *Lakshmindrav. The Commissioner, Hindu religious Endowments*, AIR 1952 Mad 613.

12. Brij Kishore Sharma, *Introducton to Constitution of India*, 67 (PHI Learning Private Limited, New Delhi, 6thedn. 2011).

13. Prof. Narender Kumar, *Constitutional Law of India*, 68 (Allahabad Law Agency, Delhi, 6th Ed., 2007).

14. *West Virginia State Board of Education Vs. Barnette*, (1943) 319 U.S. 624.

In America, the Bill of Rights was introduced in 1789 by the first ten amendments initially it was thought that there was no need of bill of rights against the local/state government as they were representative of the local people (in a democratic form of Government). But gradually it was realized that state governments could also violate rights. For instance in a famous case i.e. the red Scott case, a Federal Government was in fever of abolishing slavery but the State Governments opposed it. The Federal Government made a law abolishing slavery against which the State Governments appealed in Supreme Court. The Supreme Court in the famous *Dred Scott Case* held that the property could not be taken away without compensation and as slaves were property, slavery could not be abolished. This led to a civil war in U.S., as a result of which Abraham Lincon came to power and in 1864 by Amendments 13, 14, 15, slavery was finally abolished. Thereafter, the fundamental Rights are guaranteed to the citizens against the State Government also.¹⁵ Moreover, the rights provided under American “Bill of Rights” are binding on the executive as well as Legislature. The Courts in America, therefore, are competent to declare, an act of congress, as unconstitutional, on the ground of violation of any provision of their bill of Rights.

In India

Fundamental Rights are an important principle for promotion of the principle of Constitutionalism.¹⁶ The idea of fundamental rights in India originated in the 19th Century, though there was no bill of rights prior to the adoption of Constitution.¹⁷ Till the framing of Government of India Act, 1935, there was in affirmation of Fundamental Rights. Both the Simon Commission and the Joint Parliamentary Committee were opposed to the inclusion of a declaration to that effect in a constitutional document. They held that the declaration of rights create a grave risk of large no of laws being declared in valid and would impose an embarrassing restriction on the powers of Legislature. The other view is that a declaration of fundamental rights in the constitutional document is necessary for the welfare of the people.

The framers of Indian constitution took inspiration from the Magna Carta of England, the Declaration of Rights of Man and Citizens (France) and U.S. Bill of Rights. The declaration of Fundamental Rights in the

15. (1857) 60 US 393.

16. M. P. Jain, *Indian Constitutional Law*, 6 (Wadhwa Publications, Nagpur, 5th edn, 2006).

17. P. Sarojini Reddy, *Judicial Rewies of Fundamental Rghts*, 7 (National Publishing House, Jaipur, 1976).

Constitution serves as reminder to the Government in power that certain liberties, assured to the people by the Constitution are to be respected.

Under the Indian Constitution, these rights are not meant merely to be pious enunciation of certain principles, but they constitute express constitutional provisions limiting the legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation.¹⁸

The Fundamental Rights, in Indian Constitution have been grouped under seven heads as follows:

- (i) *Right to Equality* comprising Articles 14 to 18.
- (ii) *Right to Freedom* comprising Articles 19 to 22 which guarantee several freedoms.
- (iii) *Right against Exploitation* consists of Articles 23 and 24.
- (iv) *Right to Freedom of Religion* is guaranteed by Articles 25 to 28.
- (v) *Cultural and Educational Rights* are guaranteed by Articles 29 and 30.
- (vi) *Right to Property* is now very much diluted and is secured to some extent by Articles 31-A, 31-B, 31- C.
- (vii) *Right to constitutional remedies* is secured by Articles 32 to 35.

These articles provide the remedies to enforce the Fundamental Rights and of these the most important is Article 32. The concept of Fundamental Rights protects individuals against excesses of the state and constitutes by and large, a *Right to Constitutional Remedies* limitation on the government.

Hon'ble Supreme Court expressed its opinion in *I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others*¹⁹ that the Constitution is a living document. Therefore, it is important as well as necessary to keep in mind that due regard should be given to various precedents while construing the doctrine of basic structure as these precedents led to expansion and development of law.

Further, it is to be noted that principle of constitutionalism is now a legal principle and the protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

18. S.N.Ray, *Judicial Review and Fundamental Rights*, 126 (Eastern Law House Calcutta. 1974).

19. AIR 1999, SC 3197.

In a judgment,²⁰ Hon'ble Supreme Court also held that "The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself."²¹

In *Indra Sawhney and Others. Vs. Union of India (UOI) and Others* the court opined:

On one hand, our judiciary elicits such intellectual responses that "Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism."²²

Moreover also the case of *S. S. Bola Vs. B. D. Sardana*,²³ the court opined:

"A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the State without trespassing upon the field assigned or powers conferred upon the other wings and at the same time maintain a delicate balance on even keel".

The most important scheme for promotion of constitutionalism was laid down by the court in the *Maneka Gandhi Vs. Union of India*²⁴ as a seminal principle of constitutional interpretation which is that there cannot be a mere textual construction of the words of the Constitution. Those words are pregnant with meanings that unfold when different situations arise. Furthermore, Bhagwati J. said, "The procedure in Articles 21 must be 'right and just and fair' and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Articles

20. *E.P. Royappav. State of Tamil Nadu*, (1974) 2 SCR 348.

21. *Rameshwar Prasad and Others Vs. Union of India (UOI) and Anr.* (2006) 2 SCC 1.

22. 1992 Supp (3) SCC 212.

23. 1997) 8 SCC 522.

24. AIR 1967 SC 1507.

21 would not be satisfied. The expression "procedure established by law" extends both to substantive as well as procedural law. A procedure not fulfilling these attributes is no procedure at all in the eyes of Articles 21".

The similar observations were also made in *L. Chandra Kumar Vs. Union of India and Others*,²⁵ by Chief Justice Ahmadi affirmatively held that judicial review is one of the basic features of our Constitution. Thus, Fundamental rights impose the limitation on the powers of the legislatures. All laws whether made by legislature or by a delegated authority and all executive acts must respect and conform to the fundamental rights.

JUDICIAL REVIEW AND CONSTITUTIONALISM

Constitution is only as good as the mechanism provided within it for ensuring that implementation of its provisions done properly and that any violations of it are promptly sanctioned. An important bulwark of constitutionalism is therefore the existence of an efficient and effective mechanism for controlling and compelling compliance with the letter and spirit of the constitution.

Concept

The literal meaning of the terminology judicial review refers to the revision of the decree or sentence of an inferior court by a superior court. It has a more technical significance in public law, particularly in countries having a written constitution which are founded on the concept of limited government. The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. In *Marbury Vs. Madison*²⁶, the Supreme Court made it clear that it had the power of judicial review. Chief Justice George Marshall said, "Certainly all those who have framed the written Constitution contemplate them as forming the fundamental and paramount law of the nations, and consequently, the theory of every such Government must be that an act of the legislature, repugnant to the Constitution is void".

Origin

Despite the modifications that it has undergone, Judicial Review remains an American contribution to the art of government.²⁷ It was evolved by the American courts for the very first time in *Marlbury Vs.*

25. AIR 1997 SC 1125.

26. (1803) 1Cranch 137.

27. *Supra* Note 18 at 38.

Madison.²⁸ This case laid down judicial foundation of 'judicial review' under a written constitutional law. Chief Justice John Marshall in the present case observed that it is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessary expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each.

Basis of review power of the Judiciary

The power of judicial review is explicitly provided for in India in the context of the federal structure with defined and delimited competence of the central and state legislatures. It is based on the assumption that the laws made by the competent legislatures must be in accord with the detailed scheme of distribution of powers embodied in the seventh schedule to the constitution. The inclusion of fundamental rights,²⁹ with guaranteed provisions for their enforcement through the Supreme Court³⁰ and the High Courts,³¹ invites Judicial review most decisively, and includes the State, including the Government and Parliament of India and the Government and legislatures of each states and all local or other authorities within the territories of India under its preview".³²

There is supremacy of Constitution in U.S.A as well as in India and, therefore, in case of conflict between the Constitution and the Acts passed by the legislature, the Courts follow the Constitution and declare the acts to be unconstitutional and, therefore, void. The standards applied by the courts in judicial review must ultimately be justified by Constitutional principles, which govern the proper exercise of public power in any democracy.³³

JUDICIAL REVIEW AS A COROLLARY TO LIMITED GOVERNMENT AND CONSTITUTIONAL SUPREMACY

Under Chief Justice Marshall's theory, Judicial Review is less a necessary adjunct to the written constitution than a supplement to limited government and paramount constitution. The supremacy of the organic

28. *Supra* Note 23.

29. Article 13 (2) of The Constitution of India.

30. Article 32 of The Constitution of India.

31. Article 226 of The Constitution of India.

32. Article 12 of The Constitution of India.

33 Jeffery Jowell and The Rt Hon The Lord Woolf, *Principles of Judicial Review*, 15 (London Street & Maxwell 1999).

constitutional law, and the fundamental distinction between this law and ordinary law quite logically imply that any act of ordinary law making bodies, which contravenes the provisions of the paramount law, must be void and there must be some organ and some mechanism by and through which this can be done. Once the Constitution is considered as supreme law of the land, the powers of all the other organs of government are considered as limited or governed by the provision's of this law. It follows that not only legislature but also executive, and all administrative authorities, are equally limited by its provisions, so that any executive or administrative act which contravenes the provision of the constitution must, similarly be void and courts must invalidate them.

Today the main question is not whether there should be judicial review in the constitution of a country but to what extent and how it should remain and what purpose it should fulfill. The success or failure of a scheme of judicial review depends very much on how and to what extent it is attuned to the lofty ideal of constitutionalism as well as to the spirit and temper of a dynamic society.

United State of America

Judicial review in the United States refers to the power of a court to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the constitution itself. Article III of the U.S. Constitution states, "*the judicial power of the United States, shall be vested in Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish...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 their authority...In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.*"

Thus, judicial review as understood in the U.S.A., rests on a very simple foundation. The Constitution is the supreme law, which was ordained by the people, the ultimate source of all political authority. It confers limited powers on the government. These limitations derive partly from the fact that these powers are enumerated- government can not

exercise the power not granted to it – and partly certain express prohibitions upon its powers or upon the manner of their exercise. If the government consciously or unconsciously oversteps these limitations, there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to vindicate and preserve inviolate the will of the people as expressed in the Constitution, courts exercise this power.³⁴

In *Marlbury Vs. Madison*.³⁵ Chief Justice Marshall made judicial review not only the chief cornerstone of the constitutional superstructure, but at the same time the most significant of the American contribution to the art of the government. Moreover, this doctrine was the brainchild of Justice Marshall who stated that judges are directed by the constitution itself, took oath to support the constitution, which constitutes the paramount law of the land. It is a duty placed upon judges to review any law which is repugnant to the constitution. The Supreme Court asserted this power of judicial reviewing over both federal and state laws in *Fletherv. Peck*³⁶ and thereby secured for itself the role of chief interpreter and arbiter of constitution.³⁷

Therefore, using the American Constitution as an example, we can now analyze each component of the constitution more carefully. Under power construction and power lodging, the two key concepts are “separation of power” and “checks and balances”. In the United States, one of the key authorities and the ultimate authority that the courts rely on in conducting judicial review is the American Constitution. American courts have the power to invalidate legislative or administrative acts of other departments for violations of the Constitution. American courts also enjoy the exclusive right to interpret the Constitution. These are generally true both at the federal level and at the state level. That is, similar to federal courts, state courts usually have the power to interpret state constitutions and review acts of state legislatures and other branches of the state governments. Because of the power of independent judicial review, American courts, consisting of independent judges dedicated to legal reasoning, become a bulwark against legislative and administrative encroachments on the letter and spirit of the American Constitution. As such, the supremacy of the Constitution is protected.³⁸

34. *Supra* Note 18 at 38.

35. *Supra* Note 23.

36. 10 U.S. (6 Cranch) 87.

37. *Supra* Note 4.

38. *Ibid*.

INDIA

The Constitution of India, in this respect, is more a kin to the U.S. Constitution than any other Constitution. Under the constitution of India, powers are limited in the two ways. Firstly, there is the division of powers between the Union and the States. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. Secondly, the Supreme Court stands in a unique position wherein it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.

Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land. In fact, the study of constitutional law may be described as a study of the doctrine of judicial review in action. The courts have power to strike down any law, if they believe it to be unconstitutional.

Moreover, this power is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as Art 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372.³⁹

Article 372 (1) establishes the judicial review of the pre-constitutional legislation similarly. Article 13 specifically declares that any law, which contravenes any of the provision of the Part III of Constitution of India i.e. fundamental rights shall be void. The same has also been observed by our Supreme Court. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of inconsistency between union and state laws, the state law shall be void.

Nevertheless, in several cases, it has held that the Supreme Court can act as the custodian, defender of rights of people and democratic system of government only through the judicial review. In *Keshwanand Bharti Vs. State of Kerala*,⁴⁰ it was held that the judicial review is a 'basic feature' of the constitution and cannot be amended. The scope of judicial review is sufficient in India, to make Supreme court a powerful agency to control the activity of executive and the legislature.

39. Manoj Mante, Globalization, Rights, and Judicial Review in the Supreme Court of India 25 *Washington International Law Journal* 643 (2016).

40. AIR 1973 SC 1461.

A recent judgment of *I.R. Coelho, State of Tamil Nadu*⁴¹ also shows how the notion of judicial review can be used to maintain separation of power and supremacy of constitution, the two important notion of Justice, whenever any of the organs transgresses its limit, judicial review is there to maintain check and balance. In no way, judicial review makes the Supreme Court a rival of the Parliament. If democracy is to become consequential in India, it should be based on two important factors: enforcement of the rule of law and the transformation of the political governance –each dwelling upon the other. The judiciary is well suited to support both of these.⁴²

Under our Constitution, judicial review can conveniently be classified under three heads:⁴³

- (i) *Judicial review of Constitutional Amendments*.—This has been the subject-matter of consideration in various cases by the Supreme Court; of them worth mentioning are: *Shankari Prasad case*,⁴⁴ *Sajjan Singh case*,⁴⁵ *Golak Nath case*,⁴⁶ *Kesavananda Bharati case*,⁴⁷ *Minerva Mills case*,⁴⁸ *Sanjeev Coke case*⁴⁹ and *Indira Gandhi case*⁵⁰. The test of validity of Constitutional amendments is conforming to the basic features of the Constitution.
- (ii) *Judicial review of Legislation of Parliament, State Legislatures as well as Subordinate Legislation*.— Judicial review in this category is in respect of legislative competence and violation of fundamental rights or any other Constitutional or legislative limitations.
- (iii) *Judicial review of Administrative Action of the Union of India as well as the State Governments and authorities falling within the meaning of State*. It is necessary to distinguish between

41. AIR 2007 SC 861.

42. *Supra* Note 4.

43. Justice Syed Shah Mohammed Quadri, "Judicial Review of Administrative Action", 6 SCC (Jour) 1 (2001).

44. *Shankari Prasad Singh Deo Vs. Union of India*, AIR 1951 SC 458.

45. *Sajjan Singh Vs. State of Rajasthan*, AIR 1965 SC 845.

46. *Golak Nath Vs. State of Punjab*, AIR 1967 SC 1643.

47. *Kesavananda Bharati Vs. Union of India*, AIR 1973 SC 1461.

48. *Minerva Mills Vs. Union of India*, AIR 1980 SC 1789.

49. *Sanjeev Coke Mfg. Co. Vs. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147.

50. *Indira Nehru Gandhi Vs. Raj Narain*, 1975 Supp SCC 1.

'judicial review' and 'judicial control'. The term judicial review has a restrictive connotation as compared to the term judicial control. Judicial review is 'supervisory', rather than 'corrective', in nature. Judicial review is denoted by the writ system which functions in India under Articles 32 and 226 of the Constitution. Judicial control, on the other hand, is a broader term. It denotes a much broader concept and includes judicial review within itself. Judicial control comprises of all methods through which a person can seek relief against the Administration through the medium of the courts, such as, appeal, writs, declaration, injunction, damages statutory remedies against the Administration.⁵¹

The Supreme Court was convinced that anything that destroys the balance between the two parts will *Ipsa facto* destroy an essential element of the basic structure of our constitution.

COMPARATIVE STUDY OF JUDICIAL REVIEW BETWEEN INDIA AND U.S.A.

The scope of Judicial Review in India is somewhat circumscribed as compared to that in the U.S.A. In India the fundamental rights are not so broadly corded as in the U.S.A. and limitations there on have been stated in the Constitution itself and this task has not been left to the courts. The constitution makers adopted this strategy as they felt that the courts might find it difficult to work act the limitations on the fundamental rights and the same better be laid down in the constitution itself. The constitution makers also felt that the Judiciary should not be raised at the level of 'Super legislature', whatever the justification for the methods logy adopted by the constitution makers, the inevitable result of this has been to restrict the range of judicial review in India.

It must, however, be conceded that the American Supreme Court has consumed its power to interpret the constitution liberally and has made so thorough a use of the due process of law clause that it has become more than a more interpreter of law. However, took good care not to embody the due process of law clause in the constitution. On the contrary, the framers of the Indian constitution decided to embody the term 'procedure established by law'. It can invalidate laws if they violate provisions of the constitution but not on the ground that they are bad laws. In other words

51. M.P. Jain and S.N. Jain, *Principles of Administrative Law: An Exhaustive Commentary on the Subject Containing Case-law Reference* (Indian & Foreign) 1779 (Wadhwa and Company Nagpur, New Delhi, 6th edn. 2007).

the Indian Judiciary including the Supreme Court is not a Third Chamber claiming the power to sit in judgment on the policy embodied in the legislation passed by the legislature.

Thus, in the words of Justice Cardozo The chief worth of judicial review rather lies "in making vocal and audible ideas that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing the choice within the limits where choice rangers."⁵²

CONCLUSION

To dispose the current controversy as one that is bound to arise in systems where there are coordinate organs of government as in India where such controversies arise frequently. The primacy of parliament in India is unquestionable and half-hearted compromise between judicial supremacy and parliamentary supremacy in a predominant parliamentary form of government has provided to fail any satisfactory or viable basis for the operation of the government.

Moreover, from India, the development of judicial review and the basic framework can draw the following conclusions. First, India is an important judicial review of the constitutional system in Indian capitalism. The rule of law plays a positive role in safeguarding the constitutional system. Secondly, the main function of judicial review of the system is to balance the legislative and administrative constraints, and in essence is the interests of all sectors.

Furthermore, for constitutional provisions to be meaningfully and effectively operative there must be institutional and cultural machinery, which is partially created by the constitution itself, to implement, enforce and safeguard the constitution. Judicial Review is one of the key component in implementing and safeguarding the spirit of Constitutionalism. An independent judiciary, independent constitutional review, and the notion of the supremacy of law all work together to ensure that the letter and spirit of the constitution are complied with in the working of a constitutional government. Constitutionalism is the philosophy of the constitution, which imposes limitation upon the exercise of power. So the overall view can be concluded in the words of Frankfurter, J. that Judicial review, itself a limitation on the popular government, is a fundamental part of our constitution.

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52. B.N. Cardozo, *The Nature of Judicial Process*, 94 (Universal Law publishing Co. Pvt. Ltd., 2004).

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