DISSERTATION

Judicial Review: A juridical Analysis
With Special Reference to India, UK and USA

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DECLARATION

I, Vayuna Gupta, bearing roll no. 19ML027, do hereby declare that the dissertation submitted is original and is the outcome of the independent investigations/ research carried out by me and contains no plagiarism. The dissertation is leading to the discovery of new facts/ techniques/ correlation of scientific facts already known. This work has not been submitted to any other University or body in quest of a degree, diploma or any other kind of academic award.

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CERTIFICATE

This is to certify that the dissertation entitled "Judicial Review: A Juridical Analysis, With Special Reference to India, UK and USA" has been prepared by Vayuna Gupta under my supervision and guidance. The dissertation is carried out by her after careful research and investigation. The work of the dissertation is of the standard expected of a candidate for Master of Laws [LLM] in Constitutional Law and I recommend it be sent for evaluation.

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CASE LAWS

INDIA

1. A.K Gopalan v. State of Madras AIR 1950 SC 27.
2. Bhikaji Narain v. State of Madhya Pradesh 1955 2 SCR 589.
3. IC Golakhnath v. State of Punjab AIR 1967 SC 1643
4. Indira Gandhi v. Raj Narain 1975 AIR 865
5. IR Coelho v. State of Tamil Nadu AIR 2007 SC 861
6. Kameshwar Singh v. State of Bihar (1954) SCR 1
7. Keshavnanda Bharati v. State of Kerela (1973) 4 SCC 225.
8. Kihota v. Zachillu (199) Supp (2) SCC 651
9. L. Chandra Kumar v. Union of India AIR 1997 SC 1125.
10. Madras v. Champakam Dorairajan (1951) SCR 525.
11. Minerva Mills v. Union of India AIR 1980 SC 1789.
12. Sajjan Singh v. State of Rajasthan AIR 1965 SC 845.
13. Sakinala Harinath v. Andhra Pradesh (1993) 2 An WR 484.
14. Shankari Prasad v. Union of India AIR 1951 SC 458.
15. Sunil Batra v. Delhi Administration AIR 1978 SC 1675.

UNITED KINGDOM

1. Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223
2. Bellinger v. Bellinger [2003] 2 AC 467 (HL).
3. Chisholm v. Georgia 2 US (1 Dall) 419 (1793)
4. Dead Scott v. Sandford 60 US 393 (1857)
5. Dr. Bonham's case 8 Co. Rep. 107.
6. Ghaidan v. Mendoza [2004] 2 AC 557 (HL).
7. Pollock v. Farmers' Loan and Trust Co 157 US 429 (1895)
8. R v. Lord Chancellor [2018] EWHC 2094
9. R. v. A [2002] 1 A.C 45
10. R. v. Secretary of State for Education and Employment [2007] 7 WLUK 424.
11. R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Limited (and others) [2011] 2 All ER 929.

12. R. v. The Prime Minister [2019] UKSC 41.

UNITED STATES OF AMERICA

1. Brandenburg v. Ohio 395 US 44 (1969).
2. City of Ladue v. Gilleo 512 US 43 (1994).
3. Coleman v. Miller 307 US 433 (1939)
4. Furman v. Georgia 408 U.S 238 (1972).
5. Harper v. Virginia Board of Elections 383 U.S 663 (1966).
6. Hylton v. United States 3 US (3 Dall.) 171 (1769).
7. Iancu v. Brunetti 588 US 139 (2019).
8. Marbury v. Madison 5 U.S 137.
9. Martin v. Hunter's lessee 14 US 304 (1816).
10. McCulloh v. Maryland 17 US (4 Wheat) 316 (1819).
11. Reed v. Town of Gilbert, Arizona 576 US 155 (2015).
12. Roe v. Wade 410 US 113 (1973).
13. United States v. Carolene Products Co. 304 US 144 (1938).
14. Youngstown Sheet Tube Co. v. Sawyer 343 US 579 (1952).

CHAPTER I: INTRODUCTION

Every nation state is governed by three primary organs- the legislature, the executive and the judiciary. The legislature makes law and the executive implements them. The judiciary is entrusted with the task of protection of people and upholding the rule of law. The doctrine of separation of powers assigns individual responsibilities to each organ, as those explained above, so that none of them conflict with one another. While some nations practice a strict separation of powers, some do not practice water tight compartmentalization for separation but rely on checks and balances to ensure that no organ exceeds the powers otherwise assigned to it. Within the ambit of this arises the concept of judicial review. While the legislature comprises of people's duly appointed representatives, in order to ensure there is no concentration of power, judiciary exercises the power of review in a democracy. Judicial review is a process by which the assigned judicial body reviews the action of a public body. It is not only limited to individual rights and can mean over and beyond. It may be carried out by regular courts or via constitutional courts. While the UK adheres to the idea of parliamentary sovereignty, India and US abide by the principle of constitutional sovereignty. This causes major difference in their idea of judicial review. The scope, rationale and limitations of judicial review in the countries vary significantly.

UK follows the Wednesbuy Principle making it very difficult to invoke judicial review in the first place. Under the principle, courts are to interfere in the decision of the executive or the legislature only when it is "*so unreasonable that no reasonable*" authority should have done it. [1] UK is a strong believer of the concept of parliamentary sovereignty. But, with its association with the EU, there came certain supranational legislations that mandatorily needed basic rights to be protected within the UK. In order to balance this idea of parliamentary supremacy and its association within the EU, UK has limited the judicial review of primary legislations in violation of the EU to mere declaration of non-compatibility rather than non-enforceability. The Human Rights Act [hereinafter 'HRA'] mandates that all laws must be compatible to the European Convention of Human Rights [hereinafter 'ECHR']. This

[1] Gordon Anthony, "Civil Rights" And the reach of Judicial Review in UK Public Law, 53, ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTOS NOMINATAE, 7, 10, (2012).

declaration of incompatibility does not impact the enforceability of the legislation, it is merely an acknowledgement for the Parliament to choose to alter the legislation accordingly. The last word is theirs. UK courts have read words, sometimes to the extent of provisos and paragraphs into legislations to ensure their compatibility to the HRA and ECHR. Thus, with respect to primary legislations it can be noticed that courts have given it extensive interpretation while limiting themselves in principle to the ideology of parliamentary supremacy. Judicial review for delegated legislations is widely practiced in UK, with authority to declare it as void as per Part 54 of the Civil Procedure Rules.

Power of judicial review and that to declare a legislation void are identified in the Indian Constitution under Arts. 13(2), 32 and 226. Both, the SC and HC have the powers to declare a legislation as void under A. 13(2), if it infringes Part III of the Constitution. HCs have an additional power to declare them void if they infringe on any other parts of the Constitution as well. Both, primary as well as secondary legislations may be declared as void by courts in India under A. 13(2). The landmark case of *Keshavnanda Bharati* v. *Union of India* put in basic structure of the constitution as unalterable. Courts in India eventually, by activism, identified judicial review in itself as a part of the basic structure of the constitutionally sovereign nation, thereby making it unalterable by the parliament.

J. Marshall developed the concept of judicial review in the USA, reading it as an inherent function of the judiciary. The judicial supremacy under Article VI of the US Constitution has been the major source of upholding the *grund norm* (fundamental norm laying the basis of a legal system) of the country as well as development of the principles. The Supreme Court of the USA can declare any legislation as void. The state as well as federal Supreme Courts have equal power to do so. The only area where the US constitutional jurisprudence draws a line is for declaration of constitutional amendments as void. They read them to be political pieces, outside any direct influence of the judiciary. The only method for the parliament to undo a Supreme Court decision is to amend the Constitutional provision itself under which it was passed. Constitutional amendment procedures in the USA are long and tedious, making this very difficult.

In some nations, as discussed above, the judiciary has the last say when it comes to judicial review of legislations, the legislature is constitutionally mandated to adhere to the opinion and suggestions of the judiciary. In others, the legislature is not bound to adhere to the opinion of the judiciary and has the freedom to choose to stick to the original draft of the legislation. Mark Tushnet calls the former system, a system of strong form of judicial review [hereinafter 'SFJR'] and the latter a weak form of judicial review [hereinafter 'WFJR']. The aim of this paper is to critically evaluate the advantages and disadvantages of the two systems of judicial review mentioned above. The paper will begin by explaining the importance of judicial review for any democracy and move on to a detailed description of the WFJR. It will look into the theoretical aspects of the concept and models employed in countries such as UK following the WFJR. The next part of the essay discusses the SFJR. It is herein that a study of the theoretical framework of a SFJR for a democracy will be undertaken with US and India as the case study at hand.

The author, then, will compare the two forms of judicial review as per her understanding. The paper will try to understand whether India may be able to benefit positively by deriving from either the UK or the US model of judicial review. Mark Tushnet has propounded the theory of WFJR and SFJR. The author attempts to navigate the jurisdictions – UK, US and India into these theories as per the practical application indulged in by both of them.

1.1 LITERATURE REVIEW

1. An article by Stephen Gardbaum titled "Are Strong Constitutional Courts Always a Good Thing for New Democracies?" published in volume 53 (285) of COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2015) looks at the impact of the strong and weak form of judicial review from the perspective of the political climate in every country. The issue herein is that the article focuses more on establishing that independence of the judiciary is more important than a system of judicial review. While, this may be true it deviates focus from the aspect of critically analysing the two forms. It ends with stating that weak form of constitutional review might be the requirement for certain

democracies. The issue is that it comes across as though weak form is a compromise while trying to balance the larger issue of political climate. Nevertheless, the article does provide the author with a fresh perspective that there is a world beyond mere theoretical considerations which influences the form of judicial review adopted by a country.

2. An article by Jeremy Waldron titled "The Core of the Case against Judicial Review " published in volume 115(6) in THE YALE LAW JOURNAL (2006) argues that judicial review as a practice does not serve any end in a democratic set up. So, instead of really arguing what the form of the review must be like, it argues that there should not be a system of judicial review where the issue is on recognition of rights in the first place since legislatures are elected representatives to take decisions keeping the need of the nation in mind. This is a very strong view in times wherein the court are almost uniformly recognized as the best organs for protection of human rights. The article when read comes off as over ambitious in the faith it extends to the elected representatives of nations.

3. An article by Aileen Kavanagh titled "What's so weak about "weak-form review"? The case of UK Human Rights Act 1998"' published in volume 13(4) in INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2015) re-evaluates the distinction between the strong and weak form of judicial review given by Mark Tushnet. It establishes that looking at the UK jurisdiction from the strict lens of strong and weak form of judicial review risks distorts some of key features important to understanding it. She states that there are numerous instances in UK where though the legislature has the last word, it factors in the opinion of the judiciary making suitable alterations to the legislation. The article is particularly useful in looking at the practicality of the forms of review in varied jurisdictions.

4. An article by Rosalind Dixon titled "'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited"' published in volume 5(3) of INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2007) develops the concept of 'constitutional dialogue'. The article is written in the

background of South African Constitutional jurisprudence. It focuses on establishing that every country may determine the extent of their judicial review on the basis of their socio-economic needs and contextual set up. It leans towards a weak form of judicial review while ensuring there is constitutional dialogue. The article is particularly useful since it draws from the experiences of a less developing country rather than the established democracies. Moreover, it provides the author with a fresh line of thought and understanding within which issues are/can be dealt with in such nations.

5. An article by Rosalind Dixon titled "Weak-Form Judicial Review and American Exceptionalism" published as University of Chicago Public Law & Legal Theory Working Paper No. 348, (2011) aims at comparing the form of judicial review in the US with the newer democracies in the world. It suggests that though most of these newer democracies follow a weak form of judicial review, there are no instances wherein the legislature has used its power to over-ride the judiciary. Moreover, the context in which all these democracies developed, paved the way for a weak form of judicial review. Though, newer democracies practice a weak form of judicial review, there is as such no indication that it limited the purpose judicial review as such intended to serve. The novelty factor in the article is that, while most scholarship tends to incline towards the US form of judicial review, this paper in fact ends with suggestions for the US inspired by the newer democracies in the Commonwealth.

6. An article by Thomas Raine titled "*Judicial Review under the Human Rights Act*" published in volume 1 of NORTH EAST LAW REVIEW (2013) written primarily in the context of the UK, focuses more on judicial techniques to interpret legislations under the Human Rights Act. It, while understanding that UK has a parliamentary democracy, advocates for the judiciary to show deference towards the law maker in the nation.

7. A book by Colin Turpin and Adam Tomkins titled "British Government and the Constitution" (7th edn., 2011) thoroughly analyses the development of Constitutional Law in UK. It makes a detailed analysis of judgments of the SC, ECHR and European court of Justice. Since UK does not have a codified constitution, the insights in the book are particularly useful. It states the ideals of constitutional law as developed in the UK. The book analysis the federalism and devolution of power in the UK as well. The presence of a crown differentiates UK from other democracies. The book takes that into consideration as well. The book has a dedicated chapter to judicial review within UK courts. It the perfect, go-to book for a holistic idea on UK constitutionalism.

8. An article by Gordon Anthony titled "Civil Rights And the reach of Judicial Review in UK Public Law" in volume 53 of ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTOS NOMINATAE, (2012) analyses the impact of Human Rights Act in UK Public Law. It analyses the relationship between UK Common Law and the ECHR for protection of Human Rights. The presence of ECHR encouraged the UK government to inculcate, the otherwise absent concept of judicial review in the country. Thus, together with ECHR, there has been a development of UK Common law furthered by the pressure created within UK jurisprudence due to ECHR. The article specifically concentrates on sec. 6 of the ECHR. The article has been particularly helpful to the author in understanding how intertwined UK jurisprudence on judicial review and ECHR are.

The author shall refer to literature on similar lines during the course of her research.

1.2 STATEMENT OF PROBLEM

Every nation state is governed by three primary organs- the legislature, the executive and the judiciary. The judiciary is entrusted with the task of protection of people and upholding the rule of law. Within the ambit of this arises the concept of judicial review. Judicial review is loosely understood as the power of law authorities in a nation state to ensure that peoples' rights are protected under every legislation passed by the legislating body. The principle of judicial review thereby grants the judiciary

the power to declare a legislation as dys-functional if it infringes upon individual rights.

After development of judicial review as a concept by the US, it quickly spread throughout the world in varied forms. While some countries gave supremacy to the legislature, some focused on primacy of the judiciary as a protector of human rights. This gave birth to the concept of SFJR and WFJR. In the former, the legislature is bound to adhere to the opinion of the judiciary while in the latter there is no such compulsion. India, UK and USA are three large democracies seen at the forefront of judicial review. It is quintessential within constitutional jurisprudence to derive and get inspired out of varied jurisdictions, India being no exception. Constitutional principles within Indian subcontinent have immensely derived from western jurisprudence. It is important to study if judicial review within our socialist, welfare based economy would benefit from undergoing transformation along the lines of foreign principles. Equally important is a study on varied forms of judicial review and an evaluation whether a particular form can be uniformly labelled as better than the other.

1.3 CONCEPTUAL FRAMEWORK

Numerous concepts will be used in the course of this paper. Some of these are:

1. Judicial review: The mechanism by which the judiciary tests the constitutionality of a legislative declaration
2. Strong judicial review: The form of judicial review wherein a verdict of the judiciary is binding on the legislature
3. Weak judicial review: The form of judicial review wherein the legislature may choose to disregard a judicial verdict
4. Presumption of constitutionality: This is a doctrine by which the judiciary initiates review of constitutionality of a legislation assuming that the legislature must have ensured constitutionality.
5. Constitutional amendments: Legislative acts aimed at amending the grund norm of a nation.

6. Parliamentary sovereignty: A nation that holds the parliament above all other organs of the state.
7. Judicial supremacy: A nation that recognized the judiciary as the supreme protector of the constitution.

1.4 OBJECTIVE

While every state has a reason to resonate with a particular ideology – be it SFJR or WFJR, there are numerous considerations that go in the development of the system. The objective of the study of to critically evaluate the advantages and disadvantages of the WFJR and SFJR while trying to determine if one form can be proclaimed to be uniformly better and suitable for every democracy.

1.5 SCOPE OF STUDY

The scope of the study is limited to analysing the SFJR and WFJR. This is done by picking up model systems in certain countries and analysing them accordingly. The study has been limited to those, which provide a model system in both forms of constitutional review – India, UK and USA. The researcher shall also attempt to determine if India gains to learn from the other jurisdictions.

1.6 RESEARCH QUESTIONS

The following research questions shall be answered in the course of this paper:

1. What is the binding effect of WFJR?
2. What is the UK model of judicial review?
3. What is the binding effect of SFJR?
4. What is the Indian model of judicial review?
5. What is the US model of judicial review?
6. Is one form of judicial review preferable over another?

1.7 HYPOTHESIS

There is no one form of judicial review that must be uniformly followed across the globe based on the political climate of each country, but the aim of every democracy should be independence of the judiciary.

1.8 DATA COLLECTION

The primary source of information shall be the Indian Constitution, UK laws, US Constitution, additional legislations and case laws The secondary source shall be articles, books and reports on the subject.

1.9 DATA ANALYSIS

The nature of research shall be exploratory and explanatory coupled with diagnostic. The mode of study shall be doctrinal, aimed at associating data collected with the literature in hand. An analytical and descriptive approach shall be followed in the paper.

1.10 CHAPTERISATION SCHEME

The dissertation shall be written in the form of an article, with the following headings:

1. Introduction

   This chapter shall lay down the structure and objective of the study. It provides the reader an insight into the working and ideology behind the entire research project.

2. Conceptual Framework of Judicial Review

   This chapter shall explain to the concept of judicial review. It builds on varied principles such as that od separations of power and Wednesbury Principle. It shall move on to identifying the WFJR and SFJR. It will argue in balance with the pros and cons of both the systems.

3. Judicial Review in United Kingdom

   This chapter shall begin by analysing the idea of judicial review in a parliamentary sovereignty. It will mention the difference in the way the courts have treated the primary and secondary legislations. It goes on to discuss the power of judicial review in tribunals as well. That said, the chapter will try to determine if the jurisdictions follows a strict WFJR.

4. Judicial Review in United States of America

   This chapter traces the history of judicial review beginning with J. Marshall. It attempts to understand the Constitution of the USA as well to determine the flow of power of judicial review. The cases will show the extensive importance given to liberty by the US Supreme Court.

5. Judicial Review in India

   The Chapter will discuss the legislative framework under which the country has identified judicial review. It will go on to discuss landmark cases through history, without leaving out the very real political implications it has had, making the SC of India one of the most powerful courts in the world.

6. Conclusion

   This final chapter summarizes the discussion conducted through the paper. It will try to determine if either form of review can objectively be said to be a better than the other. It will also try to determine if any of the abovementioned countries could use a different form of review. The chapter shall also reveal its stance on the hypothesis of the paper.

CHAPTER II: CONCEPTUAL FRAMEWORK OF JUDICIAL REVIEW

Montesquieu, an 18th century French philosopher gave the theory of 'Separation of Powers'. The doctrine of separation of powers assigns individual responsibilities to each organ – the legislature makes the law, the executive implements it while the judiciary adjudicates on it. While some nations practice a strict separation of powers, some do not have water-tight compartmentalization for separation but rely on checks and balances to ensure that no organ exceeds the powers otherwise assigned to it. The aim is to balance independence while ensuring accountability.

Before the end of World War II, constitutional courts and constitutionalism was a rarity due to the prominent presence of totalitarian regimes.[2] The post totalitarian regimes regarded judicial review as the starting point to constitutionalism. It was developed in furtherance of the idea of accountability as envisioned by the separation of powers. Thus, judicial review developed in the 20th century. Until then law was regarded as divine order; politics was subordinate to it. With democratic ideals, this thought was compromised. It became evident that it was important to understand politics and law together. Constitutionalism, in the last quarter of the eighteenth century was aimed to re-establish supremacy of law. [3] The only method to put law above people was to view it as consent of people. Thus, unconventionally, it may be said that the aim of constitutionalism is to submit politics to law. [4] To ensure that it is higher than all other laws.

Judicial review is defined as subjugation of legislation to the rule of law. [5] It is the exercise of supervisory jurisdiction of a court. [6] Ronald Dworkin mentions that "*democracy demands that the power of elected officials be checked by individual*

[2] DIETER GRIMM, CONSTITUTIONALISM PAST, PRESENT AND FUTURE, 199, (2016).
[3] *Id.,*at 200.
[4] *Supra* note 2 at 200.
[5] Arpita Sarkar, Standard of Judicial Review with Respect to Socio-Economic Rights in India, 2, JOURNAL OF INDIAN LAW AND SOCIETY, 293, 294, (2011). AV Dicey, known as the profounder of 'Rule of Law' enlisted three basic facets to it – supremacy of law, equality before law and predominance of legal spirit. Judicial review very simply attempts at ensuring these are maintained within a jurisdiction. Thus, they are essentially two sides of the same coin.
[6] COLIN TURPIN AND ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION, 661, (7th edn., 2011).

rights."[7] Since 1980s most transitional democracies have established judicial review of legislations [8], putting Dworkin's thought to practical implementation. Judicial review ensures that interpretations via a non-judicial body do not gain blind precedence over that of the judiciary. With time, there has been a growth of judicial review in new democracies. This may be due to several reasons - judicial review acts as insurance in the face of uncertain political future, it may help in stabilizing a democracy against consolidation of a single political power; it forces credibility in legislators and lastly it protects the democracy from political excesses.[9] In a country without review and constitutionalism, the view of the majority prevails. On the other hand in other countries there exists a system that will not encourage political motives. [10] Bentham was one of the few philosophers who understood the limitations on sovereign powers. He acknowledged the fact that there may be situations where people do not adhere to the sovereign's orders. The sovereign is an abstract idea, which does provide legitimacy but is not devoid of other realities. This deficiency is what is aimed to be remedied by judicial review.

It is often argued that a court must possess the power to invalidate legislation because the mere existence of the legislation can be harmful to rights, courts occupy a central place in the protection of constitutional rights. Another argument in favour of judicial review is that judges have a better understanding of the law and its interpretation. Judicial review can also act as a means for legitimizing state power and establishing trust amongst people. [11] More than anything else, for developing nations struggling with a newer democracy, the prevalent evils such as corruption, legislative lack of understanding on individual rights, single dominant party system etc. make judicial review quintessential to safeguarding the democracy in itself. Judicial review does not only look into the merits or demerits but also focuses on whether procedural fairness was endured by the authority reaching a decision. [12] Critics of judicial review argue that the judges are neither elected representatives, nor can they be held accountable.

[7] Malcom Langford, Why Judicial Review, 2, OSLO LAW REVIEW, 36, 39, (2015).
[8] Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53(285), COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 291, (2015). Transitional democracies are the newly independent nations or otherwise which are moving towards democratization. Some of such are India, North Korea, Japan etc.
[9] *Id*, at 287.
[10] *Supra* note 2 at 201.
[11] *Supra* note 7 at 70.
[12] *Supra* note 6 at 662.

Judicial training tends to put on extra emphasis on adjudicatory, rather than legislative functions. [13]

Most successful democracies have inculcated the provision for judicial review. The origin of the doctrine of judicial review can be traced back to UK, though it was firmly established only by the written constitution of the US.[14] Justice Coke as early as 1610, in *Dr. Bonham's case*[15] stated that "*When an act of the parliament is against common rights or reason, repugnant or impossible to be performed, the Common Law would control it, and adjudge such Act to be void*" These words of Justice Coke were not viewed positively by King James I and the judgement got lost in time. It was only with *Marbury* v. *Madison*[16] in 1803 that the words 'void' and 'repugnant' were used in reference to judicial review, thereby solidifying the concept for the world. Though, in its true sense the doctrine reached its peak when India bestowed it with the widest interpretation in the case of *Keshavnanda Bharati* v. *State of Kerela*[17]. Development of judicial review in each of these jurisdictions has been discussed in the paper in detail, eventually.

2.1 FORMS OF JUDICIAL REVIEW

Different authors have come up with varied ideas on judicial review. [18] Mark Tushnet[19] propounded the theory of two forms of judicial review – SFJR and WFJR. In the former courts have the authority to declare that a particular legislation shall not be applicable; the judiciary gets the final say.[20] In a WFJR there is a scrutiny of the legislation by courts to determine whether they are unconstitutional or violative of rights of the individual but courts cannot decline to accept their application.[21] The

[13] RAYMOND WACKS, LAW, A VERY SHORT INTRODUCTION, 101, (2008).
[14] V. Nageshwar Rao and G.B Reddy, Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead, 39(2), JOURNAL OF INDIAN LAW INSTITUTE, 411, 411, (1997).
[15] Dr. Bonham's case 8 Co. Rep. 107.
[16] Marbury v. Madison 5 U.S 137.
[17] Keshavnanda Bharati v. State of Kerela (1973) 4 SCC 225.
[18] Stephen Gardbaum, *Supra* note 8 at 292.
[19] Prof. Tuhnet, currently serving as William Nelson Cromwell Professor of Law, is an authority on Constitutional Law, particularly Constitutional History and development of Civil Rights
[20] Aileen Kavanagh, What's so weak about wear-form Review: The case of UK Human Rights Act 1998, 13, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 1008, 1011, (2015).
[21] Annabelle Lever, Democracy and Judicial Review: Are they Really Compatible?, 7(4), AMERICAN POLITICAL SCIENCE ASSOCIATION, 805, 807, (2009).

legislature may revise the rulings, they are interim. [22] By granting the final authority to political heads, WFJR reduces the tension that might exist between the legislature and the judiciary. [23] The judiciary merely acts as a mechanism for checking the validity of legislations against the rights guaranteed in the nation state. It by no means legislates, but merely brings execution of a legislation to a standstill while the legislature develops a mechanism correcting it. WFJR works on pressure created on the constitutional authorities to alter the proposed legislation by engaging in a public discourse. SFJR, on the other hand, by forcing the government to ensure legislative provisions are in compliance with the rights reflects concern for accountability of governments. [24]

There are several stages within a WFJR. In the weakest form of judicial review, there is only an interpretative mandate. This means that the court may read a statute as per the Bill of Rights. This interpretation may give rights an overriding effect over the plain statutory meaning as well. Above the weakest form is when the court is empowered to declare the statute incompatible with fundamental rights. This arises in situations wherein the legislation has not been able to understand that the statue would impede on the fundamental rights in question. But if the legislature intended the statute such that there be a rights violation, then the court cannot do anything about it. The strongest form of WFJR gives courts the freedom to suspend the legal effect of the statute while the legislature deliberates on the right violations pointed out. [25] This is also understood as the weakest form of SFJR.

The model of WFJR has been in place in United Kingdom. This model ensures protection of rights along with proper distribution of power between the judiciary and the legislature. The model is distinctive because of three features:

1. A charter of rights[26]
2. Enhanced judicial power to access legislations in terms of this charter of rights.

[22] *Supra* note 20 at 1011.
[23] *Supra* note 8 at 311.
[24] *Supra* note 21 at 814.
[25] Stepehn Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 168 (2010).
[26] Human Rights Act, 1998.

3. Notwithstanding the previous point, the parliament possessing the power to impress the last say on the law of the land upon the other organs. [27]

All these together differentiate it from the model of judicial supremacy, otherwise practiced in the USA. There are three stages under which rights are protected under this model:

Stage I: It encourages the other organs to discuss the issue of rights. This discussion need not be only from a legal perspective, but may be broader.
Stage II: The courts take political rights review seriously while taking into account reasonable disagreement on rights between the judiciary and the legislature. They take into account views of political branches along with the legality associated.
Stage III: Debates on understanding the invalidity of the legislation and amending it accordingly. These discussions are important for understanding the rights involved. [28]

The SFJR does not allow for dialogue. Herein, there are 2 ways to undermine a court's interpretation:

1. Court reverses it itself
2. The legislature amends the Constitution[29]

Tushnet argued for the WFJR. He believed that through the WFJR, rights are protected in a less court centred way. In a world where judges and parliamentarians can have reasonable disagreements, judicial supremacy may not be the best idea. Additionally, determining infringement of rights is not exactly contingent on judicial scrutiny. [30] In this form of review, the leaders of the state voted by the citizens of the state, are presumed to move with no intention of infringing any right of the citizens. The model also allows for the legislature to ponder on rights issues and for the courts to deliberate on legislative considerations. [31] It places the legislature and the judiciary in a better place for healthy dialogue.

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[27] *Supra* note 25 at 169.
[28] *Id.* at 177.
[29] Walter Sinnott-Armstrong, *Weak and Strong Judicial Review*, 22(3/4), SPRINGER, 381, 381 (2003).
[30] *Supra* note 25 at 173.
[31] *Id* at 173.

2.2 EVALUATING THE FORMS OF JUDICIAL REVIEW

It is argued often, independence of the judiciary is more important than judicial review for establishing a stable democracy. Judicial independence cannot mean complete judicial autonomy or self-governance because the legislature does play a significant role in appointment of these judges. For judicial independence, the judges have to be free from 'governmental pressure' and should be able to perform their functions 'impartially'. [32] Both these pillars of independence are placed under stress when a SFJR is followed. This is because when the court has power to invalidate a legislative piece, it with no underlying intention ends up becoming a political actor viewed as a rival by the government.[33] This threatens the independence of the judiciary. In addition due to this excessive power wielded, judicial appointments become political appointments - appointments are made "*by politicians and for political reasons*".[34] This threatens the second leg - impartiality of the judiciary.

Hungary faced severe backlash post its SFJR; In 2012 the powers of the South African court were called for review to assess how much of them had impacted the social economic transformation of the country; the Egyptian President restricted the powers of the court and temporarily immunized all his decisions from judicial review; when the Chief Justice of Sri Lankan explained that the Devi Neguma Bill was against the 1978 constitution, the governing party signed a motion to impeach the Chief Justice. This was done despite the Supreme Court's earlier ruling labelling the impeachment procedure illegal; the Turkish court invalidated the ban on Twitter and YouTube by the government and in return the government reduced the power and independence of the court. [35] All these countries show the effect a strong judiciary

[32] *Supra* note 8 at 305.
[33] *Id* at 307.
[34] *Ibid.*
[35] *Id at* 297. Hungary -The constitutional court appointments had clear political inclinations to the party in power. The constitution was amended to reject judicial review on any law that had any impact on the parliamentary budget unless it directly infringed rights of the people. In addition *actio popularis* was abolished, and review was available only after other remedies had been exhausted. All court decisions prior to the new constitution in 2013 were also annulled. The retirement age for judges was reduced, vacating quite a lot of seats in courts. All this only goes on to show that there was a clear attempt to bring down the power of the constitutional courts after a time when Hungarian constitutional courts were seen to be quite activist striking down one legislation after another since their establishment. It took away the independence of the judiciary on a large scale.

can have in unstable and transitional democracies. The political powers tend to override the judiciary, thereby compromising with the democratic stability of the entire country. They run the risk of shifting the nation to authoritarianism again. An easy solution often propounded to these issues faced by these countries is for the court to exercise restraint - decide regular routine cases and not politically charged ones, release cautious judgments, apply restraint on the remedial measures proposed.[36]

The primary reason for Tushnet to speak for the WFJR was that it allowed for dialogue between the legislature and the judiciary. While the WFJR promotes dialogue between the legislature and the judiciary it is not that such a dialogue is prohibited or not possible in a SFJR. It is just that the dialogue is much easier in a WFJR. [37] Courts do revisit the statutes once the legislature alters them as per the directions of the court. [38] This is dialogue between the court and the legislature. Legislatures coming up with new laws also tend to try to gauge the response of the court on it by relying on previous case laws. Thus, the selling factor for WFJR cannot be the dialogue. Mere blind adherence to the judiciary should not be considered as a dialogue, there has to be certain source of disagreement or discussion with the court at some level. The greatest disadvantage of the dialogue system is that it works on good faith. The legislature needs to take the responsibility of altering the statue as per the direction of the judiciary seriously. It will not work well if the legislature regularly disregards the court's actions.[39]

When Gardbaum and Tushnet propagate the success of the WFJR it is for countries that have a similar political setting. Will the WFJR model emerge successful in countries such as Nigeria or India, which are tumultuous politically? Can the model induce dialogue between the legislature and the judiciary in countries, which were not politically moderate prior to the model?

The South African courts invalidated death penalty laws in the country. It became one of the first countries to legalize same sex marriages. The court also declared the abolition of independent corruption unit by the government as unconstitutional.

[36] *Supra* note 8 at 309.

[37] *Supra* note 20 at 1012.

[38] Case of Furman v. Georgia 408 U.S 238 (1972). Herein, Georgia rewrote the statute to meet the objections of the Supreme Court and the court later passed the statute.

[39] MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW, 60, (Edward Elgar Publishing Ltd 2014).

There are no specific standards for pointing out which form of judicial review system is better. In cases such as Hungary, South Africa, Turkey that I've discussed above SFJR has led the parliament to believe that the judiciary is getting too powerful, thereby slicing judicial independence altogether. What is to say that these countries will not respond to a WFJR with parliamentary authoritarianism? Is it not too far fetched to blame the system of legislative overview for all authoritarian political downfalls? Clearly, in these countries the idea of a dialogue between the judiciary and the legislature is bleak. In such cases it is not difficult for the political authorities in the government to come to believe that the judiciary is merely a puppet. In a WFJR this will be further enhanced with constitutional authority wherein the legislature will have the last say. At present it is at least seen as defying boundaries of fair rule when governmental authorities reduce the power of the judiciary or go against the judiciary.

For countries that move from an authoritarian government to a democratic one, it might be difficult to do so, and they may be compelled to not follow the suggestions of the court. In such situations judicial review as a concept will fail to serve any purpose, altogether. Another important factor is the role of the parliament in appointment of the judges. If there is immense parliamentary influence in judicial appointments, then politically inclined judges may be appointed who will adhere to the ideology of the parliament defeating the purpose of judicial review altogether. The WFJR may not be the best option in countries with dominant party political systems in place. [40] In a dominant party system, judicial appointments may also be made in favour of the particular party in power. There may be no opposition with respect to stacking of the judiciary with their party members. Moreover, tussle between the minority camps and the majority may convince the legislature to do nothing. There will be no change till the pressure of reform is more than the convenience to leave things unchanged. [41] Gardbum specifically states that his proposal of a WFJR of constitutional democracy is merely for the transitional democracies that are facing

[40] Mark Tushnet, WEAK FORM REVIEW AND ITS CONSTITUTIONAL RELATIVES: AN ASIAN PERSPECTIVE IN COMPARATIVE CONSTITUTIONAL LAW IN ASIA, 104, (Edward Elgar Publishing Ltd 2014).
[41] Yap, Po Jen, *Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World*, 35(1) GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 120, (2006).

issues stabilising their countries.[42] All this is not going to assist in stabilization of a democracy in any possible manner unlike Gardbum's suggestion.

[42] *Supra* note 8 at 316.

CHAPTER III: JUDICIAL REVIEW IN UNITED KINGDOM

UK public law rests on the premise that the decision of judicial review of the court cannot replace that of the original decision maker.[43] It flows from the doctrine of separation of power and from the Wednesbury standard for review. Under the principle, courts are to interfere in the decision of the administrative or executive authority only when it is "so unreasonable that no reasonable" authority should have taken it. [44] This test is understood as being extremely stringent, placing a very high standard for invoking the principle of judicial review in the first place. In the case of *City of London* v. *Wood*[45], CJ Holt stated that "*An Act of the Parliament can do no wrong though it may do several things that might look odd*." This reaffirmed the idea of parliamentary supremacy as practiced in the democracy. Despite Lord Justice Coke's words in *Dr. Thomas Bonham* v *College of Physicians*[46] (popularly known as *Dr. Bonham's* case), judicial review in England never developed to strike down unconstitutional legislations because of the principle of parliamentary sovereignty. To put this into greater perspective, it is important to note that there is a recurring joke amongst English lawyers, that the Parliament can do anything other than make a man a woman and a woman a man. [47]

UK, governed by the principle of parliamentary sovereignty had recognized the need of judicial review only to align themselves with the EU. UK was confined to a political ideology of governance where the judiciary found some place only because of the EU Act of 2011. The referrals to the ECtHR since then have reduced. [48] UK courts have learnt to balance their notion of parliamentary sovereignty to that of the supervening laws of EU. Courts have read into UK legislations to reconcile them with EU; they have directly read EU legislations to grand individual rights and also restricted application of UK laws if not in compliance with that of the EU. [49]

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[43] *Supra* note 1.
[44] *Supra* note 1.
[45] City of London v. Wood (1701) 12 Mod. 669.
[46] *Supra* note 15.
[47] *Supra* note 14 at 412.
[48] Graham Jee, Luca Rubini and Martin Trybus, *Leaving the UK? Legal Impact of "Brexit" on the United Kingdom*, EUROPEAN PUBLIC LAW JOURNAL, 1, 18, (2016).
[49] *Ibid.*

English courts exercise limited power of judicial review- they can only strike down subordinate or delegated legislation if they *are ultra* vires the parent statute. They cannot, including the Supreme Court, declare them void on any other ground. [50] There may be numerous reasons for pushing for these restrictions imposed by the court, one, that a law passed by the legislature does not warrant a review, or that reviewing it may cause an imbalance in the fabric of the three governmental departments. [51] Another reason, I presume could be the presumption that the law passed must have qualified the constitutionality tests and only then was it brought into force by the legislature. It must also be noted that an independent SC was created in the UK only in 2009 transferring power from the House of Lords.

Another important detail to be noted is that, if the UK court declares a legislation to be incompatible and the parliament does not rectify it, the aggrieved may refer the case to ECtHR. UK is under an obligation to ensure that all laws are compatible with the ECHR. Hence, with the formation of the ECHR the idea of judicial review has gained some importance in the UK. [52] It appears that the lack of a written constitutional text and the overpowering concept of parliamentary supremacy have been the primary factors restricting the complete development of the doctrine of judicial review in the UK.

3.1 PRIMARY LEGISLATION

The Human Rights Act came into force in the UK in 1998 as a consequence of permanent establishment of ECtHR in 1998. It was enacted to further the freedoms and rights imparted to the citizens under the ECHR. [53] By the time the Human Rights Act came out in 1998, the Wednesbury principles had been diluted, especially in cases where common law fundamental rights were involved. [54]

[50] *Supra* note 14 at 412.
[51] L Craft, Political Questions – Classical or Discretionary Applications of Judicial Review, 4, SUFFLOX UNIVERSITY LAW REVIEW, 127, 129, (1969).
[52] Mohit Sharma, Judicial Review- A Comparative Study, 1, INDIAN CONSTITUTIONAL LAW REVIEW, 43, 44, (2017).
[53] *Supra* note 1 at 7.
[54] *Id* at 11.

Sec. 19[55] of the HRA provides that no law can be enacted that compromises with individual rights provided under the ECHR. As per sec. 3[56] of the HRA, all primary and subordinate legislations must be read such as to give effect to the ECHR, as far as possible. Courts while interpreting legislations on the basis of sec. 3 of the HRA have established a two-pronged approach. *First*, to determine whether the legislation infringes the rights of the Convention. If there is none then it is the end of the matter. *Second*, if there is only a *prima facie* infringement, then the courts move on to determine if a rights consistent interpretation can be extended to it. [57] Lord Nicholls has clarified that interpretation for sec. 3 may also require for the court to go beyond that what was intended by the legislation. [58] This approach is now well settled jurisprudence in UK. [59]

As under sec. 4[60] of the HRA, the court may determine whether a primary legislation is compatible with the ECHR or not, but under sub-section 6 of the same section, it must be noted that a declaration of incompatibility does not impact the applicability of the legislation and is more of a moral and political sanction. The next step after trying to interpret the legislation consistent with the conventional rights is the declaration of incompatibility. When an alternative interpretation is such that the entire substance of the legislation is reversed then, the legislation may be called incompatible. [61] The courts have declined to frame any specific guidelines for this but they have mentioned that such cases should not be difficult to identify. [62] UK courts will try to remedy the legislation under sec. 3 before declaring it to be incompatible under sec. 4 later. [63] The primary reason for this probably is the possibility of injustice forced upon the litigant due to lack of remedy in case the legislation is declared incompatible. [64]

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[55] It the mandated duty of the Minister of the Crown belonging to either house of the Parliament to make a statement that the Bill is compatible with the Convention or that he is unable to make any such statement but the houses must nonetheless proceed with the Bill.
[56] "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."
[57] *Supra* note 20 at 1016.
[58] *Id* at 1017.
[59] *Ibid*.
[60] "[…] If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."
[61] *Supra* note 20 at 1020.
[62] *Ibid*.
[63] Sheldrake v. Director of Public Prosecutor [2005] 1 AC 264 (HL).
[64] *Supra* note 20 at 1022.

It was observed in *R.* v. *A(No. 2)*[65] that the court had the freedom under sec. 3 to strain the language, read down provisions and implicate them to ensure that they comply with the ECHR, however, they cannot depart from the fundamental feature of the statute, such as to radically amend it. In this case the Youth Justice and Criminal Evidence Act, 1999 severely curbed the right of the defendant to introduce the sexual history of the victim as evidence of consent in rape trials. The court held that this violated his right to free trial. Judges were given immense discretion under sec. 41 to accept such evidence, though the section very clearly provided against it, reading a complete sub section into it.[66]

In cases where a rights consistent interpretation would lead to immense disaccord with the legislation, courts have also preferred to declare the legislation incompatible without really altering or reading into it (sec. 4, HRA). [67] One such example is that of *Bellinger* v. *Bellinger*[68], The complainant was a post operative male to female transgender who argued that the Matrimonial Causes Act 1973, allowed for only a male and female (by birth) to marry thereby violating her right to family life. The court declared the legislation to be incompatible with the ECHR on the reason that the issue "called for a comprehensive legislative reform and not piecemeal judicial development." Though, I believe that going by the court action in the case of *R.* v. *A*[69] the court could have read transgenders into the 1973 Act.

A leading case on the extent of interpretation allowed under sec. 3 of HRA is of *Ghaidan* v. *Mendoza*[70]. The Rent Act 1977 gave the right of succession to the surviving spouse of a tenant. Spouse was defined as "*a person living with the original tenant as his husband or wife*". The court had to determine whether same sex partners could avail benefits under the Act. The House of Lords by a majority of 4:1 invoking their powers under sec. 3 of the HRA stated that it may be understood that though the Act was drafted such as to exclude same sex couples but the 'social policy' under the act was to protect tenancies of all that were in a loving relationship. This is how the

[65] R. v. A [2002] 1 A.C 45
[66] The subsection was whether it was "so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under A. 6 of ECHR."
[67] Aileen Kavanagh, *Supra* note 20 at 1020.
[68] Bellinger v. Bellinger [2003] 2 AC 467 (HL).
[69] *Supra* note 65.
[70] Ghaidan v. Mendoza [2004] 2 AC 557 (HL).

court read the Rent Act of 1977 in conjunction with the ECHR. Lord Nicholls while imparting the majority judgement stated that

> "*Section 3 enables language to be interpreted restrictively or expansively. But section 4 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bound only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation*."[71]

This stance has been affirmed in cases further.[72] Thus, there is no doubt that the interpretation undertaken under sec. 3 of HRA is quite extensive and may include departing from the legislative intent of the parliament.

During all these developments came the case of *R*. v. *Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Limited* [73]. In this case the Secretary of the State had been given the power to call for applications and to evaluate them under the Town and Country Planning Act, 1990. It was argued that the Secretary had exercised this power with bias. On appeal, the 5 bench of the House of Lords going by the Wednesbury principle[74] stated that, it is undeniable that the Secretary was partial, but by the principle of separation of powers, he had been granted certain powers by the Parliament and was answerable only to the Parliament. Hence, the power to call for applications and hear appeals was not violative of A. 6[75] of the ECHR. The court mentioned that the government had the power to make policies and it was not violative of ECHR for the Secretary to make his own policy to pass a decision. There is no expectation from him to act impartially or independently, but there is only an expectation to be lawful. The latter is within the purview of judicial review and not the former. The House of Lords again upheld the

[71] ¶ 32, *Ibid.*
[72] *Supra* note 20 at 1017.
[73] R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Limited (and others) [2011] 2 All ER 929.
[74] Under the principle, courts are to interfere in the decision of the administrative or executive authority only when it is "so unreasonable that no reasonable" authority should have taken it. The principle was developed in the case of Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223
[75] Right to fair trial.

principle of parliamentary sovereignty while compromising the scope of judicial review.

3.2 SECONDARY LEGISLATION

English law provides for judicial review against persons or bodies performing public functions. [76] These include, ministers, their departments, administrative bodies etc. and also charities and self-regulatory organisations.[77] The legislations developed via these bodies are known as Secondary Legislations. The procedure for claim for judicial review is provided under part 54 of the Civil Procedure Rules. Under English law there are three remedies available against legislations – quashing, mandatory and prohibiting orders. They were formally known as certiori, mandamus and prohibition.[78]

One important case wherein the High court struck down the secondary legislation was of *The Law Society, R* v. *Lord Chancellor*[79]. In this case a review was brought against the Litigator's Graduated Fee Scheme after a proposal was implemented to reduce the maximum number of prosecution pages from 10K to 6K. The court quashed these new regulations on two grounds, *first*, that the regulations were made without proper disclosure to ensure legitimate rebuttal and *second*, that the judgment of policy makers was flawed because of the fundamental incorrectness of the reasoning.

Another case was that of *R.* v. *Secretary of State for Education and Employment*[80], wherein the court held that the Secretary of the State had exceeded his power by amending the terms of employment of teachers thereby increasing their pay. His power to promote education was not inclusive of this; a reference of the parliament was mandatory.

Under Civil Procedure Rules there are certain limitations to preferring judicial review of secondary legislations. Primary ones are that only those having a *locus standi*

[76] Civil Procedure Rules, R. 54.1 (ii) (1998).
[77] *Supra* note 6 at 710.
[78] *Id* at 667.
[79] R v. Lord Chancellor [2018] EWHC 2094.
[80] R. v. Secretary of State for Education and Employment [2007] 7 WLUK 424.

('interested person') can bring about a petition for judicial review. This includes anyone affected by the law in place. [81] A claim for judicial review must be filed within 3 months after the ground arises, and in case of claim against the Secretary of State or local planning authority within a period of 6 weeks. [82] A judicial review can only be heard when a leave to do so is granted by the court. [83]

3.3 JUDICIAL REVIEW BY TRIBUNALS

Upon the recommendation of the Leggatt Report[84], numerous tribunals in the UK was combined into a two tier system in 2008.[85] The Upper Tribunal was to be the appellant court from the first tier tribunals. Since 2008, there have been 4 chambers of the Upper Tribunal – Administrative Appeals Chamber, Tax and Chancery Chamber, Lands Chamber and the Immigration and Asylum Chamber. Sections of 15-21 of the Tribunals, Courts and Enforcement Act of 2007 allowed for judicial review and applied uniformly to each of them.[86] Giving power of Judicial Review to Upper Tribunals relieves the pressure on other courts. [87] But there are limitations to this power of judicial review. The Upper tribunal cannot undertake judicial review in the following circumstances:

1. An application calling in question anything done by the Crown Court. [88]
2. Declaration of incompatibility with sec. 4 of the HRA. [89]
3. When an injunction to restrain persons from acting in an office is passed, they are not entitled to request for review in a Tribunal. The High Court cannot transfer it to the jurisdiction of the Upper Tribunal as well.[90]

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[81] *Supra* note 6 at 712.
[82] Civil Procedure Rules, R. 54.5 (1998).
[83] Civil Procedure Rules, R. 54.10 (1998).
[84] The Lord Chancellor appointed Andrew Leggatt to carry out a review of the Tribunal System in 2000. The Report stated that tribunals should be similar to court systems in tiers and independence but must more user friendly than courts. Prior to the report there were around 20 different tribunals in the UK.
[85] Gareth Mitchell, *Judicial Review, but not as we Know Judicial Review in the Upper Tribunal*, 15, JUD. REV, 112, 112, (2010).
[86] *Ibid.*
[87] *Supra* note 85 at 117.
[88] Tribunals, Courts and Enforcement Act, Sec. 18(5), (2007).
[89] Sec. 4, Human Rights Act, 1998.
[90] Senior Courts Act, Sec. 31A(4) read with sec. 31(1)(c), (1981).

In case the Upper Tribunal by mistake does conduct judicial review, it must transfer it to the High Court. But the Upper tribunal can conduct judicial review on all non-appealable cases from the first tier tribunals. First tier tribunals are asylum support, care standards, criminal injuries compensation, mental health, primary health lists, proper chamber, social security and child support etc. In cases of criminal injuries and compensation as well, no second appeal but only judicial review lies from tier one tribunals. [91] As per the Tribunal Procedure (Upper Tribunal) Rules, 2008, sec.28, a judicial review must be filed for within three months unless the lower tribunal provides a written reason for a delayed decision or the Upper Tribunal feels the circumstances are such that an exception should be made. The Upper Tribunals provide leave to hear the application only if the applicant succeeds in establishing that he has sufficient interest and if permission is not granted it shall cause him undue hardship. [92]

3.4 STRONG OR WEAK FORM OF JUDICIAL REVIEW?

In the UK the judiciary is not given the power to dis-apply a particular legislation, it can only give its opinion and the legislature is free to discard them. But it has been seen that the government has replied positively to them by contemplating and deliberating such cases. [93] The Joint Committee on Human Rights is a cross parliamentary committee to make aware the parliamentarians of right violations and has been criticized by courts for not emphasising enough on rights protection. [94] Sec. 19 of the Act provides that before introducing a legislation into the Parliament, a minister must make a statement claiming that the bill is compatible with all human rights or that he is unable to make such a statement and the houses of the parliament still wish to go ahead with the bill. With recognition of human rights jurisprudence across the globe, parliamentarians in UK, now, are asked under the Cabinet Office Guidelines to provide justification for the conclusion that the legislation is compatible with HRA. [95] This ensures a better scrutiny before the bill is assessed by the Joint Committee on Human Rights.

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[91] *Supra* note 85 at 114.
[92] *Id* at 116.
[93] *Supra* note 25 at 192.
[94] *Id* at 192.
[95] Tom Hickey , *The republican virtues of the "new commonwealth model of constitutionalism"*, 14(4), INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 811, (2016).

The UK Parliament is usually content with the interpretation given under sec. 3, HRA by courts and does not push onto having a last say in the legislation.[96] So, the idea that the parliament must have the last word as in a WFJR, explained in the last chapter, is questionable in context of UK. It also has a strong incentive to listen to the courts. The legislature is bound by the ECHR and the ECtHR might take an interpretation similar to that of UK courts. So, unless the parliament wants to risk political embarrassment, they tend to adhere to the court. [97] If UK were not treaty bound the situation might have been otherwise.[98] Some commentators argue that sec. 3, interpretation by the court does not fall under WFJR any more. It is strong adjudication to render the legislation compatible with conventional rights. [99] It has become indistinguishable from legislative amendment. [100] Had the judiciary only had an opportunity to invalidate the legislation, it would have given the legislature the freedom to correct the legislation with inputs from the judiciary. [101] But because judges try to remedy the legislations themselves it is in the end displacement of the will of the Parliament.

While most people argue that the system of judicial review in UK is weak because of the limited power with respect to primary legislations, I believe that given the extensive interpretation and reading into legislations practiced by UK courts to ensure that primary legislations protect individual rights, in essence it has ended up adhering to the SFJR. UK courts do not restrict themselves to pointing out infringement of rights under the legislation, but take a step further and use corrective measures to ensure that the legislation is understood as protecting those rights. The only drawback being that the interpretation is in place for that one case only. Thus, whatever name be given, the UK form of judicial review is definitely not weak, though there is no denying that it is not a strong one either by Tushnet's definition. This is not to take away that even today, the Parliament has the last say. This is a methodology adopted

[96] *Supra* note 20 at 1023.
[97] Michael Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38(1), WAKE FOREST LAW REVIEW ,671, (2003).
[98] Chisholm v. Georgia 2 US (1 Dall) 419 (1793); Dead Scott v. Sandford 60 US 393 (1857); Pollock v. Farmers' Loan and Trust Co 157 US 429 (1895)
[99] *Supra* note 20 at 1018.
[100] *Ibid*.
[101] *Id* at 1019.

by the courts to balance supremacy of the Parliament with acknowledging the protection of individual rights. For secondary legislations in UK there is no denial that it is a very SFJR. In furtherance of this the author would like to draw attention to the case of *R.* v. *The Prime Minister*[102]

In 2013, the British Prime Minister, David Cameron proposed a referendum for exist from the EU. This came to be known as the exit of Britain or Brexit. [103] A very close majority, that is 51.9% voted in favour at the end of 2016 and the exit was scheduled for March 29, 2019. On The UK parliament's refusal to sign the Withdrawal Agreement[104], the deadline was pushed to October 31,2019. On September 24, 2019, the most landmark judgment in the history of UK made it's way in context of UK leaving the EU – *R.* v. *The Prime Minister*[105]. The question for determination was whether the advice of Boris Johnson, the Prime Minister to the Queen to prorogue the Parliament some time between 9th to 12th September till 14th October was lawful or not. The fear was that this would prevent all discussions before the final exit day of October 31st. The Parliament had gathered on 3rd September, the House of Commons, House of Lords and the Queen passed the EU (Withdrawal) Act. The act did not allow UK to leave the EU without a Withdrawal Agreement on 31st October. 11 sitting judges of the Supreme Court gave the judgment. The court noted that it has exercised supervisory power over the parliament for ages. The court could exercise the power of judicial review on the prerogative power as well. Relying on the principles of parliamentary supremacy and accountability, the court held that the use of the power of prorogation would be unlawful if it unreasonably affects the power of the Parliament to perform its legislative function. When the Parliament is prorogued neither houses can debate or pass a legislation. It was important for the Parliament to debate and discuss before October 31, the transition it was stepping into. This would substantively affect the fundamental rights of UK's citizens. Thus, the court finally unanimously ruled that the decision to advise the Queen was unlawful and void.

This judgment of the UK SC is a clear exercise of power of SFJR, though clad under the garb of maintaining parliamentary supremacy. The author has already pointed out

[102] R. v. The Prime Minister [2019] UKSC 41.
[103] *Supra* note 48 at 4.
[104] The agreement enlists the finer aspects on UK's exit from EU.
[105] *Supra* note 102.

how the judicial review in the UK is being smartly executed into a SFJR while not disharmonizing the already existing set up. Thus, the popular belief that UK has an otherwise WFJR propagated by various theorists must be re-questioned. It is important to take a closer and more practical look into the functioning of the judiciary for reaching this conclusion.

CHAPTER IV: JUDICAL REVIEW IN UNITED STATES OF AMERICA

The United States was established as a whole when 13 colonies ratified into a confederation in the US, after the Revolutionary war ended in 1781. The Articles of Confederation instilled independence and sovereignty to the states.[106] There was as such no federal executive or judiciary. The congress as well had limited powers on regulating the states. Around, 1787, the idea of a constitution and creation of the Supreme Court as a central body was floated and received by the confederation. [107]Article IIII of the US Constitution established the federal judiciary. In 1789, James Madison gave the Bill of Rights to the USA. These became a part of the Constitution. Principles of double jeopardy and civil liberties were introduced amongst other things. [108]

In the US Constitution, Art. I establishes the legislature, Art. II establishes the executive and Art. III establishes the judiciary. Before 1803, constitutional review was not a concept known or developed around the world. There was a strict separation of powers in the USA and the SC did not interfere or evaluate the statutes passed by the Congress. Surprisingly, in 1796, the SC found itself faced with judging the validity of a congressional act of levying tax on individual carriages in the case of *Hylton* v. *United States*[109]. The idea that this amounted to questioning the constitutional validity of a statute was not yet developed. The statute was ultimately upheld, but it is important to note that reliance was laid on public policy while upholding the statute rather than the constitutionality. The SC stated that, when a statute has to be invalidated, it must be done "in a very clear case", not once was an argument vis-à-vis the constitution raised. There was no clarity in the position upheld and it seemed more like an attempt by the judiciary to favour the Congress.

[106] EARL E. POLLOCK, THE SUPREME COURT AND AMERICAN DEMOCRACY, 1, (2009).
[107] *Ibid.*
[108] *Supra* note 106 at 2.
[109] Hylton v. United States 3 US (3 Dall.) 171 (1769).

4.1 DERIVING FROM THE CONSTITUTION

Article VI para 2 of the Constitution of the USA states that "*This Constitution, and the laws of the United States which shall be made in pursuance thereof*....." [110] Thus, it may be deduced that all laws have to be in pursuance of the Constitution. [111] But nothing herein suggests permission for review of the acts of the legislature in itself. The fifth [112] and fourteenth [113] amendments to the constitution gave way to development of judicial review. However, congress was allowed to enforce the amendment via appropriate legislation under sec. 5 of the fourteenth amendment. Herein, some argued that the congress may choose to give an interpretation to the amendment which otherwise runs against that enhanced by the Supreme Court. The Supreme Court has expressly over-ruled this argument stating that the Congress cannot enforce a right by altering the meaning of the right in itself. [114] The ambit of judicial review of the SC grew extensively only after the civil right amendments, especially the fourteenth amendment.[115] The Constitution presented itself in generic language such as "equal protection", "due process", "free speech" etc,[116] after the fourteenth amendment. Interpretation of the Constitution required decision on law and public policy, both. Prior to 1860 only 2 federal legislations and around 35 state legislations had been declared unconstitutional. The Judiciary Act of 1891 and Jurisdiction and Removal Acts of 1875 increased the scope of judicial review under A. III of the Constitution, furthermore.

While in most newer democracies legislatures may over-ride court decisions in the USA, neither the congress nor the state has the authority to do so under Arts. V, III or sec. 5 of the XIV amendment in the US. [117] Art. V provides that any constitutional amendment needs a majority of 2/3 in the Senate with ¾ states agreeing to the amendment. This makes over riding any Supreme Court decision extremely

[110] Also known as the supremacy clause, establishing the Constitution as the supreme law of the land.
[111] Alvin Rubin, *Judicial Review in United States*, 40(1), LUISIANA LAW REVIEW, 67, 70 (1797).
[112] "No person shall be deprived of life and liberty without due process of law."
[113] A person's life and liberty cannot be limited unless as per due process of the law. A person shall not be denied equal protection of law within jurisdiction.
[114] Rosalind Dixon, *Weak Form Judicial Review and American Exceptionalism*, PUBLIC LAW AND LEGAL THEORY WORKING PAPERS, 1, 7, (2011). City of Boerne v. Flores 521 US 507 (1997).
[115] STEPHEN GRIFFEN, JUDICIAL REVIEW AND AMERICAN DEMOCRACY IN AMERICAN CONSTITUTIONALISM, 97, (Princeton University Press, 1996).
[116] *Supra* note 106 at 6.
[117] *Supra* note 134 at 2.

difficult.[118] The only method that the Congress has to undo this is by altering the jurisdiction of the courts altogether. This again is difficult since, the congress cannot alter the jurisdiction of all courts and anyway the lower courts mandatorily have to follow the decisions of the Supreme Court. [119] The free power of judicial review is extended by the lack of tenure of judges as well. It increases their independence. The judicial members are at the behest of presidential nominations, senate confirmation, but once appointed federal judges cannot be removed except via impeachment. [120] Thus, if the judiciary annuls a statute and the legislature disapproves, the only way to undo it is to pass a new law, amend the Constitution or to make the indicated amendment in the statute. [121]

The SC's constitutional interpretation has immensely assisted in widening the perspective on rights within the American Jurisdiction. Some examples are reading substantive due process along with procedural under the fourteenth amendment, de-criminalization of abortion laws, recognition of the right of a terminally ill patient to refuse treatment, recognition of homosexuality, ruling against restricting free speech based on content[122] including freedom of press, striking down state imposed racial segregation laws in public schools[123].

The Constitution, A. III(2) restricts the jurisdiction of the judiciary to "cases and controversies". Accordingly, the SC in the USA has drawn certain boundaries to this exercise of the power of judicial review. The court shall not render advisory opinions or review constitutionality of legislations before they are passed, nor rule on political issues which are within the domain of another branch.[124] The SC does not bind itself by the rule of *stare decises* in constitutional cases.[125]

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[118] Only 4 constitutional amendments out of 27 have over-ridden SC judgments. EARL E. POLLOCK, *Supra* note 106 at 26.
[119] *Supra* note 134 at 7.
[120] GN Barrie, *Judicial Review in the USA: A manifestation of an Independent Judiciary*, 17(1), DE JURE, 35, 36, (1984).
[121] *Supra* note 111 at 80.
[122] Brandenburg v. Ohio 395 US 44 (1969).
[123] Brown v. Board of Education 347 US 483 (1954).
[124] *Supra* note 111 at 73.
[125] *Id* at 79.

4.2 J. MARSHALL: TURNING POINT FOR JUDICIAL REVIEW

Chief Justice Marshall identified the doctrine of judicial Review, for the first time, in the case of *Marbury* v. *Madison*[126]. In 1801, when President Adams did not win a second term, he used his last few days in office to make numerous administrative changes. When the new president, Jefferson, took charge Madison, his secretary was asked not to convey appointments to administrative authorities. This was how Marbury was denied appointment. Marbury filed a petition in the US demanding a writ of mandamus compelling Madison to convey his appointment under sec. 13 of the Judiciary Act of 1789. J. Marshall while agreed that Marbury must be granted appointment, refused to pass a writ of mandamus against Madison. He opined that sec. 13 of the Judiciary Act of 1789 was in violation of appellant powers under A. III (2) of the US Constitution. He stated that *"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void."*[127] He further stated that

> *"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited AND to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed AND if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts AND like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. "*

[126] *Supra* note 16.
[127] Para 138 *Id*.

Hence, he believed, judicial review was self evident within the Constitution; Art. III of the US Constitution extends powers on the SC to declare a legislation unconstitutional. As per the judgment, this power was inherent in the judiciary originating in its duty to ensure constitutionality. They also have the power to determine if courts have an authority to enact a particular statute. [128] It is important to note here that nowhere did J. Marshall mention that the other branches will have to follow the decision of the SC.[129]

In the case of *United States* v. *Carolene Products Co.*[130] the court laid down guidelines calling for judicial review:

1. Infringement of a constitutional right
2. Exclusion of citizens from political processes
3. Prejudice against minorities
4. When democratic process breaks down

In this case, the 1923 Act of the Congress banning inter-state shipment of skimmed milk with fat (filled milk) was questioned against the fifth amendment of the Constitution. The Act was upheld in public benefit as filled milk is injurious to health and inter state commerce may be regulated by due process.

4.3 OTHER CASE LAWS

There has been an expansion of the power of judicial review over time in the US. In the case of *Martin* v. *Hunter's lessee*[131], Virginia passed a law under which it could seize the property of loyalists. This law was passed during the American Revolution. Martin, received a piece of land from his uncle who was a loyalist. This land was transferred back to the state of Virginia. The matter reached the US Supreme Court. The SC remanded the matter for consideration to the Virginia Appellant courts. The court argued that sec. 25 of the Judiciary Act, 1789 was unconstitutional. Sec. 25 granted power to the US SC to over rule state SCs on validity of federal laws. The SC

[128] *Supra* note 111 at 69.
[129] *Supra* note 106 at 15.
[130] United States v. Carolene Products Co. 304 US 144 (1938).
[131] Martin v. Hunter's lessee 14 US 304 (1816).

held that A. VI (supremacy clause) along with A. III of the US Constitution gave the US SC the power to review federal laws. Thus, sec. 25 of the Judiciary Act, 1789 was not unconstitutional. It also stated that the US SC and the state SCs were not equally placed and the decision of the US SC would over-rule that of the state SC.

In *McCulloh* v. *Maryland*[132], the state of Maryland declared the The Second Bank of United States Act unconstitutional as the constitution of the US did not provide for the central government to charter a bank. The state taxed the employees of the bank. J. Marshall herein again held that Art. 1 of the Constitution gave the congress all 'necessary and proper' powers to make laws. The petitioner interpreted 'necessary' as only those that are absolutely essential. J. Marshall rejecting this contention stated that this would include all powers as long as they are within constitutional boundaries. The court also stated that the state, though has the power to tax, it does not have the power to destroy. Hence, it struck down the taxation statute in Maryland under the Supremacy clause.

In *Harper* v. *Virginia Board of Elections*[133], the state of Virginia had a mandatory requirement for payment of poll tax in order to case a vote. The petitioner contended that this law, limited the equality clause enshrined by the 14th amendment for those such as herself who could not pay any such tax. Levying taxes was very well within the legislative boundary of the state. The court declared the legislation unconstitutional stating that a person's eligibility to vote shall have no association with the wealth of a person. The majority held that the poll tax had no rational basis to infringe on the equal rights bestowed by the 14th amendment. J. Harlan II dissented in his decision stating that, every state had the right to collect tax and it was also true that those who did pay tax must have a higher say in state policies.

In *Youngstown Sheet Tube Co*. v. *Sawyer*[134], the president issued an executive order to seize and operate the nation's steels mills. This was in the backdrop of the Korean War. The aim was to avoid the expected strike by steelworkers in America. The question before the SC was whether the president had the constitutional authority to

[132] McCulloh v. Maryland 17 US (4 Wheat) 316 (1819).
[133] Harper v. Virginia Board of Elections 383 U.S 663 (1966).
[134] Youngstown Sheet Tube Co. v. Sawyer 343 US 579 (1952).

seal and operate a steel mill. The court held that under no law could the President take possession of a private property. The court categorically stated that, the President's executive powers do not extend to law making. The court stated

> *"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he tninks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States * * *.' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.' The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."*

In *Roe* v. *Wade*[135], the petitioner questioned the law in Texas making an abortion other than that via prescription illegal. Reading right to privacy within due process of the Constitution the court struck down the statute. The court pointed out that there must be a balance struck between government's right to protect health and the privacy of an individual. A law completely prohibiting self-determined abortion with no safeguards such as duration of pregnancy etc. is violative of the due process of the Constitution. The court went to the extent of pointing out that the state must not regulate abortion in the first trimester of the pregnancy, in the second trimester it may impose certain restrictions and in the third trimester it may either ban or impose stricter restrictions. After the decision as well, Americans have been divided on the issue. The debate has been famously called pro-life v. pro-choice and continues to see divergent views. The author feels that even in this debate, it should be a personal choice to pick a stand but the state should make it possible for a person to make a choice and go forth with it. The state should not be the one limiting it, thereby infringing personal rights of the citizen. [136]

[135] Roe v. Wade 410 US 113 (1973).
[136] The same position may not hold true for all countries. Countries that display gender bias suffer from the possibility of staged abortions.

In *City of Ladue* v. *Gilleo*[137], the petitioner questioned the Constitutionality of the ordinance in the state that prohibited residents from displaying political symbols in their houses. The Court by a majority upheld the right of the resident to put such signs as freedom of speech. The Court recognized that the state had the right to restrict visual clutter, though it did not give an all-encompassing power. The citizens had the right to convey messages out of their home. The court held that

> *"The impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater than in Linmark. Gilleo and other residents of Ladue are forbidden to display virtually any "sign" on their property. The ordinance defines that term sweepingly. A prohibition is not always invalid merely because it applies to a sizeable category of speech; the sign ban we upheld in Vincent, for example, was quite broad. But, in Vincent, we specifically noted that the category of speech in question — signs placed on public property — was not a "uniquely valuable or important mode of communication," and that there was no evidence that "appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression."*
> *Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages […] They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression."*

In one of the recent cases of *Reed* v. *Town of Gilbert, Arizona*[138], a pastor put up a sign announcing the time and location of his services. The town of Gilbert had a law restricting the size, duration and location of certain type of signs. The question was whether this law was violative of free speech as promised by the first amendment and of the equal protection clause as promised by the fourteenth amendment. The court answering it in the affirmative stated that there was no compelling reason for the restriction. Towns can have restrictions to regulate signs but they cannot be unconstitutional.

The SC has traditionally exercised its powers of judicial review in 4 areas:

1. Relationship between centre and state

[137] City of Ladue v. Gilleo 512 US 43 (1994).
[138] Reed v. Town of Gilbert, Arizona 576 US 155 (2015).

2. Separation of powers
3. Regulation of economy
4. Individual freedoms.

The SC can declare federal as well as state legislations as unconstitutional. It can exercise the power of judicial review on both primary and secondary legislations. Courts deploy a presumption of constitutionality when reviewing legislations. In the USA, any court may determine constitutionality of a legislation without approval by a higher authority, making it enforceable within its jurisdiction. [139]

4.4 CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS

Since the case of *Coleman* v. *Miller*[140], the US judiciary refuses to look into constitutionality of constitutional amendments, both procedurally and substantively. [141] Art V of the US Constitution mandates that an amendment must not only be passed by the Congress but must also be ratified by ¾ of the state legislatures. According to the case, The Child Labour Amendment of 1924 was passed by the Congress but rejected by the Kansas legislature in 1925, only to be accepted in 1937. Some of the legislatures petitioned that once the amendment was rejected, it could not be accepted in 1937 since an unreasonably long time had elapsed. The judiciary held that Art. V gave the Congress the sole right to amend the constitution. J. Black mentioned that all questions under Art. V is non-justiciable. It understood the amendments under Art. V as political questions and out of the bounds of the judiciary. The Congress alone had the power to determine what constituted 'reasonable time' under Art V of the constitution. The court stated that:

> "*The question of reasonable time in many cases would involve an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice. . . On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially*

[139] Danielle Finck, *Judicial Review: The United States Court verses the German Constitutional Court*, 20(1), BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, 123, 152, (1997).
[140] Coleman v. Miller 307 US 433 (1939)
[141] Mohammad Moin Uddin and Rakiba Nabi, *Judicial Review of Constitutional Amendments in Light of the 'Political Questions' Doctrine*, 58(3), JOURNAL OF THE INDIAN LAW INSTITUTE, 313, 317, (2016).

> *political and not justiciable […] The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts."*

It has been argued by jurists that judicial review of a constitutional amendment is important to a democracy, because this amendment leaves a legacy of unconstitutionality within the constitution, then. Since, the constitution is the basic reference point, it is important to ensure it doesn't suffer from unconstitutionality. [142] I believe, that while earlier there were legitimate concerns on judiciary not being intelligible enough to make policy decision in the past, now with external assistance, the judiciary is not inapt to deal with political, social or economic considerations needed for judicial amendments.

The US Constitution establishes judicial supremacy, giving the judiciary extensive power to declare a legislation as void. The judiciary herein has carved out an exception of not looking at the constitutional compatibility of amendments to the US constitution. The free power of judicial review in the US has been extended by the lack of tenure of judges as well. It increases their independence. The US is a clear example of a SFJR.

A latest, 2019 judgment of the SC in *Iancu* v. *Brunetti*[143] led to the judicial review of the Lahman Act that prohibited the registration of 'scandalous' or 'immoral' trademarks. The question was whether this was violative of the first amendment right. The court stated that 'scandalous' and 'immoral' are subjective terms. The first amendment cannot restrict differences in point of views. The Congress is free to legislate a more specific statute to restrict the registration of vulgar remarks which is not violative of the first amendment. This clearly shows that the SC in the US exercises very wise powers and probably this is why India chooses to derive a lot of inspiration in its interpretation of principles of individual liberty from the US.

[142] *Ibid.*
[143] Iancu v. Brunetti 588 US 139 (2019).

CHAPTER V: JUDICIAL REVIEW IN INDIA

India is a Constitutionally sovereign nation. It is important to note that the Indian SC is very well aware of the cathartic consequences of giving the parliament unbridled power given the political experiences and history of the country. The attempt has been to limit abuse of parliamentary power while also ensuring that the SC does not turn into an institution overpowering other organs of the government.

5.1 JURISDICTION

The Indian Constitution is largest written constitution in the world. It encompasses provisions to deal with almost every foreseeable situation. The Indian constitution does not consist of any specific article granting the right to judicial review, though it has been read under Arts. 13(1), 13(2), 32 and 226. The Supreme Court under A.32 has the power of judicial review on all laws made by the parliament restricting individual rights mentioned in Part III of the Constitution. High Courts on the other hand have wider powers as under A. 226, they may pass a judgment on legislations restricting fundamental rights or for "any other purpose".

Now, since the High court has the power of judicial review for all of the constitution, the Supreme Court in its appellant jurisdiction from the High Court shall have the power to judicial review on all of the Constitution.[144] To add, it should not be forgotten that the Supreme Court is the highest court of the land, enshrined by the duty to protect the text of the sovereign constitution. Hence, it may also be understood that the Supreme Court derives its powers as the protector of this Constitution, consequently, this power cannot be understood to be restricted by A. 32 read with A. 13 of the Constitution. This was iterated in *A.K Gopalan* v. *State of Madras*[145], when Chief Justice Kania stated that A. 13 was inserted in Part III of the constitution merely as caution (*ex abundante cautela*) and all of the text of the Constitution was supreme, any statute must comply with the constitutional requirements of the entire constitution.

[144] *Supra* note 14 at 414.
[145] A.K Gopalan v. State of Madras AIR 1950 SC 27.

While A. 32 provides that the parliament may confer the power of the Supreme Court on any other court it cannot be in prejudice to its the power, no such provision is provided for under A. 226. Hence, it can be derived that the power of judicial review given to the Supreme Court is exclusive, but that given to the High Court is not and can be transferred to any other machinery. [146]

As. 323A and 323B allow for judicial review by administrative tribunals. Amidst all these developments on extent of jurisdiction of judicial review came the judgment of *L. Chandra Kumar* v. *Union of India*[147], herein the Supreme Court recognized that all administrative tribunals could also be granted the power of judicial review as long as they do not declare their parent act as unconstitutional. It identified that the Supreme Court and the High Court shall have a similar power of judicial review. Now, the issue that arises with this is that, legislations can be declared unconstitutional within their jurisdictions alone. Consequently, constitutional amendments may be declared unconstitutional within a few state jurisdictions and not within others.[148] It would fragment the operation of the sovereign text of the Constitution. Hence, it is best that the Supreme Court restricts striking down amendments to basic structure of the constitution to itself and does not bestow it on the High Courts.

5.2 EXTENT

The High Court and the Supreme Court's power of judicial review in India extends to:

1. Judicial review of subordinate or delegated legislation against the parent act. This is known as the 'ultra vires doctrine'.
2. Distribution of legislative powers between the centre and the state via varied doctrines[149].
3. Declaration of any law of the parliament as unconstitutional if it goes against any part of the constitution.

Courts in India presume that the legislature is aware and protective of the rights of the public. Hence, there is a presumption of constitutionality with every legislation. Thus,

[146] *Supra* note 14 at 418.
[147] L. Chandra Kumar v. Union of India AIR 1997 SC 1125.
[148] *Supra* note 14 at 421.
[149] Doctrine of colourable legislation, doctrine of pith and substance and doctrine of harmonious construction

where there are multiple interpretations possible, the court tends to adopt the one that is in harmonious consonance with the constitution. [150]

In the case of *Kameshwar Singh's Case*[151] secs. 4(b) and 23(f) of the Bihar Land Reforms Act, 1950 were declared void under A. 13(2). Sec. 4(b) provided that all arrears of rent from property were to be given to the Government and only 50% of those would be paid to the land holder were held violative of the fundamental right under A. 19(1)(f). The court held that this was clearly not in furtherance of public purpose as contemplated by A. 31(4) by the then Constitution. This was one of the initial cases truly applying judicial review. Eventually, the Congress government, uniformly in power in the initial few years of independence, removed right to property from A. 19 by the 44th amendment in 1978.

In *Madras* v. *Champakam Dorairajan*[152], a communal Government Order prevented a Brahmin Girl to get admission into a medical college. The SC struck down the GO. The GO was interpreted as law under A. 13(3)(a) and hence amenable to judicial review. J. Das observed – "*Seeing, however that Clause (4) was inserted in A. 16, the omission of such an express provision from A. 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in the matters of admission into the educational institution maintained by the state or receiving funds from the State*." The judgment rested primarily on the dichotomy of A. 46 vis-à-vis fundamental rights.

This judgment gave impetus to the first amendment to the Constitution for advancement of backward classes. The debate on laying the boundaries to the power of judicial review began in 1951. The amendment added A. 15(4) allowing for reservation for advancement of backward classes under both, A.15 and A. 29. The amendment also added A. 31A and 31B to the Constitution granting immunity to all legislations placed within the ninth schedule from judicial review. It is important to note that this amendment came within one year of the Indian Constitution coming into force. The Congress justified it in furtherance of directive principles of state policy

[150] Sunil Batra v. Delhi Administration AIR 1978 SC 1675.
[151] Kameshwar Singh v. State of Bihar (1954) SCR 1
[152] Madras v. Champakam Dorairajan (1951) SCR 525.

and distributive justice. Surprisingly, the Bihar Land Reforms Act, 1950 was the first act to be placed in the IX schedule.

This first amendment was challenged in the case of *Shankari Prasad*[153]. It was firmly established that the parliament had the freedom to amend the constitution as per A. 368, including part III of the constitution. The court opined that 'law' under A. 13 (2) would not include constitutional amendments. Again in 1965, in the case of *Sajjan Singh*[154] this position was re-iterated. But J. Hidayatullah and J. Mudolkar gave the dissenting opinion in *Sajjan Singh*[155]. J. Hidayatullah stated that:

> "*I would require stronger reasons that those given in Sankari Prasad's case to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States. No doubt Art. 19 by clauses numbered 2 to 6 allows a curtailment of rights in the public interest. This shows that Part III is not static. It visualises change and progress but at the same time it preserves the individual rights. There is hardly any measure of reform which cannot be introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without Article 31-A and 31-B but they would have cost more to the public exchequer. The rights of society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the Fundamental Rights by resort to cls. 2 to 6 of Art. 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another. This is the implication of Sankari Prasad's case. It is true that such things would never be, but one is concerned to know if such a doing would be possible*."

J. Mudholkar stated that:

> "*It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide Art. 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Art. 368 some of which are perhaps less vital than fundamental rights. It is possible, as suggested by my learned brother, that Art. 368 merely lays down the procedure to be followed for amending the Constitution and does not confer a power to amend the Constitution which, I think, has to*

[153] Shankari Prasad v. Union of India AIR 1951 SC 458.
[154] Sajjan Singh v. State of Rajasthan AIR 1965 SC 845.
[155] *Supra* note 153.

> *be ascertained from the provision sought to be amended or other relevant provisions or the preamble. The argument that if fundamental rights are regarded as unchangeable it will hamper legislation which the changing needs of a dynamic society may call for in future is weighty enough and merits consideration. It is possible that there may be an answer. The rights enumerated in Art. 19(1) can be subjected to reasonable restrictions under cls. (2) to (6) of Art. 19 and the other fundamental rights - or at least many of them - can perhaps be adapted to meet the needs of a changing society with the aid of the directive principles*."

It is important to note that, this position of restricting judicial review of constitutional amendments is similar to the current position in the US as discussed in the previous chapter. This is definitely a SFJR going by the definition adopted in this paper by the author, but it was only after the developments post *Sajjan Singh*[156], that the Indian judiciary began to exercise the strongest form of judicial review as seen in the world.

Deriving from the opinion of the dissenting judges in *Sajjan Singh*[157], in the case of *IC Golakhnath* v. *State of Punjab*[158], the legal position as to amendment of Part III of the constitution was altered in exercise of power of judicial review by an 11 judge bench. It over ruled the position established in *Sajjan Singh*[159] by a close majority of 6:5. It established that fundamental rights are natural rights and the parliament could not amend them without being subject to judicial review. The court read A. 368 as granting mere procedural legislative power to the parliament. It did not extend any constitutional 'power' to it. J. Subba Rao unequivocally stated that every parliamentary amendment shall be deemed to be law under A. 13(2) capable of judicial review. The phrase 'basic structure' was introduced by M.K Nambair for the first time during this hearing, which came to be crystallized later. Right after this judgment, the SC and the Parliament were seen at loggerheads on recognizing the extent of amending power to the Constitution. Eventually, the Parliament began placing legislations in the IX schedule, out of the power of judicial review. [160] With this judgment came the 24th amendment in 1971. The Congress government, to undo the consequences of the judgement, added A. 13(4) and A. 368(3) to the Constitution.

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[156] *Ibid*.
[157] *Ibid*.
[158] IC Golakhnath v. State of Punjab AIR 1967 SC 1643
[159] *Supra* note 153.
[160] In IR Coelho v. State of Tamil Nadu AIR 2007 SC 861, the SC unanimously held that legislations under Schedule IX of the Constitution would be open to judicial review at the touchstone of Fundamental Rights

The amendment was with a very clear aim of keeping constitutional amendments out of the purview of judicial review. This can be very well witnessed since the headnote of A. 368 was also added to read " *'Power' of the Parliament to amend the Constitution, and procedure thereof*."

In 1973, *Keshavnanda Bharati* v. *State of Kerala*[161] a 13 judge constitutional bench sat down to review this 24th and 25th amendment along with its decision in the *Golakhnath case*. The 25th amendment altered A. 31 and added A. 31C[162] to expand the power of the Government to acquire private property which was a fundamental right, otherwise. The court held that the power to amend the constitution under A. 368 allows for amendment to any part of the constitution including fundamental rights but it should not be extended to destroying the features that are identified as the basic structure of the very text of the Constitution. While part of A. 31C[163] was declared void, the 24th amendment was not. Chief Justice Sikri explained the basic structure as being:

1. *"Supremacy of the constitution*
2. *Republican and democratic form of government*
3. *Separation of powers*
4. *Federalism*
5. *Secularism* "

While developing the basic structure doctrine the judges unequivocally noted that the Constitution at no point could imagine a situation where the Fundamental Rights of individuals would be compromised. The amending power of the parliament cannot be unlimited to take away such rights. The court examined the validity of A. 31-C via its impact on Fundamental Rights and whether it would be alright to grant such bridled

[161] *Supra* note 17.
[162] "Saving of laws giving effect to certain directive principles – Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing principles specified in clause (b) and clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent, it abridges or takes away any of the rights conferred by Article 14, Article 19 and Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless such law having been reserved for the consideration of the President has received his ascent. "
[163] "and not law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy"

power for amendment to the Parliament. It is pertinent to note the basic structure doctrine is a very clear attempt by the judiciary to protect its power of judicial review.

But, the judgment received severe backlash from the parliament. Three seniormost judges, J. Dhelat, J. Grover and J. Hegde were not made the Chief Justice while J. AN Ray was. In an already established climate of political excesses, the infamous emergency was declared in 1975. Surprisingly the judgement did not mention judicial review as a basic feature of the constitution. It was only later, in the case of *Minerva Mills* v. *Union of India*[164] that judicial review was read into the basic structure of the Constitution. [165] In this case the Centre suspicious of Minerva Mills being a sick industry empowered National Textile Corporation to take over it. Minerva Mills could not question it since by the 39th amendment the centre placed the Nationalisation Act, 1974 into the IX Schedule. This made the act out of the purview judicial review. And Minerva Mills could not challenge this process of constitutional amendment since judicial review of an amendment was barred by the introduction of A. 368(4) and A. 368(5) by the 42nd amendment. The majority struck down both the amendments to the Constitution. J. Bhagwati agreed with striking down of A. 368 amendments but did not agree to the striking down of the 39th amendment. He stated that:

> *"So long as [Article 368] Clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in Kesavananda Bharati's case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in Kesavananda Bharati's case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers. I shall immediately proceed to state the reasons why I think that these two features form part of the basic structure of the Constitution."*

[164] Minerva Mills v. Union of India AIR 1980 SC 1789.
[165] Subsequently courts have struck down acts only because they took away the power of judicial review. Kihota v. Zachillu (199) Supp (2) SCC 651; Sakinala Harinath v. Andhra Pradesh (1993) 2 An WR 484.

What separates *Minerva Mills* from *Keshavnanda Bharati* is that it was decided in far less dire circumstances, but it nonetheless upheld the judgment in *Keshavnanda Bharati*. The Parliament, since the judgments has been using the IX Schedule (around 284 Acts) as a means to shy away from fulfilling the basic mandate of the constitution. A very recent judgment of *IR Coelho* v. *State of Tamil Nadu*[166] upheld the power of judicial review to the statutes in the IX Schedule as well. The basic structure of the Constitution cannot be compromised. The judgment aimed to protect judicial review, preserve constitutionalism and protect the people.

The historical development of the doctrine of judicial review since 1951 till 1980, establishing it as a part of the basic structure of the Indian Constitution has instilled the power of review inherently within the judiciary, making India one of the countries practicing the strongest form of judicial review. This power cannot be limited by any parliamentary amendments to the constitution in itself as well. The SC and HCs have used this power to strike out legislations and to give an expansive view to already passed acts. It has also given guidelines for the interim while the parliament drafted laws such as the famous Vishakha guidelines and NALSA guidelines. These eventually altered to the Sexual Harassment of Women at the Workplace Act and Transgender Rights Bill.

Once any court declares a law as unconstitutional, the doctrine of eclipse applies on it. The doctrine of eclipse[167] in India is that, when a statute or a part of it is declared as unconstitutional, it is not wiped off the book, a shadow descends on it which is lifted when the it is no longer unconstitutional (i.e. after the legislature amends it suitably). [168] Thus, the statute is merely suspended and can be brought back into force once it has been suitably amended.

[166] *Supra* note 160.
[167] The doctrine was introduced in India in the case of Bhikaji Narain v. State of Madhya Pradesh 1955 2 SCR 589.
[168] Chintan Chandrachud, Declarations of Unconstitutionality in India and UK: Comparing the Space for Political Reform, 43(2), GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 309, 330, (2015).

5.3 CAN INDIA CONSIDER A DIALOGIC WEAK FORM OF REVIEW?

In India, Congress was the dominant party for decades post independence. In 1971, the Indira Gandhi government passed a law invalidating the power of the court to question government land acquisitions. Since then, there were over 80 other amendments to override the decisions of the courts. [169] The courts struck back only in 1973, with *Keshavnanda Bharati*, a constitutional bench declared that there was a 'basic feature doctrine' governing all of the constitutional framework and hence the court also had the power to invalidate a constitutional amendment if it violated the constitutional framework. [170] The Indian courts were empowered to invalidate acts of the legislature that are incompatible with the constitution under the principle of unconstitutional constitutional amendments. [171] The amendments to the constitution fell within the ambit of judicial review under the fundamental rights of the very same constitution. But the judgement never exhaustively defined 'basic structure' leaving it for easy interpretation at the convenience of judges for years to come. In 1975, again the Allahabad High Court set aside the election in the constituency of Prime Minister Indira Gandhi for electoral misconduct.[172]

The 1951 judgment of *Champakam Dorairajan*[173] wherein the court struck down a Government Order allowing for reservations led to the first amendment to the Constitution. The Parliament undid the judgment of the court to constitutionally provide for reservations. After the *Keshavnanda Bharati* judgment, Indira Gandhi was not too happy and sought to punish the judges who passed a verdict in favour such as J. Shelat, J. Hegde and J. Grover by overlooking them for the office of the Chief Justice. The Indira Gandhi Government in India brought about the 42nd amendment to the Constitution adding two clauses to A. 368 radically altering the constitution after the *Keshavnanda Bharati* Judgment as a clear attempt to show that Parliament has the last say in making laws. [174] The second clause in the 42nd amendment clarified that

[169] *Supra* note 40 at 109.
[170] *Supra* note 17.
[171] *Supra* note 40 at 111.
[172] *Supra* note 41 at 116; Indira Gandhi v. Raj Narain 1975 AIR 865. In the case, Raj Narain questioned the election of Indira Gandhi on the malpractice of taking the assistance of an employed government servant.
[173] *Supra* note 152.
[174] CHINTAN CHANDRACHUD, THE CASES THAT INDIA FORGOT, 27, (2019).

there shall be no limitation in power to amend the Constitution of the Parliament, whatsoever. This led to the litigation in *Minerva Mills Case.*

Indian courts review constitutional amendments both procedurally and substantively. In India, due to lack of trust parliamentarians have not been understood as harbingers of social change. This failure of politicians paved the way to judicial review of constitutional amendments. The political climate during the *Keshavnanda Bharati* case also played a major role in the development of the regime of judicial review in the country.

The Indian parliament follows a procedure of easy constitutional amendment to invalidate the decision of the judiciary. The number of constitutional amendments in India as compared to that in the USA go on to show the steep process that a constitutional amendment goes through in the USA. Herein, also lies the genesis for the limitation in judicial review. The USA SC assumes that any amendment that has gone through such a difficult process must not be interfered with. [175] While in the USA, with a constitutional amendment it may be envisaged that the power of judicial review may be curbed, in India judicial review is understood as a part of the basic structure of the constitution and not amenable to parliamentary amendment restrictions.

Gardbaum argues that countries such as India show the effect a strong judiciary can have in unstable and transitional democracies. The political powers tend to override the judiciary, thereby compromising with the democratic stability of the entire country. They run the risk of shifting the nation to authoritarianism again. [176] I believe, that given the political climate of periodic excesses, corruption and effective dominant party system, Indian fundamental rights have been protected solely due to the extensively activist role the judiciary has places. It is correct that the Parliament has resorted to not very respectable methods to undermine the judiciary, but they have nonetheless contributed in reminding the Parliament of its powers as well as mobilizing the citizens against it. Contrary to Gardbaum, I believe, that it's only the current strongest form of judicial review that has managed to keep the legislature in

[175] *Supra* note 141 at 334.
[176] *Supra* note 8 at 303.

check for a new democracy like India. It is true that the judiciary now takes a pro legislature stance while undertaking judicial review of economic enactments, the fact that it has a choice not to, matters, I believe.

CHAPTER VI: CONCLUSION

Legislatures can face issues while drafting legislations due to several reasons: they may not be able to take note of the fact that the legislation may be applied in a way that infringes rights. Legislatures may not able to appreciate the impact these rights may have on different people coming from varied life experiences. They may not be equipped to see how rights based claims may be accommodated. [177] Once courts undertake judicial review, they will have some role to play to counter these blind spots. It is often argued that judges tend to understand and deliberate on individual rights more than legislatures. It is important to give courts the power to overturn legislation when the legislature might act contrary to the will of the people. [178] Courts also tend to gain more faith of the people because they are seen as a legitimate and fair system, chosen by people merely for the protection of their rights.[179] Gardbaum argues that this is not exactly true. It is just that lawyers are trained to study the reasoning of the judges and not those of the legislatures. [180] Legislators are accountable to their constituencies and do factor in individual rights while drafting or proposing legislations.

In a SFJR, attempts by the legislation at overriding the courts are seen as a threat to the integrity of the system, while in WFJR it is understood as a norm. [181] The stress between the legislature and the courts is immense in case of SFJR. In case of WFJR the legislatures have the opportunity of focusing on the questions at hand without having to re-enact or renew the legislation. Some argue that the parliamentary amendment powers must not be very difficult, because that is the only method to undo a constitutional judgment. When it is difficult, the judges inevitably end up laying down the law making them more political than the institution should be.[182] Tushnet, while giving constitutional jurisprudence the concepts of the forms of review, also propounded the WFJR.

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[177] Rosalind Dixon , *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*, 5(3), INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW ,402, (2007).
[178] *Supra* note 29 at 387.
[179] *Id* at 391.
[180] Waldron, *The Core of the Case against Judicial Review*, 115(6), THE YALE LAW JOURNAL, 1382, (2006).
[181] *Supra* note 40 at 112.
[182] *Supra* note 2 at 211.

While courts may be better equipped to deal with first generation rights, when it comes to second generation positive socioeconomic rights the situation is a little more complex. The exercise of these rights requires allocation of substantial state resources, which may be very difficult to withdraw. [183] The court may not be in a position to gauge these. Critics also tend to suggest that WFJR is quite vulnerable – it might transform into SFJR in a few contexts if the legislature accedes to all decisions of the judiciary while encouraging supremacy of the legislature in others

Gardbaum also mentions that this WFJR is not a full proof method to stabilize such democracies, other factors also need to be considered and checked. [184] WFJR may prevent the backlash against courts but it by no means guarantees non-existence of such a backlash. [185]

I've found, the key to a successful democracy is indeed independence of the judiciary. This independence ensures that judiciary can stand for the protection of rights of people irrespective of any political pressure. UK has a WFJR. Courts initially try to read a legislation in correspondence with rights and then move on to declaring the legislation incompatible or invalid, therein. While most cases show that the legislature tends to follow the opinion and rulings of the judiciary there is nothing that can take away from the fact that the legislature has the freedom to not adhere to the decision of the court. The presumption being that the legislature after discussion and deliberation feels that it needs to do so. This may be more prominent for second-generation rights because they need substantive administrative support. But, for nations where this presumption may not work WFJR will only end up leading to a political anarchy. Such is the case with Asian countries. Most Asian countries have a dominant party system. They have been ruled by outsiders and have earned independence only to be left within the hands of a few politicians to run the country. In such a state a few political parties gained immense power and ruled for years altogether. This can be seen in India. Indian Congress tried pushing for a WFJR through the easy

[183] *Supra* note 177 at 402.
[184] *Supra* note 8 at 317.
[185] *Id* at 319

constitutional amendment procedure in India.[186] Such amendments faced heavy backlash from the people. In this scenario, along with the political excesses in 1971 and 1975 as discussed, it is hardly surprising that the judiciary has to step in. A SFJR has assisted in keeping the political parties under control. The basic structure doctrine and the activist steps of the judiciary have been highly appreciated in the democracy and were a boon during the India Gandhi governmental tyranny.

It was important for the judiciary to take an activist approach and curtail the blind tyranny of political parties. Allowing for judicial review of constitutional amendments unlike USA is a product of this. A SFJR is what kept the democracy going. Plus there is nothing to suggest that there is a lack of dialogue between the judiciary and the legislature in a SFJR. It may only be easier in a WFJR. Thus, the distinction between the SFJR and WFJR is not exactly absence of dialogue, unlike Tushnet's thesis, but merely relative usage.

Thus, to conclude, in WFJR, such as traditionally argued for the UK, the legislature gets the final say. Though, I have found in the study that UK seems to be aligning towards a SFJR since the legislature most times deems it right to adhere to the judiciary. Though, the freedom to not do so exists. In countries such as India and US there is a SFJR- while in US the Congress is mandated to adhere to the judiciary, in India the parliament has tried to undo judicial pronouncements by passing contradictory laws. The judiciary has come out strong against it, but has also bowed down to some. Thus, neither forms of review are binding enough if the legislature decides against it. There cannot be one form of review that should be applied to all democratic countries. Emphasis needs to be placed on constitutional comparison on the basis of the regional history and political situations. Neither system is bullet proof, while one may be more stable and efficient for a few nations, the other works for other nations. It is impossible to pick one as better than the other. The aim of every democracy should be only to ensure independence and impartiality of the judiciary with a positive democratic economy. This may come with either a WFJR or a SFJR on the basis of their constitutional history and political progress.

[186] *Supra* note 40 at 114.

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APPENDIX

India	UK	USA
Constitutional sovereignty. Written constitution.	Parliamentary sovereignty. No written constitution.	Constitutional sovereignty. Written constitution. Judicial supremacy.
Judicial review is provided for under A. 13 of the Constitution.	Judicial review is provided for under Secs. 3,4,6 of the HRA and Part 54 of the Civil Procedure Rules.	Judicial review developed with the 5th and 14th amendment to the constitution.
SC, HC and Administrative Tribunals have the power of judicial review under Arts. 32 and 226 respectively	SC, ECtHR, HC and Upper Tribunals have the power of judicial review.	All courts the power to judicial review within their jurisdiction.
Declaration of unconstitutionality of any legislation makes it void and inapplicable.	Primary legislations can only be declared incompatible and not inapplicable. Secondary legislations may be declared void and inapplicable, both.	Legislative and Executive legislations may be declared unconstitutional and void. This does not apply to constitutional amendments.
SC and HC can undertake judicial review on violation of Part III of the Constitution. HC can additionally undertake judicial review on other	Judicial review is undertaken to protect all rights granted in the ECHR via HRA.	Judicial review is undertaken for all of the Constitution except for political actions.

parts of the Constitution as well.		
Neither the SC nor HC can amend a legislation within its power of judicial review.	No amendment can be carried out of the primary or secondary legislation within the power of judicial review.	If a law is rejected by the SC, it can draft a new law in its place.
Writs of certiorari, mandamus, prohibition, habeous corpus and quo warranto have been constitutionally allowed for.	Writs of certiori, mandamus and prohibition are recognized statutorily.	Writs of certiorari, mandamus, habeous corpus and scire facias and any other suitable writs may be issued by court.
There is no time limit for preferring a judicial review petition.	Judicial review of secondary legislations and in Upper Tribunals must be filed within 3 months.	There is no time limit for preferring a judicial review petition.
The consequence of judicial review is that the application of the legislation is restricted in the jurisdiction of the court for everyone.	Judicial review merely restricts application to the applicant and has no overall consequences.	The consequence of judicial review is that the application of the legislation is restricted in the jurisdiction of the court for everyone.
Judicial review may be conducted on distribution of legislative powers between the centre and state.	Judicial review cannot be conducted on this aspect.	Judicial review may be conducted on distribution of legislative powers between the centre and state.

It is believed to practice SFJR.	It is believed to practice WFJR.	It is believed to practice SFJR.
Judicial review is a part of the basic structure of the Constitution and cannot be taken away.	The power of judicial review may be taken away by legislation.	The power of judicial review may be taken away by legislation.
Indian courts do not read into legislations for constitutionality, but in case two interpretations are possible, prefer the one that adheres to the Constitution.	Courts read into primary legislations to ensure that they are compatible with the ECHR.	US courts do not read into legislations for constitutionality, but in case two interpretations are possible, prefer the one that adheres to the Constitution.
Declaration of unconstitutionality in India makes the legislations defunct	A declaration on incompatibility has no impact on the operation of the primary legislation	Declaration of unconstitutionality in India makes the legislations defunct
There is a presumption of constitutionality of legislation.	There is a presumption that legislation adheres to HRA and ECHR.	There is a presumption of constitutionality of legislation.