# JUDICIAL ACTIVISM AND JUDICIAL INTERVENTION IN INDIA IN TERMS OF JUDICIAL REVIEW - A CRITICAL ANALYSIS

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**ABSTRACT**

The ultimate power is vested in the judiciary to maintain the check and balance between the three organs of the government.

We follow the rule of law in India, which means that the constitution is the highest law of the country and that any legislation that conflicts with it is invalid. When a judge determines that a legislation, presidential order, or other official action violates the written constitution, it has the authority to proclaim it to be unconstitutional and void.

One of the powers vested in the judiciary is to ascertain the legitimacy of the act of the legislature and judiciary through the application of judicial review.

Basically, the power of judiciary is exerted to examine the constitutionality of action of the legislature and executive.

Judicial Review refers to the Judiciary's authority to read the Constitution and void any relevant law, legislative order, or presidential order. If it discovers that they do not follow the Indian Constitution.

Judicial review serves two crucial purposes, including legitimising government action and defending the law from any excessive government intrusion.

**Keywords**: Judiciary to review, Judicial Review, power of Judiciary, constitution of India, government action

*"Judicial review…can be characterised as the rule of law in action…"*

## Introduction

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[1]

- **Chief Justice John Marshall**

The rule of law is the personification of judicial review. It's the courts that review the conduct of the legislative and administrative branches. It's also credited with redefining judicial action by the Higher Judiciary. A court must examine the legality of any law or exertion, whether it's legal or not. It's the conception of the rule of law. Judicial review is a check and balance to maintain the separation of powers. Separation of powers is abecedarian to judicial review, as there's unnaturally a separation of powers between all three bodies legislative, administrative and judicial.

The separation of powers defined the compass of judicial review. Declaring illegal and unenforceable any law or order that contradicts or conflicts with the essential traditions or foundations of the Indian Constitution is an extraordinary armament in the hands of the courts. The two principal basis of judicial review are "Theory of Limited Government" and "Supremacy of constitution with the requirement that ordinary law must confirm to the Constitutional law."[2]

As guardian of the Constitution, the Supreme Court of India has the implicit power to declare as an ultravirus any central or state act or administrative order that violates the vittles of the Constitution. The power of the judiciary to review the laws of a legislative or executive branch to determine their constitutional validity is well known. as the "Doctrine of Judicial Review".[3]

America is the first home of Judicial Review. It was an established development in America.

[1] Available at http://streetlaw.org/en/case/1%22 (last visited on 30 December, 2021).
[2] Prashant Gupta, "Doctrine of Judicial Review: A Comparative Analysis Between India, U.K. and U.S.A" IJLDAI 49
[3] Available at www.quora.com/what-is-meant-by-thedoctrine-of-the-judicial-review (last visited on 01 December, 2021)

In the well-known case of ***Marbury v. Madison (1803)***[4] **"**Chief Justice John Marshal of the United States implicitly mention that there is the power of the Court to proclaim the of act or laws of the council as ultra vires. Marshal asserted this sanction of the Court from popular provision of "Due process of Law" of the American Constitution". One of the Bills of Rights in the American Constitution is that "No person shall be deprived of his life, personal liberty and property without due process of law".

There's no judicial review in England. Britain has an verbal constitution. The British Parliament is the supreme body. The Chief MP and Chief Executive are merged and a Cabinet headed by the Prime Minister ensures perfect collaboration between Parliament and the Administrative. thus, judicial review isn't needed. Judicial review is an important part of the Indian Constitution. likewise, the compass of judicial review in India isn't as expansive as in the United States. As the Indian Constitution is the longest written constitution in the world, judicial review is limited in India. In India there the fundamental rights has limited the scope of Judicial Review as there is an essential distinction between the two provisions contained in the both constitution America and India , Due Process of Law of the American Constitution and "Procedure established by law" of the Indian Constitution. Article 21 of the Constitution gives that "no person shall be deprived form his personal life and liberty"[5] freedom besides as per the method set up by law". The term "law" stipulated in the constitution of India does not mean natural law rather it implies state made laws.

## Chapter 2- Judicial Review

### 1.1 Meaning of Judicial Review

There is the power of Judiciary to determine the ambit and constitutionality of any act or order passed by the legislature, the process of the same is termed as judicial review.

The judiciary is the sole proprietor who has the authority to protect the rights of the citizens. The judicial system used the act for the welfare of the people, he act as the guardian of the constitution.

[4] Available at www.history.com/this-day-inhistory/marbury-medison-establishes-judicial-review (last visited on 2 December, 2021).
[5] Article 21 Constitution of Indian

Edward S. Corwin says that says that judicial review is the power and duty of the courts to disallow all legislative or executive acts of governments, which in the Court‟s opinion transgresses the Constitution.[6]

Accordingly the Rule of law means the law is the supreme i.e the supremacy of the constitution, hence judicial review empowers the court to declare any laws void which is inconsistent with the fundamentals of the law of the land.

The Constitution is the supreme law of the land and the judicial review empowers the court to enquire the actions of legislature, executive order which conflicts with the Indian constitution and declare the same unconstitutional or ultra vires. The scope of judicial review is not limited to the constitution rather it empowers the court to revise the decree of inferior court through the remedies of appeal, revision.

Judicial review prevails in those countries where there is written constitution. Its means that the constitution is the supreme law of land and any law inconsistent therewith with the fundamentals of the law of law is termed void ab initio. The term judicial review has enshrined in the constitution to review the actions of legislature or executive that whether the said authority has done its actions in consonance with the authority prescribes therein. For example, in Indian Constitution if the Hon'ble High Court or Apex Court finds any act of Union legislature or State legislature in violation of Part III of the constitution of India, the law shall be struck down by the Hon'ble court under article 13(2) of the constitution of India.

### 1.2 Evolution and History of Judicial Review

The doctrine of judicial review can be traced back from the United States of America in the case of ***Marbury Vs. Medison*** Whereas other constitution of the world evolved the concept during 18th century. In Indian judicial system the concept of judicial review is based on the Rule of law. In India Since, Govt. of India Act 1858, viz-viz Indian Council Act 1861 imposed several restrictions on the power of Governor General in council in **evading** laws as there were no provisions for judicial review. The Court has only power to implement those laws. In 1877 ***Emperor Vs. Burhah***[7] was the first case wherein the court interpreted as well as originated the concept of judicial review in India. In this case the court ruled that the party become aggrieved

[6] Corwin Edward S., A Constitution of Powers in a Secular State 3-4 (The Michie Company, USA 1951)
[7] 1877 3. ILR 63 ( Cal)

by the legislation, he has the right to challenge the constitutionality of the act enacted by the Governor Council in access of the power conferred upon him by the imperial parliament. The high court and privy council has adopted the view the Indian Courts has power to review the legislature with some limitations.

Again in, ***Secretary of State v. Moment*** [8] Lord Haldane observed that "the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858".

In another case, ***Annie Besant v. Government of Madras,***[9] though, the major parts of the constitution of India has been browed from Government of India Act, 1935, the said act had no provisions relating to Judicial Review which cause problems to the court and necessitated the adoption of Judicial review. Hence, the Constitution of India explicitly mention the Doctrine of judicial review vide its Art. 13, 32, 131-136, 137, 143, 226, 227, 245, 246, 372.[10]

### 1.3 Judicial Review in India

Indian Constitution is the blend of ideas of several constitution of the world. The impotence of the Indian Constitution as explained by H.C.L. Merrilat, [11] he asserted that "it shows the combination of a British parliamentary system where the executive is responsible to the legislature and a written constitution on the American model, including a Bill of Rights and separation of powers and federal principles by division of powers between center and federating units, resulting in a unique constitutional position regarding judicial review in India."

Supremacy of law is the spirit of Indian Constitution. In India, the "Doctrine of Judicial Review" is the basic Structure of the Indian Constitution. It based upon the concept of Rule of Law. Though the Doctrine of Judicial Review has neither defined in the Indian Constitution nor implicitly mention but it is the integral part of the Indian Constitution of India. The Judicial Review, in Indian constitution has been appended to secure the Check and Balances among all the three organs i.e Legislature, Judiciary and Executive.

[8] 1913 40. ILR 391 (Cal)
[9] 1918 . AIR 1210 ( Mad)
[10] M.Laxmikanth, Indian Polity (Tata McGraw Hill Education Private Limited, New Delhi, 2010)
[11] H.C.L. Meillat, University of Toronto Law Journal, Vol. 15, 1963-64, pp. 489-492, quoted by P. Ravi Jashuva

Various provisions of the Indian Constitution explicitly mention about the judicial review to the court such as Articles 13, 32, 131- 136, 137, 141, 143, 226, 227, 245, 246, 372.

The most prominent object of judicial review is to protect the Citizens from abuse of power conferred upon the legislature or executive. The individual receives just and fair treatment. The basic purpose of judicial review is to assert the some alleged right of one parties to grant the relief to other aggrieved parties by declaring the enactment of legislature as void. But, the real purpose is to serve something higher i.e no statute which is repugnant to the constitution should be enforced by courts of law.[12]

The Indian Constitution like other written constitution it prescribes the "Separation of Powers" among three organs of the constitution. No organs conflict the powers with other organs as has conferred upon them. The Doctrine of Separation of powers stated in its rigid sense that each organ of the constitution namely, Legislature, executive and Judiciary should operate its power in its own sphere and there should no conflicting between their functioning. The Indian Constitution doesn't include Separation of Powers in rigid sense but it does include the same in a flexible manner which can easily be differentiated. It can very well be said that our constitution does not contemplate assumption, by one organ of the functions that essentially belongs to another. [13]

### 1.4 Constitutional Provisions regarding Judicial Review

The founding father of the Indian Constitution took the notice of great importance of check and balances among all the three organs as it has stated by Lord Acton that "Power tends to corrupt; absolute power corrupt absolutely" means therein that when any authority bestowed with absolute power, it needs an another authority who can glance over the actions of that authority. In Indian Constitution Judicial review has been enshrined to monitor the actions of Executive and legislature.

Article 13 and 32 of the Indian Constitution signify the attachment of founding father with fundamental rights enshrined in Part III of the Indian Constitution. The Hon'ble High Court and Supreme Court have been bestowed with the power of judicial review in following aspect.

[12] Justice CK Thakkar and Justice Arijit Pasayat, Dr. CD Jha Judicial Review of Legislative Acts 116 (2nd, Lexis Nexis Butterworths Wadhwa, Nagpur 2009)
[13] Ram Jawaya Kapoor v. State of Punjab, AIR 1955 SC 549 at 556.

(i) The Judicial review means the power of the higher court to assess the delegated or subordinate legislation in context with their compatibility with parents act. This is called the "doctrine of ultra vires.

(ii) Under Federal Constitutions the courts have the ability to uphold the plan of conveyance of administrative powers between the Central Government and the Provincial Governments. This legal capacity is innate in a composed government Constitution independent of whether such power is explicitly given or essentially gave or fundamentally gathered. Legal audit in this sense is particular to government constitution, similar to that of the USA and India and consequently isn't found under the English Constitution which is unitary and unwritten.

(iii) Judicial review in its third and most common sense means the power of the Court to declare any act as unconstitutional if the act not found in consonance with the fundamentals of the constitution of India. This is the essence of what has been propounded by the Justice Marshall and the same is exercised by the Indian and USA Courts. [14]

***(iv)*** The basic feature of Indian Constitution of India is that the Supreme Court in ***Keshavanand Bharti Vs. State of Kerela***, [15] asserted that the legislature has power to amend any part of the Indian Constitution except altering the basic structure of the Indian Constitution. The Hon'ble Court formulated the concept of "Doctrine basic structure" in Indian Constitution. The legislature can't destroy the basic feature of the Indian Constitution. It is pertinent to mention that different judges seated in the bench have asserted different types basic feature but the concept of judicial review has not been included in the list. Later on, in the case of ***Minerva Mills v. Union of India, [16]*** the "doctrine of judicial review" has been added in the list and the constitutional amendment has been tested on the grounds of ***"basic structure doctrine"*** the Hon'ble Supreme court struck down certain provisions (amendments) only on the grounds of infringing the basic structure of the

[14] Encyclopedia of the American Constitution 1054 (1986), quoted by V. Nageswara Rao and G.B.Reddy, Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead, "(1997) 39 JILI. 415.
[15] (1973) 4 SCC 225
[16] AIR 1980 SC 1789

> constitution as that amendment has ousted the power of the judicial review of supreme court and High Court. [17]

The necessity of courts to declare any act or statute unconstitutional arise not because the judiciary is the supreme rather it maintain the checks and balances among legislature or executive in one hand and in another hand provides means to correct the mistakes of one and other or both. The duty of judiciary is to guard the mistakes or the other organs and maintain law and order in the society.

The exercise of judicial review by constitutional courts is not restricted but it has certain limitations. The limitations or restrictions are covered mostly of the constitution itself. According to D.D Basu,[18] there are three types of limitations prescribed therein in the constitution- Constitutional limitations, instrinsic limitation or self- imposed limitation. The constitution of India by various articles excluded certain provisions from judicial review. These are Article 31 A, 31-B read with Ninth Schedule, 31-C, 74(2), 77(2), 105(2), 194(2), 122, 232-A, 323-B, 239(a) 359, 361-A, 363, 368 (4) and Tenth Schedule. Whereas later on, certain articles were included in the list of judicial review. The Hon'ble court in the case of ***L. Chandrakumar Vs. UOI***,[19] ruled that the judicial review is the basic feature of the Indian Constitution.

In the case of ***IR Coelho Vs. State of Tamil Nadu***, [20] the supreme court considering the view taken in ***Keshavanand Bharti,*** [21] ruled that the judicial review is most important element of Indian Constitution of India and Schedule 9 can also not be alibi from Judicial review. Any acts inserted in schedule 9 of Indian Constitution of India are subject to judicial review to extent it abridges fundamental rights of the individuals.

In India judicial review is not limited to the extent of constitution itself rather there are several other statute as well which prescribe judicial review like-wise Section 114 Order 47 Code of civil procedure 1908 ( hereinafter C.P.C), section 115 of C.P.C, Section 397, 399 of Criminal

[17] P. Sambhamurthy v. State of A.P. AIR 1987 SC 663; Kihota v. Zachillu (1992) Supp. (2) SCC 651; L. Chandra Kumar v. U.O.I. AIR 1997 SC 1125.
[18] D.D. Basu, Commentary on the constitution of India, 5th Ed., Vol. 1, p. 170.
[19] 1997 (2) SCR 1186
[20] AIR 2007 SC 861
[21] Supra

procedure code ( herein after Cr.p.c). There are other provisions enshrined in the many statutes which impliedly support judicial review in India.

### 1.5 Features of Judicial Review

In my opinion, India is a democratic country which means in the words of Abraham Lincon, [22] "Democracy is a government of the people, by the people and for the people". In democratic country the government is run by the people. Every single citizens have right to cast vote and elect their representatives. It is basically, different from monarchy or dictatorship, in dictatorship there is one king who has all the authority of Government.

Coming to the judicial review concept, in democratic country without judicial review the democracy cannot subsist. As democracy is for the benefits of the people and the representatives elected by the people represent them in the both houses of parliament. The law making power subsist with the legislature wherein they make the law. And the concept of judicial review bestow the power to the judiciary to scrutinize the law made by the legislature and if anything found contrary the fundamentals of the constitution, declare that act unconstitutional.

**Power of Judicial review by the Supreme Court of India and High Court-**

Article 226 empowers any person to approach to the high court for the violation of their fundamental right enshrined in Part III of the Constitution of India. Article 32 renders power to any individuals to move to the Supreme Court for the violation of fundamentals rights or any question of law whereas it is Supreme Court who has final authority to interpret any laws or the constitution of India as its Judgment is binding all over the Country.

**Judicial Review of State or central Laws**

**Article 13 States [23]**

Laws inconsistent with or in derogation of the fundamental rights

[22] President of United States of America
[23] Constitution of India 1950

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void;

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void;

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas;

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality;

Above article under Constitution of India provides judicial review. Laws made by Centre or State are subject to Judicial Review which is inconstant with fundamental right under Part III of the Constitution.

**Application of Judicial Review**

The judicial review is not automatically (Suo Motu) applied or challenged until and unless it is not challenged. It is applied or challenged when there is question of law or rule involved and the same is challenged.

**Principal of Judicial Review**

Judicial review is based upon the principal of "Procedure established by law" enshrined under Art. 21 of the Constitution of India or "Due process of Law" impliedly taken from the U.S Constitution. Basically, Due process of Law means the Law must be just and fair. It should not be arbitrary.

There are three types of Judicial review:-

Review appertaining to Legislative action:

The law making power bestowed upon the legislature and the legislature are bound to comply the provisions of constitution while making the law.

Review of Administrative action:

Administrative are the enforcement agencies and this is a tool for exercising the discipline while implementing the law by administrative agencies.

Review of Judicial decisions:

The judiciary is the backbone of Indian democratic system and it cannot be ruled out to that judiciary has a wide power among two other organs. it has power to change its descision under Art. 137, 145, 226, 32 of the Constitution of India.

### 1.6 Judicial Activism in context of Rule of Law

Judicial Activism is a dynamic process in Indian Judiciary. The term "judicial activism" refers when the judiciary exceeds it power; stepping in the shoes of legislature and coming with a new rules and regulations. In another sense the law making power bestowed upon the legislature whereas judiciary can neither make the law nor direct to make the laws. In judicial activism not only he makes the law rather it also tells the legislature what and how it does make laws.

For the first time **Arthur Schlesinger** introduced the term "judicial activism" in a January 1947 fortune magazine article titled "The Supreme Court: 1947"[24] According to Justice J.S Verma, Judge Supreme Court of India, "The role of the judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of Judicial Activism."

The term judicial activism can be traced back in 1893. When Allahabad High Court judge S. Mahmud held that the pre-condition for hearing a case would be accomplished only when

[24] Hon'ble Mr. K.G. Balakrishnan, Judicial Activism under the Indian Constitution available at http://www.sci.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf , Visited on 31.11.2021

someone speaks. In the case, the under trial was not in a position to afford a lawyer (Justice Mahmud, 1893).[25]

Judicial Activism is based on two main theories (i) Theories of vacuum filing (ii) Theories of Social want.

### (A) Reasons for growth of Judicial Activism

It is more difficult to identify the growth of Judicial Activism as there is not a single reasons wherein the evolution of judicial activism takes place.

In India, Rule of Law has given the highest place and in this way, the judicial activism derived impliedly from the Rule of law as Rule of law has the synthesis from (i) Supremacy of Law (ii) Equality before law (iii) Absence of Arbitrary. The judicial activism keeps all the principle in consonance with the rule of law.

By the way there are following reasons which cannot be denied to the reasons of evolution of rule of law. (i) Judicial enthusiasm, (ii) Legislative vacuum, (iii) Moral pressure on judiciary, (iv) Near collapse of responsible government, (v) The Constitutional provisions, (vi) Guardian of Fundamental Rights, (vii) Public confidence, (viii) Enthusiasm of the individual players.

### (B) Evolution of Judicial Activism in India

In India judicial activism mainly taken place in the year 1950 to 2000 in broad sense, the court emphasizes over the constitutional validity of laws affecting the fundamental rights of the individual.

One of the land mark cases appertaining to judicial activism is ***Keshavanand Bharti Case,*** [26] wherein the court formulated doctrine of basic structure as the question tabled before the Supreme Court that to what extent the parliament can amend the constitution. Basically, the apex court by formulating the doctrine of basis structure; overruling ***Golaknath Case***.

The main question arose that the court has not the power of making laws or directing to make laws whereas in the instant situation the Apex Court outlined the concept of basic structure

[25] Evolution & Growth Of Judicial Activism In India', Shodhganga at 79, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf (Last accessed on 10.12.2021).
[26] Supra

doctrine limited the amending power of the legislative. The legislature can amend any part of the constitution but he cannot abridge the fundament rights of the people or cannot alter the basic structure of the Indian Constitution. In this way, the court step his foot in the shoes of legislature.

**Introduction of PIL and Judicial Activism**

As said there is catena of judgments, wherein the court has not deferred himself from evolving judicial activism, introduction of PIL in Indian history is itself an strong example of judicial activism. It was introduce in the case of Bangladesh as an outcome of ***Kazi Moklesur Rahman v. Bangladesh,***[27](hereinafter referred as "***Berubari case"*** ) in which the matter of locus-standi was came into consideration and later on, in the case ***Dr. Mohiuddin Farooque v. Bangladesh & others,*** [28]**.** The PIL was introduced to protect the interest of the individuals, when their legal rights get infringed.

**Problems and Criticism with Judicial Activism**

Some time, the judiciary in the name of judicial activism itself exceeds its power and often mixes personal bias and opinions with the law. The theory of separation of powers between the three arms of the State goes for a toss with judicial activism. Many times, the judiciary, in the name of activism, interferes in an administrative domain, and ventures into judicial adventurism/overreach.

**1.7 Problems with Judicial Review**

As previously discuss in this project/ article, judicial review is the core of democratic country, there are some problems subsist with judicial review as well.

There is some problems outline as follows:

(i) Excessive use of judicial power by the judicial authority.

(ii) The judicial review limit the power of government; sometime cause unnecessary intervention by the courts in the work of government.

[27] 1974, 26 DLR 44(AD)
[28] 1977, 49 DLR 1 (AD)

(iii) Unnecessary bias on the part of judiciary.

## Chapter 3. Rule of Law

### 1.1 Evolution of Rule of Law

Rule of law means the law regulates everything besides the government or other authority. In democratic country the government is chosen by the people but it runs within the sphere of law. In simple term nothing is above than the law.

The term rule of law derives from the French word *'la principe de legalite'* which means the *'principal of legality'*. It refers about a government based upon principles of law and not of men. In other sense, principles of *'la principe de legalite'* opposed the arbitrary power of the government.

The concept of Rule of law is an old practice and can be traced back at the time of ancient Greek Philosopher Aristotle or Plato around 350 BC.

Plato wrote: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state". Likewise, Aristotle also endorsed the concept of Rule of law by writing that "law should govern and those in powers should be servants of the laws."[29]

### 1.2 Dicey's Rule of Law

Dicey developed the contents of his thesis of Rule of Law by peeping from a foggy England into a sunny France. In france, Dicey look that the Government officials used to exercise wide discretionary power and if there any dispute arose between a governmental authority of an individual. The same doesn't tried by the ordinary court rather administrative court used to try the same. The law applied therein was not ordinary law but the court used to apply special law. From this Dicey concluded that this system spelt the negation of the concept of rule of law

[29] Flathman Richard (1994). 'Liberalism and the suspect Enterprise of political Institutionalism: the case of the Rule of Law', The Rule of Law: Nomos XXXVI, New York: New York University Press

which is secret of Englishman's liberty. Therefore, dicey concluded that there was no administrative law in England.

In England the Rule of Law was applied in strict sense. If a man is wrongfully arrested by the police, he can file a suit for damages against them as if the police were private individuals. In ***Wilkes v. wood***,[30] it was held that an action for damages for trespass was maintainable even if the action complained of was taken in pursuance of the order of the minister. In the leading case of ***Entick v. Carrington***,[31] a publisher's house was ransacked by the king's messengers sent by the secretary of state. In an action for trespass, 300 were awarded to the publisher as damages. In the same matter, if a man's land is compulsorily acquired under a illegal order, he can bring an action for trespass against any person who tries to disturb his possession or attempts to execute the said order.

According to the formulation of Dicey's Rule of Law; forming the basis of Constitutional Law in England, Contains three Principles:[32]

1. Absence of discretionary power from the hands of Government officials as it leads to arbitrariness. Hence, it implies the absence of Rule of Law and accordingly there is no room for arbitrariness.

2. No person should be suffered except for breach of law, established in ordinary legal manner before the ordinary court of land.

   (a) Absence of special privileges for a government official or any other person.

   (b) All the persons irrespective of status must be subjected to the ordinary courts of the land.

   (c) Everyone should be governed by the law passed by the ordinary legislative organs of the state.

3. Equality before law or equal protection of law. The people must follow custom or regulations recognized by the court of law.

[30] Wilkes v. wood, 1763 19 St Tr 1153
[31] Entick v. Carrington, 1765 19 St Tr 1030
[32] Massey, I P (2008). Administrative law, Lucknow: Eastern Book Company.

As dicey's Rule of Law propounded, his theory has its own merits or advantage. The doctrine of Rule of Law propounded by Dicey proved to be more effective in the administration of Justice. His assertion helps to keep the administrative authority to keep within their limits.

The concept of Rule of Law propounded by Dicey was followed by most of the legal system as constitutional safeguard.

The first principle (Supremacy of Law) has been proved to be cardinal rule. In democratic country every government must be subject to the rule of law whereas it should not be the law which should be under the control of government.

Thus, the concept of judicial review has been formulated to keep the government under the control of law.

The Second principle of law (Equality before law) is most important in democratic forms of government. It is based on the principles "how high so ever you may be but the law is above than you". All are equal before law.

The third principle discharges one of the most prominent obligations, declaring the role of judiciary in enforcing the rights of the individuals. Dicey tells mere declaration of rights in the book would be futile until and unless there is enforcement mechanism. The rights can be amended or abrogated without such authority. We can see a situation in the year 1975 when the Indira Ghandhi led government proclaim emergency in the country abrogating all rights of the individuals. Wherein it was realizes that the absence of strong or powerful judiciary, despite written constitution.

### 1.2 Criticism of Dicey's Rule of Law

The idea that the rule of law precludes even broad discretionary authority by the government has gravely questioned Dicey's first principle (supremacy of regular law as opposed to the impact of arbitrary power). The large number of statutes that are yearly enacted by parliament or other legislatures give the president many discretionary powers that are essential to contemporary government. It appears that Dicey's wording could be read to oppose the thousands of rules that are made at the discretion of delegated officials in our society. This first principle also conflicts with the fact that many modern laws give police the authority to hold

individuals for a brief period of time based only on a plausible suspect. This is essential for efficiency reasons. Jennings, Ivor

The second interpretation of Dicey emphasises how everyone is equally subject to the law. A constitutional guarantee of equality before the law may allow legislation that discriminates between people on reasons that are deemed irrelevant, undesirable, or offensive to be declared unlawful. Although Dicey's beliefs have long prevented the proper understanding of administrative law, it is now impossible to dispute the necessity of such law in a democracy. The existence of administrative courts safeguards the person from illegal actions by public entities. Equal treatment under the general law of the land, Dicey's second principle, may also be contested under current legal standards. Although it is true that public officials who commit crimes or torts are liable before the ordinary courts (except for circumstances of nonjusticiability, such as in The Church of ***Scientology v Woodward,***[33] it is not true that those public officials and private citizens have the same rights, and are thus equal. "A tax investigator, for example, has powers which the taxpayer does not possess". In addition, police officers might be able to use much greater legal authority than a typical citizen might over other members of society.

The equality before the law premise has created serious issues for the rule of law. It would be unfair if the law assumed that everyone was equal and entitled to the same treatment, disregarding social disadvantage. This led Hayek to attempt to adapt the rule of law in a manner that Joseph Raz thought created "exaggerated expectations" for it[34]. Hayek stated: "The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess... Such distinctions will not be arbitrary; will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group". This statement lead Raz to allege it was a guarantee of freedom and a "slippery slope leading to the identification of the rule of law with the rule of good law".

In his third definition of the term, Dicey strongly favoured the common law principles that judges had deemed to be the cornerstone of people' rights and liberties. Dicey was thinking of the essential political liberties, such as freedom of speech, freedom of association, and freedom

[33] Church of Scientology v Woodward, (1983) 57 ALJR 42
[34] Joseph Raz, 'The Rule of Law and its Virtue', 1977, 93 The Law Quarterly Review, 195, 209

of the individual. Today, it is challenging to share Dicey's belief that the common law is the main legal tool for defending a citizen's rights against the state. First, Parliament may weaken common law fundamental liberties and give them a residual character. Second, the common law does not guarantee the economic and social security of the citizen. Third, while adequate legal remedies are crucial, a proclamation of a person's fundamental rights and freedoms can be valuable. Diceyan theory may be further criticised due to his perception of the "sovereignty of Parliament and the supremacy of the rule of (ordinary) law". Keith Mason has pointed out that Australian parliaments may be supreme, but they are not sovereign. "The rule of law affirms parliament's supremacy while at the same time denying it sovereignty over the Constitution." Criticisms of Diceyan theory have lead to different formulations of the rule of law; but Dicey's formulation still reflects some of the fundamental principles of the rule of law. In following his formulation some commentators prefer the narrow term 'government under law' rather than 'rule of law'. However, other writers prefer to define the rule of law as a "statement of constitutional and juridical principle, a juristic reserve, an idea of a profound legality superior, and possibly previous, to explicit legislation" rather than as an actual rule of law in itself. It is difficult to characterise precisely because, like those other great negatives, peace and freedom, it sometimes shows itself as more of an absence than a presence.

**Assault on Independence of Indian Judiciary**

As soon as the constitution 24th amendment was challenged in the case of ***Keshavanand Bharti Case,*** [35]the SC by a majority of Judgement overruled the decision of rendered in Golakhnath's Case nad held that the parliament has very wide power to amend the constitution subject to abrogation of basic structure of the constitution. There is implied restrictions contained in Art 368 to amend the constitution and the parliament has to work within that sphere. Justice HR khana played a pivotive role in preserving the rule of law by giving dissenting opinion. As soon as the judgement delivered, the Indira ghnadhi led government influenced the president and appointed Justice A.N Ray as the Chief Justice of India bypassing four senior most judges of the Supreme Court. The three judges resigned the post in the name of settled convention to make the senior most judge as the chief justice of India.

[35] AIR 1973 SC 1461

Justice Ray had given dissenting opinion in favour of the Govt.in several cases like, Bank Nationalization case and Privy Purses case.

### 1.3 Habeas Corpus Case (A Black Mark on the Rule of Law)

In the year 1975, the Indira Ghandhi led govt. proclaim emergency and when the people oppose the autocracy of govt. The widespread illegal detention came into the consideration before the court laying with bunch of Heabus Corpus petition, seeking setting aside the unlawful detention of the citizen or political leaders all over the country. With all other high court, Nine High Court took the notice that the fundamental rights under Art. 14,19,21 & 22 should not be suspended, hence the petition are maintainable.

In ***A.D.M Jabalpur Vs. Shivkant Shukla,***[36] the Supreme Court overturned the verdicts of these High Courts but a majority of 4:1 and he pointed out that neither detainees nor their representatives have the right to appeal to the courts for suspension of fundamental rights under habeas corpus. This decision either precluded an appeal against a lawful arrest warrant or was abusive. H. It was not issued by an authorized person or to the wrong person. The majority consisted of Chief Justice A N Ray, Justices MH Beg, Y V Chandrachud and P N Bhagwati, with the sole dissent being Justice H R Khanna.

Strong Comments were made against the majority judgments and the role of Justice H R Khanna was appreciated and applauded all over the world. Mr. V M Tarkunde, an eminent lawyer and editor of The Radical Humanist, characterized the majority judgments as "Judicial Suicide". H M Servai, a leading Commentator on Constitutional Law and former Advocate General of Bombay wrote: The Four judgmentsdelivered in the darkest hour of India's history independence, and they made that darkness complete…Ordinary men and women could understand Satan saying, 'evil be thou my good', but they were bewildered and perplexed to be told by four learned judges of the Supreme Court that in substance the founding fathers had written into the emergency provisions of our constitution 'lawlessness be thou our law[37]'.

The Supreme Court reached its finest hour in the unforgettable dissent of *Justice H R Khanna*. He refused to bow down to the powers that be and immortalized the great spirit of

[36] AIR 1976 SC 1207
[37] Seervai H M (1993). Constitutional Law of India, Bombay: Tripathi Publishers.

the judiciary and the rule of law in his stinging dissent, observing: It has been argued that suspending the right of a Person to move any court for enforcement of right to life and personal liberty is done under a constitutional provision and therefore it cannot be said that the resulting situation would be the absence of the rule of law. This argument, in my opinion, cannot stand close scrutiny for it tries to equate illusion of the rule of law with the reality of rule of law[38]. In his autobiography, Justice Khanna recounts that he told to his Younger sister Santosh, "I have prepared a judgment which is going to cost me the chief Justiceship of India[39]". That came to be true and Khanna was Superseded b Justice Beg during Emergency. He thereupon resigned.

But any research on Rule of law is incomplete without a reference to the editorial in the New York Times which appeared on April 30, 1976, shortly after Habeas Corpus case. The Paper wrote: if India ever finds its way back to the freedom and democracy that were proud hallmarks of its first 18 years as an independent nation, someone will surely erect a monument to Justice H R Khanna of the Supreme Court. It was Mr. Justice Khanna who spoke out fearlessly and eloquently for freedom this week in dissenting from the court's decision upholding the right of PM Indira Gandhi's Government to imprison political opponents at will and without court hearings. Indian democrats are likely to remember only in infamy the four judges who obediently over turned the decisions of a half dozen lower courts scattered across India which had ruled in defiance of the government…..But they will long cherish the lonely judge who said, in words reminiscent of other enduring declarations for freedoms: "….The Principle that no one shall be deprived of his life and liberty without the authority of law is rooted in the consideration that life and liberty are precious possessions" ….The submission of an independent judiciary to absolute government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court's decision appears close to utter surrender.

How the emergency came to an end and Indira Gandhi was defeated at the polls is another story. Neither Chief Justice Ray nor Chief Justice Beg were able to live down their judgments. Justice Chandrachud and Justice Bhagwati both became the Chief Justice of India after the Emergency was withdrawn on the basis of seniority but they never commanded the respect, affection and reverence which Justice Khanna Commanded.

[38] AIR 1976 SC 1207 para 171
[39] Khanna H R (1987). Neither Roses nor Thorns, Lucknow: Eastern Book Company

Justice Khanna was in the Mould of Chief Justice Coke who could withstand "the frowns of power" and the refused to be "Craven and cringing.

### 1.4 Conclusion/ Suggestions/ Remarks

In my Concluding remarks, I would definitely not deferred myself saying that Judicial Review is a rule of law in context of judicial Activism, without Judicial review there would be anarchy in the state as the judicial review used to maintain checks and balances between the three organs. Judicial Review also maintains law and order in the society that no single organ command or keep power with them.

As Rule of Law have three principles (i) Supremacy of Law (ii) Equality before law (iii) absence of Arbitrariness.

The Judicial Review in India keeps all the three concepts of with consonance of Rule of Law. It keeps the law in supremacy also empowers the court to scrutinize the law made by the parliament in consonance with the fundamentals of the law. If the same is not in consonance with the fundamental principles of law. The court can turned the same down.

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