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ABSTRACT:

"The Constitution of India is the paramount parchment of our nation and the Honourable Supreme Court of India is the highest Court of Law. Separation of powers propounded by Montesquieu is a doctrine that can fit into the frame of ***'tale as old as time'.*** *The doctrine mandates that every organ of State shall function in its own operational area without interfering with or hampering the functions of the other organs. However, Montesquieu did not propound a theory that created impassible barriers or unalterable frontiers but a theory of mutual restrains which is commonly known as 'checks and balances'. To make this idea a reality, the judiciary is conferred with the power of judicial review. Judicial review affirms as well as negates. This paper explores the multifaceted dimensions of Judicial Review, criticisms and the room for improvement".*

Keywords: Judicial Review, Supreme Court, Constitution, Article 42, Article 226, Article 136, Separation of Powers, Judiciary.

I. INTRODUCTION:

Separation of powers propounded by Montesquieu is a doctrine that can fit into the frame of **'*tale as old as time*'.** The doctrine mandates that every organ of State shall function in its own operational area without interfering with or hampering the functions of the other organs. However, Montesquieu did not propound a theory that created impassible barriers or unalterable frontiers but a theory of mutual restrains which is commonly known as 'checks and balances'. To make this idea a reality, the judiciary is conferred with the power of judicial review. Judicial review affirms as well as negates. It is both a power breaking and power releasing function.[1] The debates of the Constituent Assembly reveal beyond any dispute that Judiciary was contemplated as an extension of the rights and an arm of social revolution.[2] Judicial review was accordingly desired to be an essential condition for successful

[1] Alpheus Thomas Mason, *Understanding the Warren Court: Judicial Self Restraint and Judicial Duty,* Political Science Quarterly 532(December 1966).
[2] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION – CORNERSTONE OF A NATION 164 (1999).

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implementation and enforcement of fundamental rights.[3] Judicial review is the cornerstone of constitutionalism, which implies limited government.[4] The chief worth of judicial review lies in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression in guiding and directing choice within the limits where choice ranges.[5] Judicial review is a theme with many variations and subtle implications.[6] Judicial creativity is evident even in administrative law.[7] To be precise, judicial review is mainly of three kinds – judicial review of legislative action, judicial review of administrative action and judicial review of constitutional amendments.

This submission hinges on the concept of judicial review, the significance in India, judicial review by the Supreme Court of India and criticisms with special reference to administrative actions.

II. WHAT IS JUDICIAL REVIEW?

Judicial review is the most important and a unique power of the judiciary. It is the power of the Court to review the actions of the Legislative and the Executive and also the actions of the Judiciary itself as well. It is also the power to scrutinize the validity of any law. In other words, Judicial Review can also be described as a strong weapon in the hands of the Courts to hold unconstitutional and unenforceable, any law and order which is inconsistent or in conflict with the basic law of the land. Supremacy of law is the essence of judicial review.

It is thus the power of Judiciary to interpret the Constitution and declare any law and order of the Legislature and Executive void if it finds them in conflict with the Constitutional parameters. By using this power, the Judiciary keeps the Legislative and the Executive within

[3] Samirendra Nath Ray, *The Crisis Of Judicial Review In India*, The Indian Journal of Political Science, Vol. 29, No.1, 29-35 (January-March 1968).
[4] P. Sharan, *Constitution Of India And Judicial Review*, The Indian Journal of Political Science, Vol. 39, No.4, 526 (Oct-Dec. 1978).
[5] BENJAMIN N. CARDOZO THE NATURE OF JUDICIAL PROCESS 94 (1921).
[6] Mauro Cappelletti, *Judicial Review in Comparative Perspective*, California Law Review, Vol. 58, No.5, 1017-1053 (Oct., 1970).
[7] S. A. De Smith, *Judicial Control of Administrative Action in India and Pakistan by M.A. Fazal*, The International and Comparative Law Quarterly, Vol.19, No.1, 170-171(Jan.1970).

the purview of the Constitution. It is also an icon depicting separation of powers. In short, judicial review is the power of the Judiciary to review and determine the validity of a law or an Order. It functions to legitimize the Governmental action and to ensure the protection of Constitution against any undue encroachment by the Government.

Thus, in nutshell, judicial review can be termed as the power of courts to consider the constitutionality of the acts of organs of the Government.

III. ORIGIN OF THE CONCEPT:

The origin of the concept of judicial review is often credited to Chief Justice Marshall for molding the same in the historic decision of ***Marbury* vs. *Madison***[8], in 1803. However, as opposed to this, we can see that the concept did sprout in England for the first time in the year 1610 i.e. prior to the decision of *Marbury*. This is evident in the words of Lord Coke in the decision of ***Dr. Bonham* vs. *Cambridge University***.[9]

Judicial review could be understood in two different legal systems which are encompassed of the Civil law system and the Common law system. For example, it is evincible that in United Kingdom, a common law country, there is dominance of parliamentary supremacy. Wherefore, judicial review of the legislative acts is not permitted. However, a contrary position is seen in United States of America and India where supremacy of the Constitution is established.

From a comparative standpoint one of the most important features of any system of Judicial Review is the State's choice of either a centralized or decentralized system.[10] In USA judicial review is a product of the Supreme Court itself. [11] Though Civil and Common law countries

[8] 5 U.S. 137 (1803).
[9] 77 Eng. Rep. 638.
[10] Mauro Cappelletti, *Judicial Review in Comparative Perspective,* California Law Review, Vol. 58, No.5, 1033 (Oct., 1970).
[11] Mauro Cappelletti, *Judicial Review in Comparative Perspective,* California Law Review, Vol. 58, No.5, 1033 (Oct., 1970).

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are back on the same road, differences in approach to judicial review remain as a testimony to past divergences.[12]

IV. JUDICIAL REVIEW IN INDIA:

Judicial review is an important component of the Indian Constitutional system, meant to protect the ramparts of various freedoms.[13] In India, the doctrine of judicial review is preserved in its entire sanctity and the same is considered to be a part of the basic structure of our Constitution.[14] It is a concept of Rule of law and the touchstone of the Constitution of India. Judicial review is viewed as the power of the Court to set up an effective system of check and balance between the Legislature and the Executive. This power tends to confirm that an authority does not abuse its power.

In India, the power of judicial review is exercised by the Supreme Court[15] and the High Courts.[16] By invoking this power the Court may review its own judgment or order. Thus, Judicial Review is also the competence of a court of law to declare constitutionality of a legislative enactment also. The power of the Court to declare legislative enactments invalid is expressly embedded within the contours of Article 13 of the Constitution of India.

Further, Article 372(1) establishes judicial review of pre-constitution legislation. Articles 32 and 226 entrusts the roles of a protector and a guarantor of fundamental rights to the Supreme Court and High Courts. Further, is also visible from the reading of Articles 251 and 254 that in case of any inconsistency between the Union law and State law, the state law shall be ousted and shall be declared invalid. Article 245 elucidates the powers of the Parliament and the State Legislatures to make laws subject to the provisions of the Constitution. [17] Dr. B. R. Ambedkar,

[12] Mauro Cappelletti, *Judicial Review in Comparative Perspective,* California Law Review, Vol. 58, No.5, 1052 (Oct., 1970).
[13] Vibhuti Singh Shekhawat, *Judicial Review In India: Maxims And Limitations,* The Indian Journal of Political Science, Vol. 55, No.2, 182 (April - June 1994).
[14] *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789.
[15] Articles 32 and 136.
[16] Article 226.
[17] DR. J. N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA 369-402 & 517-520 (47th ed.2010).

described Articles 32 and 226 as the heart of the Constitution. This is purely because the said provisions render constitutional remedies and bestows the Courts with the sacred power of judicial review.

To quote, there are a few cases which depict the prevalence of the doctrine in the Country. Of the ***Emperor* vs. *Burah*[18],** of 1877 occupies the prior sear seat because this is the first case in India which interpreted and originated the concept of Judicial Review in India. It was held in this case that the aggrieved party has a right to challenge the constitutionality of a legislative act enacted by the Governor General Council in excess of the power conferred on him by the Imperial Parliament.

The second case falls in the year1913 with the cause title ***Secretary of State vs. Momentum*[19]**. Lord Haldane jotted down in the aforesaid verdict that the Government of India cannot by way of legislation taken away the right of the Indian subject conferred by the Parliament Act i.e. the Government of India Act of 1858. The third and the final case is *Annie Besant* v. *Government of Madras*[20] decided in the year 1918. In this case, it was held that any enactment of the Indian legislature in excess of the delegated powers or in violation of the limitation imposed by the Imperial Parliament will be null and void.

V. FEATURES OF JUDICIAL REVIEW IN INDIA:

***Exploring the contours of the doctrine of judicial review in India, the following facets may be tagged as the essential features of judicial review in India.*[21]**

1. Judicial review is the power used by both the Supreme Court and the High Courts. However, the final power lies with the Supreme Court.
2. Judicial review can be exercised in questions pertaining to Central laws as well as State laws. This covers any orders, ordinances, and even the Constitutional Amendments.

[18] [1877]3 ILR 63 (Cal).
[19] [1913]40 ILR 391 (Cal).
[20] [1918] AIR 1210 (Mad).
[21] M. P. JAIN, INDIAN CONSTITUTIONAL LAW (7th ed.2016).

3. Inapplicability to the Ninth Schedule laws is a limitation fettering the power of judicial review.
4. Judicial review covers laws and not any political issues.
5. Judicial review is not automatic. This indicates that the power is triggered only when a law or an action is specifically challenged before the competent courts of law.
6. Decisions in the cases were judicial review is exercised shall fall into any of the three categories listed as follows:
    - ***i.*** *Law is constitutionally valid on account of which the law continues to operate as it was before.*
    - ***ii.*** *Law is constitutionally invalid whereby the law ceases to operate from the date of judgment.*
    - ***iii.*** *Only a part of the law is declared invalid wherein the said invalid parts become non-operative whereas the remaining parts continue to persist validly in operation.*
7. A judicial review decision gets implemented or operative from the date of judgment which means that all activities that took place prior to the date of judgment and in consonance with the then law remain valid. No retrospective colour is painted.
8. Judicial review is considered as a principle of procedure established by law. Court conducts a test to decipher the same i.e. whether the law has been made in accordance with the powers granted by the Constitution.
9. In judicial review matters, it is also necessary that the clarifications of rejecting legislation or an executive act must be clearly explicated. Court must envisage the provisions of Constitution which the act of law in question infringes. Also, the invalidity of the law or the action taken should also be established in the judgment in just and cogent terms.

VI. SCOPE OF JUDICIAL REVIEW:

Judicial review is essential for maintaining supremacy of the constitution. It is a power mandatory for checking the possible misuse of power by the legislature and the executive. It is

a device for protecting the rights of the people. By invoking the power of judicial review, judiciary acts as an umpire or an arbiter between the Centre and the States for maintaining the federal balance. Thus, this power enables the judiciary to secure the federal equilibrium of the country. It also assures the independence of judiciary. Judicial review is a mechanism that aids and assists the judiciary to exercise it's the constitutional duties. In short, the possibility of abuse is whittled down due to the presence of several checks.

VII. ARTICLE 32 AND JUDICIAL REVIEW:

Article 32 that embraces the right to Constitutional remedies is the very soul of the constitution and the very heart of it according to Dr. B. R. Ambedkar.[22] The Supreme Court is the protector of the rights of citizens. According to Article 32 any person alleging an infringement of his fundamental right or an immediate threat of such infringement can move the Supreme Court directly without going to any other court.[23] Articles 13, 32 and 226 clearly make provision for the protection of fundamental rights and they introduce the doctrine of judicial review. Thus, the Constitution of India has incorporated Rule of Law.[24]

The entire provisions of the Constitution become a rope of sand in the absence of Article 32. This is because, every right bestowed is prone to abuse. When the rights are exposed to vulnerability it is necessary that there should an adequate mechanism to bring them back in place and back in action. The powers of the Supreme Court under Article 32 and the machinery of judicial review facilitate this in practical terms. As far as the paradigms of Article 32 are concerned the Supreme Court has the power to issue five different kinds of writs – habeas corpus, mandamus, certiorari, quo warranto and writ of prohibition. While adhering to Article 32, the Supreme Court shall not stick to any rigid pattern or apply a strait jacket formula. The Court shall be lenient and even a letter is accepted as a petition and the grievance is addressed.

[22] Constitutional Assembly Debates Vol.VII at 953.
[23] P. Sharan, *Constitution Of India And Judicial Review,* The Indian Journal of Political Science, Vol. 39, No.4, 530 (Oct-Dec. 1978).
[24] P. Sharan, *Constitution Of India And Judicial Review,* The Indian Journal of Political Science, Vol. 39, No.4, 535 (Oct-Dec. 1978).

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Judicial activism and judicial creativity are two important developments that the Supreme Court has introduced under Article 32.

Further, from an administrative point of view, the Supreme Court is also empowered by Article 32 to review administrative actions. Instance an order passed or a decision taken by an administrative authority in violation of the principles of natural justice or if the same is arbitrary makes a fit case for challenge before the Supreme Court under Article 32.[25] However, under Article 32, it is not the case that the Court sits and decides on every administrative matter. Judicial restraint comes into action whereby the Judiciary restrains itself from interfering in certain matters by using the tool of judicial review. For example, it is a settled law that the Court shall not interfere in any policy matter.[26]

The real value of judicial review and public interest litigation has been in its ready availability to the common person and particularly to the exploited and the oppressed, for checking executive arbitrariness and gross violation of human rights, particularly at lower official levels.[27]

VIII. ARTICLE 136 AND JUDICIAL REVIEW:

Article 136 of the Constitution of India bestows on Supreme Court discretion to grant special leave to appeal from;

- ***a)*** *Any judgment, decree, determination, sentence or order*
- ***b)*** *In any case or matter*
- ***c)*** *Passed or made by any Court or tribunal in the territory of India.*

The only exception that fetters the application of the above article is matters pertaining to Armed Forces. Brushing aside the exception, it is evident that the powers of the Supreme Court under this provision is wide. It is in the nature of special residuary power that is exercisable outside the ambit of the ordinary law. The Supreme Court incurs a plenary jurisdiction under

[25] C. K. TAKWANI, LECTURES ON ADMINISTRATIVE LAW (4th ed.2010).
[26] C. K. THAKKER, ADMINISTRATIVE LAW (2nd ed.2012).
[27] Soli J. Sorabjee, *Role of the Judiciary—boon or bane?* India International Centre Quarterly, Vol. 28, No. 4, Special Commemorative Vol.40, 260-270 (WINTER 2001/SPRING 2002).

this Article.[28] The line of demarcation between Article 136 and Articles 132 to 135 is drawn on various dimensions. At the outset, it has to be noted that unlike the Articles 132 to 135, Article 136 is restricted by any of the limitations. The Appeals under Articles 132 to 135 are entertained by the Supreme Court only if it lies against a final order. Different from this, under Article 136, final is not mandatory in the meaning of the word order. It implicates that the Supreme Court can grant special leave under Article 136 even from an interlocutory or an interim order. Another difference that is seen is that where the Appeals are to be mandatorily against a final order by the High Court under Articles 132 to 134, an order of a tribunal is also sheltered under Article 136. And finally, under Article 136, an appeal is entertained against any case or matter whereas the corresponding notion in the preceding Articles speaks only about any judgment, decree, determination, sentence or order.[29]

Another important element to taken care of while analyzing Article 136 is that, in an Appeal under this provision, the Supreme Court does not entertain raising a new plea for the first time.[30] Also, the discretionary power conferred on the Supreme Court under this provision is very wide that it should be exercised only in exceptional cases.[31] Thus even under Article 136, the Court bears in mind that judicial review performs the cardinal function of preventing encroachments into each other's sphere of authority in the case of institutions as well.[32]

IX. LANDMARK DECISIONS:

In ***Kesavananda Bharati* vs. *State of Kerala*,**[33] the Supreme Court observed that Rule of Law has been ensured by providing for judicial review. It added that judicial review is indispensable in a federal structure. Judicial review is made an integral part of the Constitution and it is in discharge of a duty plainly laid upon them by Constitution.

[28] M. P. JAIN, INDIAN CONSTITUTIONAL LAW (7th ed.2016).
[29] *Id.*
[30] *M/s Badrikedar Paper Pvt. Ltd.* v. *U.P. Electricity Regulatory Commission*, AIR 2009 SC 1783.
[31] *Pritam Singh* v. *State*, AIR 1950 SC 169.
[32] Vibhuti Singh Shekhawat, *Judicial Review In India: Maxims And Limitations*, The Indian Journal of Political Science, Vol. 55, No.2, 182 (April - June 1994).
[33] (1973) 4 SCC 225.

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Further, the Supreme Court observed in ***Indira Nehru Gandhi* vs. *Raj Narain*[34],** that without judicial review, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. Judicial review was held to be a part of the basic structure of the Constitution of India in the case of ***Minerva Mills* vs. *Union of India***.[35]

A step further, is evident in the case of ***S.P. Sampath Kumar* vs. *Union of India***[36], and in the subsequent decision of ***L. Chandra Kumar* vs. *Union of India*[37],** which overruled the former. This was cutting edge in the spectrum of judicial review. The novel approach of judicial review and its applicability to the Ninth Schedule laws was impeccably elucidated by the Supreme Court in the landmark decisions of ***Waman Rao* vs. *Union of India*[38],** and ***I. R. Coelho* vs. *State of Tamil Nadu***.[39]

In the case of ***Vacher and Sons Ltd.* vs. *London Society of Compositors*[40]**, *Lord MacNaghten* held that a Judicial Tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. This was one of the oldest decisions when it comes to administrative law and judicial review.

As stated earlier, Court imposes a self-restraint which is termed as judicial restraint when it comes to policy matters. One of the important decisions which accentuate the same is ***Prag Ice and Oil Mills* vs. *Union of India*.[41]** The policy in question in the present case was affecting the producers and sellers of oil. It was held that it is not the function of the Supreme Court or any court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide. Price fixations, according to the Court, are necessarily matters of prediction of ultimate results on which even experts can err and doubtlessly differ.

[34] AIR 1975 SC 865.
[35] AIR 1980 SC 1789.
[36] (1987) 1 SCC 124.
[37] (1995) 1 SCC 400.
[38] (1981)2 SCC 362.
[39] (2007) 2 SCC 1.
[40] 1913 AC 107; PAUL CRAIG, ADMINISTRATIVE LAW (6th ed.2008).
[41] AIR 1978 SC 1296.

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Hence the Supreme Court held that Courts cannot be expected to decide them without the aid and assistance of experts.

The case of ***Peerless General Finance and Investment Co. Ltd.* vs. *Reserve Bank of India*[42],** depicts the view of the Supreme Court in checking abuse of authority by the members of administration and balancing the federal equilibrium. The Supreme Court held that the function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. The authority must act in good faith and must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the Courts to sit in judgment over matters if economic policy and it must necessarily be left to the expert bodies.

In ***M. P. Oil Extraction* vs. *State of Madhya Pradesh*[43],** the Supreme Court observed that the power of judicial review of the executive and legislative action must be kept within the bounds of the Constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limits by unwarranted judicial activism being very often talked of these days. The Supreme Court clarified in ***Narmada Bachao Andolan* vs. *Union of India*[44],** that minimal interference is called from the court when a policy is the deliberation of technical experts.

The question where the policy is evolved by the Government, judicial review is thereof limited was examined in the case of ***Federation of Railway Officers Association* vs. *Union of India***.[45] On matters affecting policy and requiring technical expertise, the Court would leave the decision of those who are qualified to address the issues. Unless the policy or action is

[42] (1992)2 SCC 343.
[43] (1997)7 SCC 592.
[44] (2000)10 SCC 664.
[45] (2003)4 SCC 289.

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inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the Court will not interfere with such matters.

X. A GLIMPSE AT THE RECENT DECISIONS (2014-2017):

The present day position on judicial review pertaining to administrative matters commences from the 2014 decision of ***Jal Mahal Resorts (P) Ltd.* vs. *K. P. Sharma*.**[46] Although Courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specifically if it is based on the opinions of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the state administration, acknowledged, accepted and approved one government after another will have to be given due to credence and weightage .

Unless proved strictly, an exercise undertaken by an extensive body which includes administrators, technocrats and financial experts not be put at stake. A decision on hair splitting submissions might lead to a friction if not collusion among the three organs of the state and would affect the principle of governance ingrained in the theory of separations of powers.

In the decision of ***Brajendra Singh Yambem* vs. *Union of India and Ors.*[47]** the Supreme Court deviated from the decision in ***State of Madhya Pradesh* vs. *Trimbak*[48]**, wherein it was held by the Supreme Court that the power of Judicial review is not available in case of executive exercise of power by the President or the Governor. In the case at hand the Supreme Court held that the said observation is not tenable in law in view of the landmark case of ***Kesavananda Bharati* vs. *State of Kerala*[49]**, wherein the Supreme Court rightly held that the power of judicial review by the judiciary is a part of the basic structure of our constitution.

[46] (2014)8 SCC 804.
[47] AIR 2016 SC 4107.
[48] (1996)2 SCC 305.
[49] (1973) 4 SCC 225.

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Pertaining to the scope of judicial review, the Supreme Court held in the case of ***State of Punjab* vs. *Brijeshwar Singh Chahal*[50],** that the Court's power of judicial review is wide enough to strike out and annul any state action that is arbitrary, unguided, whimsical, unfair or discriminatory. Judicial review is a heartening development on the judicial landscape that will disentitle exercise of power to have it reversed if such reversal is otherwise merited.

The case of ***Pramati Mahila Samaj and Anr.* vs. *Arun and Ors.*[51]** dealt with the question of judicial review of an appointment/recruitment. In the above case, the respondent was temporarily appointed as part time lecturer in a private college for a fixed period. However, after the expiry of the said period, the Respondent came up with claims for regularization which the petitioner rejected.

When the matter came up before the High Court, it directed the reinstatement of the Respondent on two findings. Firstly, the Court observed that the Respondent was appointed as fulltime lecture and secondly the order of the Order of the University and College Tribunal, Nagpur was erroneous. The same was set aside by the High Court.

However, when the matter came up before the Supreme Court, the impugned judgment was set aside as unsustainable on five counts. At the outset, it is the duty of the Court to test the validity of the appointment in the light of mandatory statutory provisions. Further, the Respondent neither challenged the validity of the Maharashtra Employees of private Schools (Conditions of Service) Regulation Act, 1977 nor alleged any malafide against the authority. Also, the respondent was not able to pin point any sort of arbitrariness in the impugned action. The second appointment was for a fixed period without adding any rights and hence the appointment was temporary and not permanent in nature. The High Court erred in invoking Article 14 for the quashing of the termination order. The facets emphasized by the Supreme

[50] AIR 2016 SC 1629.
[51] (2016)9 SCC 255.

Court was cemented by the decision in ***Hindustan Education Society* vs. *Sk. Kaleem Sk. Gulam Nabi***.[52]

Another recent decision rendered by the Supreme Court is ***State of Uttar Pradesh and Anr.* vs. *Al Faheem Meetex Private Ltd. and Anr.*[53]** where the exclusion of judicial review is evident. This factual matrix spread like this. There was a cancellation of bid by the Bid Evaluation Committee (BEC) in view of the adequate number of valid tenders. Fresh tenders were initiated for construction of modern slaughter house. This triggered the edifice of the case.

The Appellant challenged the said decision of the BEC to invite fresh tenders before the High Court and the decision of the BEC was quashed. The High Court directed that the bid of the Appellant should be accepted.

In the appeal, the Supreme Court held that the High Court was not justified in interfering in policy matters. BEC was only a recommendatory body and the matter had not reached competent authority for final decision. As per the subsisting Financial Rules, there ought to be three more bids and hence BEC has recall to make the bid more competitive. Judicial review is excluded from policy decisions.

***Centre for Public Interest Litigation* vs. *Union of India and Ors.*[54]**, This case hinges specifically on the topic 'judicial review of administrative action'. There were two issues that were under the consideration of the Court. The first issue was whether the decision of the Respondent in allowing the migration from BWA to UAS licensing UL was valid and legal. The second question was whether the said decision of the first respondent had unduly benefited the second respondent. This matter was considered on the backdrop of the fact that technological developments are taking place at an abnormal pace. Modification and

[52] (1997)5 SCC 152.
[53] (2016)4 SCC 766.
[54] (2016)6 SCC 408.

substitution may become necessary. The court also quoted a perfect example. The first telecom policy came in the year 1994. But it was replaced in by the revised policy of 1999. It was further revised in the year 2004. This was followed by a substitution by the telecom policy of 2012.

In the case at hand, the Court held that, a policy decision, when not found to be malafide or based on irrelevant considerations or arbitrary or against any statutory provisions, does not call for any interference by the Courts in exercise of the powers of judicial review. This principle of law is ingrained in stone which stated and restated time and again by the Supreme Court on numerous occasions.

Court further stated that when decision making is policy based, judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory or arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters, and is held to be valid, then the only question to be examined is whether the decision in question is in conformity with the said policy.

Further, the Court also relies on the work 'Administrative law: text and materials' by Beatson, Matthews and Elliot to elucidate the importance of non-interference in policy matters by Court. The primary and the central purpose of judicial review of the administrative action are to promote good administration. It is ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent and unbiased fashion, keeping in forefront the public interest. To ensure that the aforesaid dominant objectives are achieved, the Supreme Court has added new dimensions to the contours of judicial review and it has undergone tremendous change in recent years. The scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of public power in response to the changing architecture of the Government. Thus, not only has the judiciary grown wider in scope, its intensity has also increased. Notwithstanding the same, it is, however, central to received perceptions of judicial review that courts may not

interfere with exercise of discretion merely because they disagree with the decision or action in question, instead, Courts intervene only if some specific faulty can be established for example, if the decision was procedurally unfair. Thus, while choosing not to interfere, the Court jotted down that minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of the deliberations of the technical experts in the fields in as much as Courts are not well equipped to fathom into such domain which is left to the discretion of the execution. When it comes to judicial review of economic policy, the Courts are more conservative as such policies are generally formulated by experts.

In a very recent decision of the Supreme Court (2017) in ***Allahabad Bank* vs. *Krishna Narayan Tewari*[55],** it was held by that if the findings are unsupported by evidence or are such as no reasonable person would arrive at, then the writ court is justified if not duty bound to examine the matter. Very recently (January 2017), the Bombay High Court clarified in the decision of ***Ivy C. da. Conceicao* v. *State of Goa*[56],** that the process of appointment of Principal in Minority Institution is open to Judicial Review.

XI. CRITICISM:

The basic problem of judicial review in a modern democratic society inheres in the apparent possibility of antithesis between a rigid and doctrinaire attitude in preserving the fundamental human liberties and the effective pursuit of a social welfare objective by the Legislature in consonance with the interplay of the dominant socio political forces.[57] Experience in India suggests or rather conclusively establishes that a narrow, headstrong and conservative insistence on the Constitutional sanction of the liberties might easily frustrate the aspirations and ambitions of a representative democratic legislature.[58] In that event, judicial review

[55] (2017)2 SCC 308.
[56] 2017 SCC OnLine Bom 1040.
[57] Samirendra Nath Ray, *The Crisis Of Judicial Review In India*, The Indian Journal of Political Science, Vol. 29, No.1, 29 (January-March 1968).
[58] *Id.*

becomes a nasty brake on social dynamics and social progress and assumes a basically negative and undemocratic character.[59] This undemocratic nature of judicial review is the primary point of criticism to the doctrine. Further, lack of clarity also attributes to the critical angle. Another argument that vouches against judicial review is that the source of judicial review is administrative problems. Many come up with the argument that most of the cases that come before the Supreme Court to exercise the power of judicial review is administrative in nature. The fetter of judicial restraint is also alleged to be overlooked in many instances.

The next issue judicial review confronts with is that it is *reactionary.* The critics opine that the justice garnered through judicial review is an icon that practically cements the saying *only the crying baby gets its milk.* Joined to this is another argument that entire process causes a delaying system. As a result, judiciary through judicial review tends to make Parliament less responsible. The final outcome is also a fear of judicial tyranny. The reversal of its own decisions by the Supreme Court is also barrier in the way of judicial review.

A meticulous scrutiny of the above criticisms throws light on an inference that the criticism stems from a misconception of the judicial function and the purpose and judicial review in our constitutional system.[60] The charge that judicial review is undemocratic and judicial validation of laws thwarts the will of the people is based on the fallacy that the will of the people are the same. [61]

XII. CONCLUSION:

Judicial review is a kind of institutional ballast, helping to stabilize the kind of democracy that so many nations today enjoy.[62] If the Constitution is the vehicle of national life and social revolution as it indeed is and must be, then judicial review ought to accelerate and quicken its

[59] *Id.*
[60] Soli J. Sorabjee, *Role of the Judiciary—boon or bane?,* India International Centre Quarterly, Vol. 28, No. 4, Special Commemorative Vol.40, 260-270 (WINTER 2001/SPRING 2002).
[61] *Id.*
[62] Stephen Breyer, *Judicial Review: A Practising Judge's Perspective,* Oxford Journal of Legal Studies, Vol.19, No.2, 157 (Summer, 1999).

movement and expedite the realization of the social conscience.[63] The success or failure of a scheme of judicial review depends very much on how and to what extent it is attuned to the lofty ideal of constitutionalism as well as to the spirit and temper of a dynamic society.[64]

Judicial review is mandatory, inevitable and essential for an independent judiciary. This power is sacred on one hand as well as dangerous on the other hand. Hence it is necessary that this power should be exercised by the competent courts as and when it is needed. However, it should be borne in mind that the power of judicial review should be used if required and no blind eye should be turned to the needy. This power adds strength to the judiciary maintains the federal equilibrium of the country and assures justice.

With all its imperfections, exercise of judicial review in India has played a significant role in maintaining the Rule of Law, preserving the basic values of Constitution and making fundamental rights living realities to some segments of the population for whom the guarantee of human rights was a teasing illusion.[65]

[63] Samirendra Nath Ray, *The Crisis Of Judicial Review In India*, The Indian Journal of Political Science, Vol. 29, No.1, 29-35 (January-March 1968).
[64] *Ibid* at 29.
[65] Soli J. Sorabjee, *Role of the Judiciary—boon or bane?*, India International Centre Quarterly, Vol. 28, No. 4, Special Commemorative Vol.40, 260-270 (WINTER 2001/SPRING 2002).