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## TABLE OF CONTENTS

|                                                                                                                    |    |
|--------------------------------------------------------------------------------------------------------------------|----|
| Table of cases                                                                                                     | 3  |
| Table of Statutes                                                                                                  | 4  |
| List of Abbreviation                                                                                               | 5  |
| Introduction                                                                                                       | 6  |
| Factors enabling judge made law:                                                                                   | 9  |
| a) The role of the concept of judicial precedent ( <i>Stare Decisis</i> ) in empowering the judiciary to make laws | 12 |
| b) Constitutional provisions leading to judicial review                                                            | 14 |
| Survey of judicial review / judge made law in some common law countries                                            | 18 |
| a) The United Kingdom                                                                                              | 18 |
| b) USA                                                                                                             | 19 |
| c) India                                                                                                           | 20 |
| d) Sri Lanka                                                                                                       | 21 |
| Conclusion                                                                                                         | 24 |
| Bibliography                                                                                                       | 27 |

## TABLE OF CASES

*A.P Goplan v. State of Madras* AIR 1950 SC 27

*Anisminic Ltd. v. foreign Compensation Commission* [1962] 2 A.C. 147

*Bandahamy v. Senanayake* 62 NLR 313

*Boddington v. British Transport Police* [1999] 2 AC 143

*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

*Bulankulame v. Secretary Ministry of Industrial Development* [2000] 3 Sri.L.R 243

*Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374

*Fernando v. Sri Lanka Broadcasting Corporation*, [1996] 1 Sri.L.R 157

*Golaknath v. State of Punjab*, AIR 1967 SC 1643

*Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461

*Laker Airways Ltd. v. Department of Trade* [1977] All.E.R. 18

*Lamaheage Lal v. Officer in Charge, Minor Offences, Seeduwa Police Station*, [2005] 1 Sri. L.R. 40

*London Street Tramway Co. Ltd. v. London Council* 1898 A.C. 375

*M.C. Mehta v. Union of India (Taj Mahal case)*, AIR 1997 SC 734

*Maneka Gandhi v. Union of India* AIR 1978 SC 597

*Manganese Ore(India) v. R. Assistant Commissioner* AIR 1976 SC 410

*Marbury v. Madison*, 5. U.S. (1 Cranch) 137 (1803)

*Mendis and 9 Others v. Kumaratunge and Others* [2008] B.L.R. 1

*Miranda v. Arizona* 384 U.S. 486 (1966)

*Municipal Council Ratlam v Varichad* AIR 1980 SC 1622

*O' Really v. Mackman* [1983] 2 AC 237

*Olga Tellis v. Bombay Municipal Corporation* (AIR 1986 SC 180)

*Pearlman v. Harrow School Governors* [1979] QB 56

*Planned Parenthood v Casey* 505 U.S. 833 (1992)

*R.v. Hull University ex.p Page* [1993] AC 682,

*Regents of the University of California v. Bakke* 438.U.S.235(1976)

*Roe v. Wade* 410 U.S. 113 (1973)

*S.P.Gupta v. Union of India* AIR 1982 SC 149

*Sambandan v. AG and 5 Others* SCFR 351/2018 SC Minutes 13 December 2018

*Supreme Court Advocates-on Record v. Union of India* AIR 1994 SC 268

*Vasudeva Nanayakkara v. K,N. Choksy and Others*, [2008] B.L.R. 23

*Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715

*Visaka v. State of Rajasthan* AIR 1997 SC 307.

*Young v Bristol Aeroplane Co.Ltd.* [1944] 2 All.E.R 293

## **TABLE OF STATUTES**

Constitution of India

Constitution of the Democratic Socialist Republic of Sri Lanka

Constitution of the United States of America

## **LIST OF ABBREVIATIONS**

|           |                                           |
|-----------|-------------------------------------------|
| AC        | - Appeal Cases                            |
| AIR       | - All India Reports                       |
| All.E.R   | - All England Reports                     |
| B.L. R    | - Bar Association Law Reports (Sri Lanka) |
| NLR       | - New Law Reports (Sri Lanka)             |
| QB        | - Queens Bench                            |
| SC        | - Supreme Court                           |
| SCFR      | - Supreme Court Fundamental Rights        |
| Sri. L.R. | - Sri Lanka Law Reports                   |
| U.S.      | - United States                           |

## Chapter I - Introduction

A civilized society consists of various branches of government, which includes the executive, the legislature and the judiciary. These three organs of government are not necessarily neatly separated, and there is at times an overlap; much depends on the constitutional model and political history of the society in which these three organs of government operate.

The United Kingdom (U.K.) does not have a written constitution and has constitutional traditions for a constitution. Thus, historically there has been a power struggle between the King and Parliament initially over taxation and thereafter over full legislative and executive power. In this background there is no neat separation of the executive and the legislature in the U.K. unlike in the United States of America which has a written constitution with a rigid separation of the executive from the Legislature. Be that as it may the function of the legislature is to promulgate laws as the supreme law giver. This leads to certainty in the law and orderly conduct of society.

Montesquieu, the French philosopher came up with a theory of separation of powers stating;

When the legislative and executive powers are the same person or body, there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to enforce them in a tyrannical manner...were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.<sup>1</sup>

In this context, the judiciary plays an important role in resolving disputes between citizens *inter se* and between government and citizens. Historically, in the United Kingdom, the courts assisted the King in the administration of Justice and thus developed together with the courts of equity a body of law based on its decisions followed by lower courts for certainty in the application of the law.

This judge made law as it were sometimes rivals the laws of Parliament; as judges interpret the various laws. In the U.K., however, if there is a contest between the judge made law and the

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<sup>1</sup> Laski, *Grammar Politics* (2003), p.297

Parliament, the Parliament being supreme can overturn a judgment by passing a law. This *modus operandi* is not available to some legislatures in which there is a written constitution and often, the courts have the final say in declaring a law as unconstitutional.

The British, motivated by trade, and with a strong naval force spread their Empire, transplanted its form of government, including judicial precedent (common law) in many parts of the world including south Asia. This study will focus on how judicial review in some common law countries has become a mechanism for judges to make laws in the guise of interpreting laws, thus encroaching at times in the spheres of the executive and the legislature.

### **Statement of Problem**

The issue then arises as to whether legislative intent may be superseded or supplanted by judicial review. There are instances in which the judiciary not only encroaches upon the legislature but may also step into the shoes of the executive in making directions on matters such as policy. This creates not only a problem in the theory of separation of powers but as describe by Mark Levin in his book, *Men in Black: How the Supreme Court is Destroying America* (2005); “judges have abused their constitutional mandate by imposing their personal prejudices and beliefs on the rest of society. They make rather than interpret the law”.<sup>2</sup>

### **Research Question**

Do judges make law and control the executive or do they only interpret the law and resolve disputes between parties, be they State or citizens?

Does the concept of *Stare Decisis*, or binding judicial precedent assist the judiciary to make laws?

How important are constitutional provisions in facilitating judicial legislation

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<sup>2</sup> Modi, Zia, *10 Judgments that changed India* (2013)

## **Hypothesis**

It is the hypotheses of this paper that judges in common law countries make law and are not merely interpreting the law. They are aided in this process by the doctrine of judicial precedent. In South Asia in particular, through the mechanism of Judicial Review, the judges not only make laws but also sometimes step into the shoes of the executive.

## **Research Methodology**

The methodology used would be both a theoretical analysis of the doctrine of separation of powers and testing this theory against its application in some common law jurisdictions, to this end, a survey of judicial review in Britain, India, Sri Lanka and USA would be done with reference to case law and academic opinion.

## Chapter II – Background to separation of powers and the role of the judiciary

The British system of government is based on the rule of law, which supposes that all persons are subject to the same laws.<sup>3</sup> As administrative mechanisms of government grew, it became necessary for courts to ensure that discretionary powers granted to administrative bodies were exercised properly<sup>4</sup>. To this end the doctrine of *ultra vires* was developed by the courts. Thus, the actions of a person or body if acting beyond the powers granted, was quashed by a writ of certiorari.

Wade<sup>5</sup> commenting on this point states;

The technique by which the courts have extended the judicial control of power is that of stretching the doctrine of ultra vires. As already observed they can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament...For this purpose they have only one weapon, the doctrine of ultra vires. This is because they have no constitutional right to interfere with action which is within the power granted (*intra vires*), If it is within jurisdiction, and therefore authorized by Parliament, the court has no right to treat it as unlawful.

It is thus seen that the English courts used creative tools to strike down executive action. However, they were limited by their concept of ultra vires to striking down executive action and unable to direct particular courses of action for the executive. The English Courts were also not able to strike down legislation as the English constitutional principle of Sovereignty of Parliament meant that courts cannot strike down legislation.

Commenting on this position Wade states<sup>6</sup>;

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<sup>3</sup> Appaduari, *Substance of Politics* (2002) p 278. Also Dicey, *Law of the Constitution*, 4<sup>th</sup> Indian reprint (2003)

<sup>4</sup> Craig, *Administrative Law*, 5<sup>th</sup> ed. p56

<sup>5</sup> Wade and Forsythe, *Administrative Law*, 8<sup>th</sup> ed. p17

<sup>6</sup> Wade op cit. p. 25 and p 29

The sovereignty of Parliament is a peculiar feature of the British constitution which exerts a constant and powerful influence. In particular, it is an ever present threat to the position of the courts...Parliamentary sovereignty, as it now exists, profoundly affects the position of the judges. They are not appointed guardians of constitutional rights, with power declare statutes unconstitutional...

The English courts are also limited in giving directions to administrative bodies by the tool the writ of Mandamus – a mandate to perform a statutory duty. The remedy however is limited in that the courts can only compel a duty and not a discretionary power. In this regard, Wade states<sup>7</sup>; “Obligatory duties must be distinguished from discretionary powers. With the latter mandamus has nothing to do: it will not for example issue to compel a minister to promulgate legislation”. The English courts thus yet function on the notion that judges do not make law but are merely interpreting the law.

The position is different in regard to countries that have written constitutions such as United States of America and India.

In the United States, its constitution was framed close to the time Montesque formulated his theory of Separation of Powers and thus a rigid separation of powers was introduced. Weeramantry states<sup>8</sup>;

This philosophy found its way into the Federal Constitution of the US, which rigidly separated the executive, judicial and legislative functions of government. This was the first of the world’s important constitutions which explicitly recognized such a rigid separation. It has since been followed by many others such as the Indian and the Australian which in different degrees seek to insulate each of these limbs of governmental power from interference by the other”.

Hence, the Federal Supreme Court of the United States has struck down legislation, policy and executive decisions as being unconstitutional. These have included issues such as racial

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<sup>7</sup> Wade, op cit. p. 609

<sup>8</sup> Weeramantry, *An invitation to the law* (1982) p 145

segregation in *Brown v. Board of Education*<sup>9</sup>, to a woman's right to abortion in *Roe v. Wade*<sup>10</sup>.

Likewise, the Indian Supreme Court has struck down constitutional amendments itself as being unconstitutional in *Keshavananda v. State of Kerakala*<sup>11</sup>. It has also in numerous cases directed the executive in such cases as *Municipal Council Ratlam v Varichad*<sup>12</sup> in which sanitary standards were enforced, as well as in *M.C. Mehta v. Union of India (Taj Mahal case)*<sup>13</sup> to relocate industries.

It is thus seen that the courts through activist judgments are impinging on the functions of both the legislature and executive. The issue or criticism that arises from such a position is that judges are unelected and often times in the guise of interpreting laws usurping the functions of the elected bodies.<sup>14</sup>

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<sup>9</sup> 347 U.S. 483 (1954)

<sup>10</sup> 410 U.S. 113 (1973)

<sup>11</sup> AIR 1973 SC 1461

<sup>12</sup> AIR 1980 SC 1622

<sup>13</sup> AIR 1997 SC 734

<sup>14</sup> Roosevelt.K, *The Myth of Judicial Activism* (2006)

## CHAPTER III – Factors enabling judges made law

### The concept of Stare Decisis – Binding Precedent

The mere fact that a court or a judge makes orders that overturn legislation or direct the executive to act in a particular way does not by itself cause such judgments to become binding on future cases.

The factor that makes judgments binding is peculiar to common law jurisdictions which have the concept of *Stare Decisis*. This concept of binding precedent has been explained by Dicey in his work, *Law and Public Opinion in England*<sup>15</sup> as follows:

Our common law system consists in applying to new combination of circumstances these rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency and certainty we must apply these rules...and we are not at liberty to reject them...because we think that the rules are not as convenient and reasonable as we ourselves have devised.

The House of Lords, in the case of; *London Street Tramway Co. Ltd. v. London Council*<sup>16</sup> set out the position in the U.K. Lord Halsbury enunciated it thus<sup>17</sup>;

Under these circumstances, it appears to me that Your Lordships would do well to act upon that which has been universally assumed in the profession so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive and nothing but an Act of Parliament can set right that which is alleged to be a wrong judgment of this House

The applicability of the concept of binding precedent has also been pronounced upon in the Court of Appeal in the U.K. in the case of *Young v Bristol Aeroplane Co.Ltd.*<sup>18</sup>

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<sup>15</sup> 2<sup>nd</sup> Edition, third Indian reprint (2003), p 367

<sup>16</sup> 1898 A.C. 375

<sup>17</sup> (1898) A.C. 375, 380

<sup>18</sup> [1944] 2 All.E.R 293.

The concept of Stare Decisis was also the subject of a full bench decision of the Supreme Court of Ceylon/ Sri Lanka in *Bandahamy v. Senanayake*<sup>19</sup> in which the court analyzed the doctrine in various common law countries. The Court stated;

Every Supreme Court in the Commonwealth of Nations as well as America recognize the principle of the doctrine... The early American view point which has not undergone appreciable change is thus expressed in Kent's Commentaries, Vol.1 p. 476(12<sup>th</sup> End.1896) as follows :- "a solemn decision on a point of law, arising in a given case, becomes an authority in a like case...when a rule of law has once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review and never by the same court...and if the practice were otherwise it would be leaving us in a state of perplexing uncertainty as to the law".

The Supreme court of Ceylon/Sri Lanka went on to hold that the doctrine of Stare Decisis was applicable in Sri Lanka and set out rules as to its application in regard to the various courts based on its hierarchy and the numerical strength of the Bench. The court also in passing analyzed the doctrine as applicable in India and stated;

India, being a country in which the influence of the English legal system has prevailed for well over a century, regards judicial precedent with the same veneration as England...The establishment of the Supreme Court of India in the post independence period and the abolition of appeals to the Privy Council have caused no change except that the decisions of the Supreme Court now bind the High Court absolutely. The Supreme Court regards itself as bound by its own decisions subject to their being overruled by benches of greater numerical strength. Pakistan does not call for detailed reference as the principle is the same in that country. .

The concept of judicial precedent has been pronounced upon in India in the case of *Manganese Ore(India) v. R. Assistant Commissioner*<sup>20</sup>, in which the court held that it would not lightly depart from established precedent.

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<sup>19</sup> 62 NLR 313

<sup>20</sup> AIR 1976 SC 410 at 413

While noting that judicial precedent as concept has been adopted by judges in the various common law jurisdictions, their various constitutions have also facilitated the judiciary to set down rules.

### **Constitutional provisions leading to judicial review**

In the United States of America, Article III of the Constitution states that; “The Judicial power of the United States shall be vested in one Supreme Court...” Article III (2) as to the scope of that power states; “The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and the treaties made, or which shall be made under Authority...”<sup>21</sup>

While the above Article grants judicial power to the Supreme Court, there is no specific mention of judicial review. This power while implicit was assumed by the Supreme Court. The United States Information Agency, in its publication, “*American Government*” (1989) states (p.94);

Most of the cases involve interpretation of the law or the intent of Congress in the passing of a piece of legislation. A significant amount of the work of the Supreme Court, however, consists of determining whether legislation or executive acts conform to the Constitution. This power of judicial review is not specifically provided for in the Constitution. Rather, it is doctrine inferred by the Court from its reading of the Constitution, and forcefully stated in the landmark *Marbury v. Madison* case of 1803. In its decision in that case, the court held that “a legislative decision contrary to the Constitution is not law,” and further observed that “it is emphatically the province and duty of the judicial department to say what the law is”. The doctrine has also been extended to cover the activities of state and local governments

Thus, in the United States of America judge made law is possible due to both an interpretation of the constitution granting powers of judicial review to the Supreme Court and the doctrine of precedent.

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<sup>21</sup> M.V. Pylee, *Select Constitutions of the World* 2002, p 728.

In the United Kingdom, with no written constitution, more reliance is placed on judicial pronouncements. A.V. Dicey in his seminal work, *Law and Public Opinion in England* (2<sup>nd</sup> Edition, Third Indian Reprint 2003, pp 361-362) explains it as follows;

As all lawyers are aware, a large part and as many would add, the best part of the law of England is judge made law- that is to say, consists of rules to be collected from the judgments of Courts. This portion of the law has not been created by Act of Parliament and is not recorded in the statute book. It is the work of Courts; it is recorded in the Reports; it is in short the work of judicial legislation. The amount of judge-made law is far more extensive than a student easily realizes. Nine tenths, at least of the law of contract and the whole or nearly the whole of the law of torts are not to be discovered in any volumes of the statutes. Many Acts of Parliament...are little else than the reproduction in a statutory shape of rules originally established by courts. Judge made law has in such cases passes into statute law.

In the U.K. in the absence of a written constitution, the doctrine of *stare decisis* itself has facilitated the constitutional Principle of judicial review, however with limits. Parliament is supreme and can make any law it pleases. Dicey states that<sup>22</sup>;

The Principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has under the English constitution the right to make or unmake any law whatsoever; and, further that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

However, even in this regard, at present the judgments of the European Court on Human Rights are binding on the U.K., thus eroding the sovereignty of Parliament<sup>23</sup>.

In this context, even in regard to European countries, Weeramantry<sup>24</sup> states;

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<sup>22</sup> '*Law of the Constitution*' (1885), 10<sup>th</sup> Indian reprint (2003) p. 39

<sup>23</sup> Wade, *Administrative Law*, 10<sup>th</sup> ed. p140.

<sup>24</sup> op.cit., p 52

The strong tradition of legal science which characterizes the civil law is perhaps changing somewhat under the influence of modern constitutional development. Many civil law countries have in the post war years adopted constitutions which guarantee civil rights. The courts are often called upon to interpret these, sometimes to the extent of striking down legislation which ignores these principles or countermanding administrative work of officials. The traditional low-key attitude of the judges is altering under the stresses of these circumstances, and they are tending to adopt a more assertive role, somewhat on the lines of their American counterparts.

It is to be understood therefore, that even in civil law jurisdictions, especially in the field of human rights, judge made law, through the mechanism of judicial review is gaining a foothold.

The Sri Lankan Constitution is specific, in granting to the Supreme Court sole and exclusive jurisdiction to determine whether a Bill is inconsistent with the Constitution – Article 120 of the Constitution of the Democratic Socialist Republic of Sri Lanka. It may be noted however that this power is only in respect of pre-enactment review. This is made more explicit on a plain reading of Article 80(3) which states that; “Where a Bill becomes law upon a certificate of the Speaker as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever”<sup>25</sup>

In Sri Lanka therefore, judicial review of the legislation is possible at the pre-enactment stage and the Supreme Court of Sri Lanka exercises its sole and exclusive jurisdiction in striking down executive acts as unconstitutional. Most recently a full bench of the Supreme Court struck down the decision of the President to dissolve Parliament as unconstitutional<sup>26</sup>.

In India, a reading of Articles 245 and 246 set out the legislative competence of Parliament. Article 245 of the Constitution reads; “Subject to the provisions of the Constitution,

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<sup>25</sup> Pylee, *Select Constitutions of the of the World* (2002)

<sup>26</sup> *Sambandan v. AG and 5 Others* SCFR 351/2018 SC Minutes 13 December 2018

Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State”.

Shukla<sup>27</sup> opines that the opening words of this Article; “Subject to the provisions of the Constitution” lend itself to judicial review as has been the case in a long line of cases; including *A.P Goplan v. State of Madras*<sup>28</sup> and *Golaknath v. State of Punjab*<sup>29</sup>.

Further, Article 141 of the Indian Constitution recognizes the concept of stare decisis, by stating that the law declared by the Supreme Court shall be binding on all courts within the territory of India, thus facilitating judge made law

It is seen from the above that the doctrine of judicial precedent combined with judicial review, has been the foundation for judge made law, not only in India, but also in other commonwealth countries and the USA.

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<sup>27</sup> *The Constitution of India*, 10<sup>th</sup> ed. (2003), p 628

<sup>28</sup> AIR 1950 SC 27

<sup>29</sup> AIR 1967 SC 1643.

## Chapter IV - A survey of Judicial Review in some jurisdictions

### United Kingdom

In the U.K., the courts created various tools to embark upon judicial review; the doctrine of ultra vires. However, this had its limits and if the lower tribunal, or body was acting within the bounds of its power, the courts were not able to interfere.

In order to get over this difficulty, the courts came up with the doctrine of ‘error of law on the face of the record’. The legislature responded however by inserting ‘no certiorari’ clauses or ouster clause. The court not undone by this new measure began to hold that if a tribunal asked itself a wrong question in deciding a matter there was an error of law and hence its decision would be reviewable. The leading case in this regard is *Anisminic Ltd. v. foreign Compensation Commission*<sup>30</sup>. In this case the Foreign compensation commission had rejected a claim for compensation on an erroneous ground. The House of Lords by a majority held that the tribunal by asking themselves the wrong question and imposing requirement that were not required had over stepped their authority – ultra vires.

The result of *Anisminic* is that a tribunal has no power to decide questions of law wrongly; in effect any error of law would render a decision struck down on the basis of ultra vires.

This principle was followed in *Pearlman v. Harrow School Governors*<sup>31</sup> and thereafter in a line of cases such as *O’Really v. Mackman*<sup>32</sup> and *R.v. Hull University ex.p Page*<sup>33</sup>.

In *Boddington v. British Transport Police*<sup>34</sup>, Lord Irvine stated in his speech that;

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<sup>30</sup> [1962] 2 A.C. 147

<sup>31</sup> [1979] QB 56

<sup>32</sup> [1983] 2 AC 237

<sup>33</sup> [1993] AC 682

<sup>34</sup> [1999] 2 AC 143 at 154

Anisminic made obsolete the historic distinction between error of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires, so that any misdirection in law would render the decision ultra vires and a nullity.

It is seen however, that despite all judicial creativity, in the U.K, judicial review is limited firstly, by the doctrine of ultra vires to striking down administrative or policy decision and secondly the courts do not give directions to administrative bodies in the sense of performing an act in a particular way. They will always only order the administrative body to reconsider its policy or action. These limitations are captured in the Speech of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*<sup>35</sup> wherein he enunciated that judicial review was possible on three grounds, namely, illegality, irrationality and procedural impropriety.

### **United States of America**

The limitation on judicial review in the U.K. is not inherent in the United States. This was so from the early case of *Marbury v. Madison*<sup>36</sup> which was the very first case by which the U.S. Supreme Court exerted its right of judicial review in quashing legalization as unconstitutional. In that case the issue was whether the Supreme Court would issue a Mandamus to direct the then Secretary of State James Madison to deliver the letter of appointment as a judge to William Marbury. The Court however, went onto hold that the Supreme Court had power to declare the Judiciary Act of 1789 unconstitutional.

In *Brown v. Board of Education of Topeka*<sup>37</sup>, the U.S. Supreme Court struck down state action to in regard to racial segregation in schools as contrary to the equal protection clause of the 14<sup>th</sup> Amendment to the Constitution.

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<sup>35</sup> [1985] A.C. 374

<sup>36</sup> 5. U.S. (1 Cranch) 137 (1803)

<sup>37</sup> 347 U.S. 483 (1954)

Similarly, in *Miranda v. Arizona*<sup>38</sup>, the court held that a statement obtained by the police without first informing the suspect of his rights violated of the equal protection clause. It is in consequence of this case that the “Miranda warning is given to suspects apprehended by the police as seen in most US films and television series.

In *Roe v. Wade*<sup>39</sup> the court made a land mark ruling on the right of a woman to have an abortion by striking down a Texas law that criminalized abortion, on the basis that it violated the 14<sup>th</sup> amendment and the right to privacy. The court in this instance even stepped into the policy issue by stipulating that an abortion could be permitted till the third trimester. This was modified in the case of *Planned Parenthood v Casey*<sup>40</sup> in which the court recognized a woman’s right to abortion till fetal viability.

Also in *Regents of the University of California v. Bakke*<sup>41</sup> the court struck down affirmative action in respect of university admission on the basis of race and went on to stipulate guidelines on affirmative action in regard to university admission.

It is thus seen that unlike in the U.K. in the U.S. the Supreme Court has the capacity to use judicial review to strike down legislation both at Federal and State level. It also has the capacity to strike down administrative action and policy and also to set standards for the administration as it did in the *Bakke* and *Planned Parenthood* cases.

## **Sri Lanka**

In Sri Lanka, as discussed previously, in regard to legislation, the Constitution permits only pre-enactment review – Article 80(3). However, Article 126 grants the Supreme Court sole and exclusive jurisdiction in respect of the infringement of a fundamental right by executive and administrative action while Article 126 (3) grants the Supreme Court wide powers to grant “just and equitable relief”.

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<sup>38</sup> 384 U.S. 486 (1966)

<sup>39</sup> 410 U.S. 113 (1973)

<sup>40</sup> 505 U.S. 833 (1992)

<sup>41</sup> 438.U.S.235(1976)

Using these provisions, the Supreme Court of Sri Lanka, has struck down decisions of the President to dissolve Parliament<sup>42</sup>, recognized the right to life as implicit in the constitution though not specifically stated<sup>43</sup> and declared the right to receive information implicit in the right freedom of expression<sup>44</sup>

The Court has also broadened scope of standing to permit interested persons to petition the court though not specifically provided for in Article 17 of the Constitution<sup>45</sup>. It has also relied upon the doctrine of the 'Public Trust' to impose conditions on the executive<sup>46</sup>.

Thus, in Sri Lanka, too, despite judicial review, being restricted to pre enactment review, the Supreme Court in its interpretation of the Constitution set standards and these standards have been followed due to a process of judicial precedent.

## **India**

The Case of *Kesavananda Bharati v. State of Kerala*<sup>47</sup> is considered an important milestone in Indian Jurisprudence, for in it the Supreme Court came up with the 'basic features' doctrine enabling the court to strike down legislation or even constitutional amendment itself that sought to contravene the basic features of the Indian Constitution. While the court relied upon the preamble to the constitution, the directive principles of state policy and fundamental rights, what this means for future interpretation is left open, thus giving the court the flexibility to strike down future legislation.

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<sup>42</sup> *Sambandan v. AG and 5 Others* SCFR 351/2018 SC Minutes 13 December 2018

<sup>43</sup> *Lamaheage Lal v. Officer in Charge, Minor Offences, Seeduwa Police Station*, [2005] 1 Sri. L.R. 40,

<sup>44</sup> *Fernando v. Sri Lanka Broadcasting Corporation*, [1996] 1 Sri.L.R 157

<sup>45</sup> *Bulankulame v. Secretary Ministry of Industrial Development* [2000] 3 Sri.L.R 243, *Vasudeva Nanayakkara v. K.N. Choksy and Others*, [2008] B.L.R. 23)

<sup>46</sup> *Mendis and 9 Others v. Kumaratunge and Others* [2008] B.L.R. 1

<sup>47</sup> AIR 1973 SC 1461

Another important case is that of *Supreme Court Advocates-on Record v. Union of India*<sup>48</sup> in which the court interpreted Article 124(2) of the Constitution, giving its view that the word 'consultation' appearing in the article in regard to appointment of judges should mean concurrence of the Supreme Court. Thus the Supreme Court, took away the discretion of the executive in the appointment of judges; an important function of government, effectively reversing the position the Court had taken in *S.P.Gupta v. Union of India*<sup>49</sup> whereby it had held that the matter of appointing judges was the job of the executive which had the final say in the matter.

These two judgements by themselves, have had a far reaching impact in controlling both the legislature and the executive.

The court has also virtually exercised executive functions, in many matters in regard to the environment. Notably in the case of *Vellore Citizens Welfare Forum v. Union of India* (AIR 1996 SC 2715) the court took serious note of water pollution by tanneries and issued standards to the Pollution Control Board and directed the Madras High Court to monitor matters in regard to the environment. The court impinged on executive policy in stating that no new industries were to be set up in prohibited areas and set out penalties and fines. It also empowered magistrates to recover payments from polluters. It is seen therefore that in this judgment the court was exercising both executive and supervisory functions. It also was giving traction to the principles of sustainable development, an international standard recognized in treaties given effect to by the executive<sup>50</sup>.

The court has also filled statutory vacuums in giving effect to international standard in the case of *Visaka v. State of Rajasthan*<sup>51</sup>. In this case the Supreme Court went so far as to state that any international convention that was not inconsistent with the Constitution could be read in to Article 51(c) which requires Indian to foster respect for International law. The

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<sup>48</sup> AIR 1994 SC 268

<sup>49</sup> AIR 1982 SC 149

<sup>50</sup> D.J.De, *Fundamental Rights*, (2000), p. 674

<sup>51</sup> AIR 1997 SC 307

court thus brought in standards of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) to Indian and in the absence of adequate legislation laid down standards and guidelines to be observed in workplaces and be made binding till until suitable laws were made. In this instance the court clearly stepped into the shoes of the legislature in formulation its own brand of law. It has been commented that by this judgment court has institutionalized judicial law making<sup>52</sup>

It is also observed that two judgments of the court have been instrumental in establishing first and second generation human rights in India. The first generation deals with civil and political rights, while the second generation deals with social and economic rights. As to the first, the case of *Maneka Gandhi v. Union of India*<sup>53</sup> clearly established the right to life, liberty and personal liberty while the case of *Olga Tellis v. Bombay Municipal Corporation*<sup>54</sup> set a trend in second generation rights such as housing for the poor, on an interpretation of the right to life.

Thus it is seen that the Indian Supreme Court has been actively involved in judicial legislation.

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<sup>52</sup> Zia Mody, *10 Judgments that changed India*, (2013) p. 189-206

<sup>53</sup> (AIR 1978 SC 597)

<sup>54</sup> (AIR 1986 SC 180)

## CONCLUSION

It is apparent from the survey of the cases on judicial review in the four jurisdictions looked at above that the judges in the U.K. though they have become creative and come out of the era in which they merely applied law have less scope for stepping into the shoes of the legislature and the executive. This is despite the exhortation by Lord Denning that judges should not be timorous souls. The English Courts seem more to conform to Lord Lawton's speech in *Laker Airways Ltd. v. Department of Trade*<sup>55</sup> in which he said "...I regard myself as a referee. I can blow my judicial whistle when the ball goes out play; but when the game restarts I must neither take part in it nor tell the players how to play"<sup>56</sup>.

That view is far away from the activist approach of the Indian Supreme Court in *Visaka v. State of Rajasthan* where the court embarked on setting standards to be followed in the absence of law or the Sri Lanka Supreme Court in *Mendis and 9 Others v. Kumaratunge*. It is perhaps strange that the U.K. whose common-law system has been the root for the U.S., Sri Lankan and Indian system of law has a more restrained approach to checking the other two branches of government. This result is due to the concept of the sovereignty of Parliament in the U.K. and though it has been weakened by enforcement of judgements of the European Court on Human Rights, Britain's desire to sever ties with the EU will further the concept of the Parliamentary sovereignty.

The U.S. Supreme Court has in comparison to their counterparts in the U.K. been bolder in crafting judgements to set out judicial reasoning on laws and give effect to changing social sensitivities as it did in *Brown v. Board of Education*, *Roe v. Wade* and *University of California v. Bakke*. The U.S court is also the last word in regard to legislative power having the power to strike down laws as unconstitutional. In this sense judicial review in the U.S. also amount in a certain degree to law making as it sets out principles through its judgments

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<sup>55</sup> [1977] All.E.R. 182

<sup>56</sup> Malik Lokendra, *Judicial Activism in India – A Festschrift in honour of Justice V.K. Iyer* (2013)

that need to be followed not only by lower courts but by future law makers who keep in mind the view of the court in the formulation of new laws.

The south Asian Supreme Courts have progressed not only in striking down laws but also in formulation guidelines and regulations in keeping with international law and at times enforcing the rules framed by them with contempt of court proceedings. This is a classic case of Montesques' warning that; "were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor"<sup>57</sup>.

In bringing about this state of affairs it should be noted that while these jurisdictions have similarities, they are unique and different in that they have their unique constitutions which give life to the judiciary. In the U.K. the judiciary without a written constitution is unable to check Parliament. The U.S. Constitution has no express provision for such check, however, the Supreme Court after the judgment of *Marbury v. Madison* has assumed that role. In Sri Lanka the Constitution permits pre-enactment review, and as such while legislation cannot be struck down, its interpretation gives wide powers to the judges to strike down executive action and to formulate rules and guidelines for the executive. The Indian Supreme Court has gone the furthest down the road through its creative and what some call activist interpreting of the Constitution to give it self the role of watchman with regard to protecting the rights of the people against the tardiness and excesses of the legislature and the executive.

The different positions attributable to judiciaries of the various jurisdictions it must not be forgotten stem from their constitutional provisions or a lack of it. While judges have been creative in interpreting their role they can do so only if a constitution facilitates it. Hence, it is argued that one cannot ignore the constitutional document itself as a means of facilitating juggle made law.

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<sup>57</sup> Laski, op.cit

In all the above four jurisdictions surveyed, it should also be noted that the common law doctrine of judicial precedent has been the unwritten force that enables courts to have what it says followed in the years to come. This factor has found the force of written law in the case of India in terms of Article 141 of the Constitution.

Is judicial review another form of law making? the answer would depend on not so much on a simple yes or no but the degree to which judicial review is made possible in the jurisdiction in which it is applied and the extent of the application of the principle of judicial precedent.

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