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Judicial Review: A Comparative Analysis between India & U. S. A.

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Abstract: ***The primary duty of the courts of any country is to interpret the laws and enforce them, while doing such interpretation the courts are bound to maintain the supremacy of the Constitution and if any law or order is violative of the provisions of the Constitution it is bound to declare them ultra vires, thus, Judicial review is a weapon in the hands of judiciary to hold unconstitutional and unenforceable any law and order which is inconsistent with the Constitution of the country. Judicial Review is one of the most important features of any democracy. It is the power given to the Country's judiciary to maintain a check and balance system so as to control the arbitrary powers of the legislature and executive. It is the power of courts to enquire the validity of law or any other action on the touchstone of the provisions of Constitution and other implied limitations. It is one of the tools to maintain the doctrine of rule of law and it also helps the Judiciary to perform the function of judicial activism. In other words judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. Judicial review stands as a cornerstone of modern democratic governance, ensuring the supremacy of constitutional principles over legislative actions. The paper delves into the judicial review systems of two prominent democracies, India and the United States of America (U. S. A.). Despite their shared commitment to democracy and the rule of law, both nations have evolved distinct approaches to judicial review, influenced by their unique historical, political, and legal contexts. This paper examines the origins and development of judicial review in India and the U. S. A., tracing its roots to the respective constitutions and landmark judicial decisions.***

Keywords: Judicial Review, Comparison, Judiciary

1. Introduction

The concept of judicial review flows from the concept of limited government as it is assumed that there is a paramount law which constitutes the foundation and source of all other legislative authority and therefore it follows that any act of the ordinary law making bodies which contravenes the provisions of the paramount law must be void. According to the definition given by Britannica, Judicial review is the power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. [1] Thus judicial review helps understand more clearly that the Constitution of any country is the supreme law of the land and any law inconsistent with it is void. It can also be said that judicial review has two prime functions i. e. legitimizing government actions and to protect the constitution against any undue governmental encroachment. Judicial review thus protects the sanctity of the constitution and gives supremacy to it and assures rule of law in any country.

Kailash Rai defines judicial review as the authority of the Courts to declare void the acts of the legislature and executive, if they are found in the violation of the provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction. [2] Alexander Bickel however states that, "judicial review means not only that the Court may strike down a legislative action as unconstitutional but that it may also validate it as within constitutionally granted powers and as not violating constitutional limitations". [3] Nwabueze has also observed that judicial review is the power of a Court, in appropriate proceedings before it, to declare a governmental measure either contrary to, or in accordance with, the Constitution or other governing law with the effect of rendering the measure invalid and void or vindicating its validity. [4] Thus, the main object of the doctrine of judicial review is aimed at, not only to protect the citizens from abuse of power by any branch of the State but also to ensure that no authority or branch reaches a conclusion which is incorrect in the eye of law.

The doctrine of judicial review is one of the invaluable contributions of the U. S. A. The concept of judicial review was developed by in the landmark judgment of *Marbury* v. *Madison* by the Chief Justice Marshall of the American Supreme Court. But there are two theories about the origin of Judicial review, which are as follows:

a) Pre - Marbury case analysis

This theory talks about the contributions of the English courts in the process of development of the doctrine of judicial review. Judicial Review in England rests upon a mass of case laws. It's origin can be traced back to the decision of Sir Edward Coke, the lord Chief Justice of the Common pleas in England who declared, in the famous Dr. Bonham's case that "it appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason and repugnant, or impossible to be

[1] *Judicial review, available at:* https://www.britannica.com/topic/judicial-review (Last visited on August 4, 2016).
[2] Kailash Rai, *Administrative Law* 395 (Haryana: Allahabad Law Agency, 2006).
[3] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at The Bar of Politics* 16 (Yale University Press, 2nd edn.,1986).
[4] Nwabueze, B.O., *Judicialism in Commonwealth Africa* 229 (St. Martin's Press, 1977).

performed, the common law will control it and adjudge such act to be void". [5] This concept of the supremacy of common law, together with the idea that the courts were the defenders of the people rights, was carried by some Englishmen who settled in America. Therefore, this theory advocates that the concept of judicial review emerged from the Common law courts.

b) *Marbury* v. *Madison*

Marbury v. *Madison*[6] is seen as the first cases wherein the concept judicial review was recognised. In this case Chief Justice Marshall laid down that the judiciary has the power to examine the laws made by the legislature. It was also declared that if any such law is found to be in violation of the constitution, then such a law would be declared by the court as ultra - vires of the constitution.

Thus it can be said that judicial review as a doctrine is accepted in all legal systems and it usually find its place in the cases laws and is not expressly provided in the Constitution of the countries, however few express provisions are mentioned in different constitutions from which the doctrine of judicial review gain authority.

Judicial Review in India

Supremacy of the law is the spirit of the Indian Constitution. In India, the doctrine of judicial review is the basic feature of the Constitution. Though there is no express provision for judicial review in Indian Constitution but it is an integral part of constitutional system of India. Also many provisions of the Indian constitution have conferred the power of judicial review on the Judiciary, such as Art.13, 32, 131 - 136, 141, 143, 226, 227, 245, 246, 372. Constitution provides under Art 13 the right to courts to declare any law in violation of fundamental rights as void and also Art 367 clearly provides that the power to declare a statute to be unconstitutional will belong to the judiciary. But the scope of judicial review is not restricted to Art 13 and 367 because it has already been made clear in *A. K. Gopalan*[7] by Kania C. J., " the inclusion of Art 13 (1) & (2) in the constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactment, to the extent it transgresses the limit, invalid. " Thus, judicial review, in India is not dependent upon the express provisions in Article 13 nor is it restricted to the sphere of fundamental rights alone. It extends to the entire length and breadth of the constitution.

Judicial in India comprises three aspects:

1) Judicial Review of legislative action.
2) Judicial Review of judicial decision.
3) Judicial Review of administrative action. [8]

The most prominent object of judicial review in India is to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The ostensible purpose however is to grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real purpose is something higher i. e., no statute which is repugnant to the constitution should be enforced by courts of law. [9]

Emperor v. *Burah*[10] was the first case in India which interpreted and originated the concept of judicial review. In this case court held that aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor General council in excess of the power given to him by the Imperial Parliament. In this case the High court and Privy Council adopted the view that Indian courts had power of judicial review but subject to certain limitations. Again in, *Secretary of State For India* v. *J. Moment*[11], it was 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. The same trend of giving precedence to rule of law through mechanism of judicial review and upholding the sanctity of Constitution of India post - Independence has been carried forward.

In India, there has been a long tussle between parliament and the Supreme Court on the scope and limits of judicial review. The twenty - fourth amendment to the constitution passed in 1971 authorised parliament to amend any provision of the constitution. However, the Supreme Court subsequently declared that while parliament was competent to amend any provision of the constitution, any amendment had to conform to the basic framework of the constitution. Thereafter to undo the observation of the Supreme Court, the then Prime Minister Indra Gandhi introduced the forty - second amendment to the constitution during the proclamation of emergency, which stripped the apex court of the power of reviewing an amendment to the constitution. However, the forty - third and forty - fourth amendments undid the provisions of the forty - second amendment regarding powers of the Supreme Court to judge the validity of constitutional amendments, [12] since then the Supreme Court of India has been establishing the significance of judicial review in India time and again in the judgments of various cases.

Initially in earlier judgments Supreme Court gave a narrow scope to the concept of judicial review. In *Shankri Prasad* v. *U. O. I.* [13] or *Sajjan Singh* v. *State of Rajasthan*[14] or the *A. K. Gopalan* v. *State of Madras*[15], Supreme Court adopted literal. And narrow interpretation. However, in course of time this narrow view was seen to be transformed from judicial positivism to judicial activism. The landmark judgment in this context is *Keshavananda Bharti* v. *State of Kerala*[16], wherein

[5] Judicial Review: The Concept, Origin and Development, *available at:* http://vishwabhushan.blogspot.in/2011/09/judicial-review-concept-origin-and.html, (Last visited on August 4, 2016).
[6] *William Marbury* v. *James Madison, Secretary of State of the United States*, 5 U.S. (1 Cranch) 137.
[7] *A.K. Gopalan* v. *State of Madras* (1950) SCR 88 (100).
[8] *L. Chandra Kumar* v. *Union of India*, AIR 1997 SC 3616.
[9] Justice CK Thakkar, Justice Arijit Pasayat, et.al., *Judicial Review of Legislative Acts* 116 (Lexis Nexis Butterworths Wadhwa, Nagpur 2009).
[10] (1878) ILR 3 Cal 64.
[11] (1913) 15 BOMLR 27.
[12] The power of judicial review: scope and limits, *available at*: http://www.dawn.com/news/881082/the-power-of-judicial-review-scope-and-limits (Last visited on August 4, 2016).
[13] AIR 1965 SC 538.
[14] *AIR 1965 SC 845.*
[15] AIR 1950 SC 27.
[16] *AIR 1973 SC 543.*

it was held that the power of judicial review is not con fined merely to deciding whether in making the impugned laws the central or state Legislatures have acted within the four corners of the legislative lists embarked for them, the courts also have to take into account whether the laws made are in conformity with the provisions of the constitution. Thus judicial review has become an integral part of our Constitutional system and this power has been vested in the High Courts and the Supreme Court. In another landmark case *L. Chandra Kumar* v. *U. O. I*[17], judicial review was held to be a basic structure of the Constitution, which cannot be taken away through any law or enactment or even by way of amendment. [18] Even in the present scenario Supreme Court has time and again laid down grounds for judicial review, which can be broadly classified into two:

1) Procedural irregularity: Any legislative enactment or any executive order or even an amendment made to the Constitution can be challenged in the Court on the ground of procedural irregularity i. e. if the due procedure to make such law or order or the amendment is not followed then the court can struck down its validity.
2) Substantive Limits: Substantive limits means the implied limitations put on the power of legislature and executive not to make any law or order which violates the basic structure of the Constitution and the fundamental principles which though not mentioned but have been formulated and accepted over time.

These two broad grounds include grounds such as Violation of fundamental rights, outside the competence of the authority which has framed it, repugnant to the Constitutional provisions, irrationality, etc. Thus the scope of judicial review is widening with the changing times to suit the needs of the present. It has become an indispensable feature of Indian democracy. Judicial review is an unavoidable necessity wherever there is a constant danger of legislative or executive lapses, and appalling erosion of ethical standards in the society. The absence of judicial review in the Indian Constitution would have created extreme social and economic revolutions leading to complete annihilation of democracy.

Judicial Review in USA

According to the Bernard Schwartz "The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America. "[19]

The doctrine of judicial review is one of the invaluable contributions of the U. S. A. Two landmark decisions by the U. S. Supreme Court led to the concept of judicial review. In 1796, *Hylton* v. *United States*[20] was the first case decided by the Supreme Court involving a direct challenge to the constitutionality of an act of Congress, the Carriage Act of 1794 which imposed a "carriage tax". The Court did the judicial review of the said Act and held it Constitutional. The second case was Marbury v. Madison[21] where the Court asserted its authority for judicial review to strike down a law as unconstitutional. In this case Chief Justice Marshall laid down that the judiciary has the power to examine the laws made by the legislature. Chief Justice Marshall laid down few objectives of judicial review in this case:

1) To uphold the principle of the supremacy of the Constitution.
2) To maintain federal equilibrium i. e. balance between the centre and the states.
3) To protect the fundamental rights of the citizens. [22]

The US Constitution is the supreme law of the land. The Supreme Court of US has the power to interpret it and preserve its supremacy by preventing its violations. This provision has been the basis of the judicial review power of the Supreme Court. "Judicial Review " is the principle and authority which give the Supreme Court of USA the power to reject or abrogate any law which is made by Congress or states. According to this power Supreme Court of USA reject or abrogate any law which does not conform to the constitution of USA. The Constitution of US does not expressly mention the power of judicial review being vested in the US Supreme Court, thus concept of judicial review in US is mostly the contribution of judicial decisions. But Article III and Article VI of the Constitution are mostly read to give constitutional authority to the doctrine of judicial review in US. Article III merely provides that the judicial power of the United States shall vest in Supreme Court and the other inferior courts and they shall be the ultimate judicial authorities in US. Article VI provides that the US constitution is the supreme law of the land, and every other law shall be made in consonance with the Constitution. Article VI is known as the supremacy clause, as this clause gives supremacy to the constitution in relation to every other law. It mandates the judges in every state shall be bound to give precedence to constitution and struck down the laws made in derogation of constitution, also it casts a duty on the legislature, Congress and other authority to make laws and other treatise which are in pursuance of the constitution. Thus, if a Congressional law conflicted with the Constitutional law, the court is bound to uphold the Constitution as the highest law of land. In other words, any law contrary to the Constitution is void. This gives an implied power of judicial review in US. This Constitutional provision and the decisions of the US Supreme court have resulted in widening the scope of judicial review in US.

2. Comparative Analysis

The doctrine of judicial review exists both in India and USA. But it is exercised differently in different political systems. Both the countries have recognised this doctrine in their Constitution as well as in their judicial decisions. The power of judicial review has been adopted in India from USA, but the scope of judicial review differs in the two countries. None of the country expressly make mention of the term judicial review in their Constitutions. In both the countries the doctrine has been recognised by the judicial decisions.

[17] (1997) 3 SCC 261.
[18] Nuzhat Parveen Khan, Comparative Constitutional Law 293-295(Satyam Law International, New Delhi).
[19] Bernard Schwartz, *The Powers of Government* 19 (The Macmillan Company , New York 1963).
[20] 3 U.S. 171 (1796).
[21] 5 U.S. 137 (1803).
[22] Judicial Review in India And USA : A Comparative Study, *available at:* http://www.legalservicesindia.com/article/article/judicial-review-in-india-and-usa-1734-1.html (Last visited on August 15, 2016).

However Indian Constitution has impliedly accepted and recognised this doctrine in wider amplitude than American Constitution. The former has extensive number of provisions which implicitly contains the provisions of judicial review, which includes Art 13, 32, 131 - 136, 143, 226, 227, 246, 372 etc. on the other hand American Constitution has article III and VI which provides for the judicial review powers of the US judiciary. This sufficiently signifies that both the countries has recognised the doctrine of judicial review, however their scope varies.

In USA the judges exercise the power of judicial review in a more lenient manner, whereas in India the judges are bound by certain principles and cannot go beyond them to strike down any law. Therefore, in India there are certain specific grounds on which a law can be declared unconstitutional, one of these is the procedural limits i. e. a law is valid if the procedure to enact the law was valid, in *A. K. Gopalan* v. *The state of Madras*[23], the Chief Justice Kania opined," However iniquitous and unjust may be a law, we have no right to question its legality provided it is passed according to the procedure laid down by law. "[24] And the other limitation on the power of judicial review in India is the substantive limit i. e. the doctrine of basic structure i. e. no law can be enacted which violates the basic structure of the Constitution. On the other hand in USA the only limit is that the judges have to give reasoned decision if they struck down any law.

In India the doctrine of Eclipse is followed. If a provision is declared unconstitutional by the Court, then that particular law is not deleted form the statute books rather its operation is suspended. For example, Article 368 (4) and Article 368 (5) of the Indian Constitution were declared unconstitutional in Minerva Mills v. UOI[25] by the Supreme Court, since then thier operation has been suspended but it still exists on the statute books, the simple reason for the same is that may be in future a higher bench may be constituted and they may declare it valid. So, a law declared by the Indian Supreme Court as unconstitutional does not mean that the said law is removed from the statute book or a new law is created in its place by the Court or by the Legislature immediately. However, there is an entirely different position in America. If the American Supreme Court declares any law as unconstitutional then the court will make a new law in its place. These are known as judge made laws and are very common in America.

Another difference between the power of judicial review in the two countries is that the American Constitution provides "due process of law' against that of 'procedure established by law' which is contained in the Indian Constitution. The difference between the two is that the scope of the former is wide while the scope of the later is narrow. Due process of law clause has made the American Supreme Court become more than a mere interpreter of law. [26] It can declare laws violative of rights as null and void not only on substantive grounds of being unlawful, but also on procedural grounds of being unreasonable. Whereas in India the "Procedure established by law" does not give such wide powers to our Supreme Court, as here the court examines only the substantive question i. e., whether the law is within the powers of the authority concerned or not. However India has without doubt has widened the scope of procedure established by law to the extent of due process, but still the courts do not go into the question of its reasonableness or suitability or policy requirement. Thus the scope of Judicial Review in India is somewhat circumscribed as compared to that in the US.

3. Conclusion

The doctrine of judicial review which came into existence through a number of judicial decisions has been accepted in term and essence in almost all the countries. It finds its place in India as well as in America also not only through the recognition of the courts but also being implicitly embedded in numerous Constitutional provisions. The said power gives the much-needed autonomy to the Supreme Court so that they can give the true meaning to the individual liberty and rights by invalidating those laws which conflict with the Constitution. Since Constitution is the grundnorm in any country, its sanctity cannot be hampered in any case. The sole responsibility to attain this main objective does not lie on the Supreme Court alone but also upon the citizens of the country therefore they have been given the right to approach the courts in order to challenge the laws which they seem to violate the provisions of the Constitution.

The doctrine of judicial review gives immense power to the courts to strike down any law made by the parliament on the touchstone of the Constitution. Moreover, it was held in Keshvavanada Bharti case[27] that even if the Parliament takes away the judicial review power of the court by inserting laws in the 9th Schedule even then the Court can judicially review the amendment through which the said law was inserted in the 9th schedule if not that particular law. Thus, judicial review is one of the basic features of the Constitution which cannot be taken away in any case, the same is the case in America wherein the Judicial review is an indispensable tool in the hands of the judiciary. However, this doctrine cannot be exercised in an arbitrary manner. This power is not absolute in any country and thus it has to be exercised on certain principles and the decision has to be a reasoned one. The comparison of the two countries show that the American judiciary exercise this judicial review power more liberally but this in no sense deny that the Indian judiciary is bound by any external authority rather it is bound by the self - imposed limitations. Thus, judicial review exists in both the countries though they have certain differences, but the essence remains the same.

[23] 1950 AIR 27.
[24] American vs. Indian law: Judicial Review, *available a:*, http://www.lawcation.com/american-vs-indian-law-judicial-review/ (Last visited on August 24, 2016).
[25] (1980) 3 SCC 625.
[26] Essay on the Indian Supreme Court unlike the U.S. Supreme Court, *available at:* http://www.preservearticles.com/2011100314414/essay-on-the-indian-supreme-court-unlike-the-us-supreme-court.html (Last visited on August 26, 2016).
[27] *Keshavnanda Bharti* v. *State of Kerala* (1973) 4 SCC 225.