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THE SCOPE OF JUDICIAL REVIEW - A COMPARATIVE ANALYSIS BETWEEN USA, UK, FRANCE, AND INDIA.

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Introduction

The government of a country is having the power to enact the laws. However such power granted to them to legislate is not complete. Lord Acton has said that 'power always tends to corrupt and absolute power tends to corrupt absolutely'. A country's government has the authority to enact laws. The ability to legislate granted to them is not unqualified, though. Lord Acton was right when he said, "Power corrupts, and absolute power tends to corrupt totally." The legislation passed by the legislature and executive branch should be subject to some regulation. There will be a breach of the rule of law if there is improper control over the authority granted to the government.

If the government exercises its legislative authority in an unconstitutional way, who will control it? Are courts able to investigate this unconstitutionality? Is there any specific provision in the Constitution of countries like the USA, U.K, France and India to regulate such acts of the government? If so, How? The purpose of this research paper is to find the answers to all these questions by conducting a comparative analysis of the positions in USA, U.K, France, and India.

What is Judicial Review?

The ability of a nation's courts to determine whether the legislative, executive, and administrative bodies of government are operating in conformity with the constitution is known as judicial review. Any actions deemed to be in violation of the Constitution are deemed invalid and void. In this sense, the existence of a written constitution is necessary for the institution of

judicial review.¹ So it can be said that a judiciary's ability to review legislative and executive decisions is known as judicial review. If a law is passed and such law violates the constitution or the ultimate law of the land, the judiciary is responsible for regulating it. A second definition of judicial review is the subjection of legislation to the rule of law.² The idea of judicial review has various implications under various democratic constitutions. As a result, the notion of judicial review has changed in different ways in India, the United States, and the United Kingdom. It can be traced back to the UK, which does not have a written Constitution, but it has established a stronghold in the US, which does have a written Constitution that creates a federal polity.³ It can be viewed as a system of checks and balances to restrict the arbitrary power that the various parts of government can exercise. Judicial review, as defined under Black's Law Dictionary, is the power of a court to investigate the conduct of other branches or levels of government, notably the power to declare legislative and executive actions unlawful.⁴

Judicial Review in USA

The American Constitution does not expressly grant the Supreme Court the authority to conduct judicial review. It is not the outcome of the American Constitution. Many authors questioned the court's authority to use this judicial power. But According to Alexander Hamilton, the American Constitution's independent judiciary serves as a great deterrent to the expansion and oppression of the representative body. Because the founders of the American constitution considered that the power should be plainly conveyed in the text of Articles III and VI, a specific provision was not added.⁵ The Judiciary's ability to consider all disputes in law and equity arising under the Constitution, US law, and treaties signed or to be passed under this authority is covered under Article III Section 2. The Supremacy of the Constitution, United States law, and treaties made under its authority is covered in Article VI Section 2. In the case of *Marbury v. Madison*,⁶ it was first implemented in the US legal system. The Judiciary Act of 1789, which expanded the Supreme Court's original jurisdiction, was nullified in this decision by the US Supreme Court. According to Chief Justice Marshall, the Constitution is

¹ <https://www.britannica.com/topic/judicial-review>

² Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1354 (2006).

³ V. Nageswara Rao and G.B. Reddy, *Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead*, 39 JILI. 411 (1997).

⁴ Black's Law Dictionary 924 (Bryan A. Garner Ed.2008).

⁵ VISHNOO BHAGWAN, VIDYA BHUSHAN, VANDANA MOHLA, WORLD CONSTITUTIONS-A COMPARATIVE STUDY 216

⁶ 5 U.S. 137

the supreme law of a country, and it is the obligation of judges to uphold the Constitution that compels the courts to declare when they believe that congressional actions violate the Constitution.⁷

Ely, John Hart proposed the Representation- Reinforcement theory, which he considered to be consistent with the American system. This argument holds that the court should intervene in the democratic exercise of law and exercise judicial review of such unlawful activities when it finds that the political process is so defective that the republican ideal of representative democracy is out of reach for some individuals.⁸ According to this theory, courts should only get involved when politics are going wrong.

Numerous Latin American nations underwent constitutional transformation between World Wars I and II, which led to the acceptance of judicial review in Chile, Guatemala, and Uruguay.⁹

Using the power of judicial review, the US Supreme Court created section 227(b)(1)(A)(iii) of the Consumer Protection Act in the 2019 case of Barr v. American Ass'n of Political Consultants, Inc. This is the final instance in which the USA has used judicial review.¹⁰

Judicial Review in UK

In England judicial review is considered as the core of administrative law, with the goal of "enforcing the legal boundaries of public and, in particular, executive power." Because of having an unwritten Constitution in England, the scope of review is limited to judicial decisions and Parliamentary acts. Because of the ongoing changes made by the courts, this concept has grown to enormous dimensions throughout time. This concept has expanded tremendously throughout the years as a result of the court's constant modifications.¹¹

In England, the Judicial Review process is a multi-step procedure that is described as a difficult process. Typically, a letter of claim is the first step. This is somewhat of a window of chance

⁷ Supra note 5 at 217

⁸ Anjali Rawat, John H. Ely's Formulation of Representation-Reinforcement" as an Approach for Constitutional Interpretation, 2.2 NLUJ LR 123, 125 (2014).

⁹ Deener, David, Judicial Review in Modern Constitutional Systems, 46 The APSR 1079, 1088 (1952).

¹⁰ 140 S. Ct. 2335.

¹¹ Abhishek Mour and Adarsh Tripathi, *English Concept of Judicial Review and its Application to India: An Analysis in Light of Current Trends* 2 NSLJ 1, 2 (2013).

before the official Judicial Review application. Following that, a claim form will then be delivered to the defendant. The courts will either grant judicial review or issue a denial order with justification, in which case the claimant may ask for a hearing to have the decision reconsidered or reviewed. The option to "appeal to the Court of Appeal" at this point exists regardless of whether the courts grant permission or issue a denial order. When the claimant has been given permission, the substantive hearing will proceed. Unless the parties agree to a consent order, which states that "all the parties agree the conditions in which a judgment should be issued or an order should be made," it will finish with a judgment. The decision can be challenged to the Court of Appeal, and in some cases, it can even be appealed to the Supreme Court.¹²

Although the idea of judicial review can be traceable in UK, it is not currently functioning to its full potential. This is due to the existence of the royal prerogative on the one hand and parliament and its people on the other. Parliament's Sovereignty and the absence of a written constitution in the United Kingdom are the reason for its limited impact on the nation.

In England, courts only have a very limited power of judicial review, which consists of examining the legality of subsidiary laws and other executive acts of the government and repealing them if they are in contravention of the parent Acts under which they were created. The House of Lords and English courts, however, lack the power to declare Parliamentary Acts invalid and unlawful for any cause.¹³

Judicial review in France

In contrast to the American system, France does not have a federal system, and all reviews are circulated only inside the central government. A law passed by Parliament cannot be declared unconstitutional by a court in France. French courts are not recognised as a separate body of government, but rather as an administrative agency, and they draw their authority from the Parliament rather than the Constitution. It is unlawful for a French citizen to ask a court to declare a statute unconstitutional.¹⁴ However, the Constitutional Council is a viable option.

¹² Radoslaw Stech, *A carrot and stick approach? An analysis of the UK Government's proposals on environmental judicial review* 15 Env. L. Rev. 139-151 (2013).

¹³ Nageswara Rao and G.B. Reddy, *Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead* 39 JILI 411, 412 (1997).

¹⁴ VISHNOO BHAGWAN, VIDYA BHUSHAN, VANDANA MOHLA *supra* note 5, at 333.

The Constitutional Council is established under Title VII of the French Constitution and replaced the Constitutional Committee of 1946. It has nine members, each one of whom has a nine-year term of office that cannot be renewed.¹⁵ Its goal was to protect the newly established executive authority of General de Gaulle from legislative intrusion. It was also tasked with investigating incidents involving purported electoral irregularities¹⁶.

The Constitutional Council, like any wise legislature, is required to inquire and answer general questions about the general nature of the proposed legislation, and thus must forecast how the world, in general, and in a variety of potential particulars, will play out in the future when the proposed statute must be implemented. From the perspective of a common lawyer, the Constitutional Council tactics are more like those of a legislator than a court since they are generic and prospective rather than specific and retroactive.¹⁷

The Constitutional Council has three distinct roles: judicial, legislative, and electoral. The council's ability to determine the constitutionality of acts of Parliament before they are promulgated, when such acts are so submitted to it by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or by sixty deputies or sixty senators, is another of its important functions that can be outlined here.¹⁸

Judicial review in India

In India the Indian Constitution specifically mentions judicial review. Article 13 of the Indian Constitution specifically gives the judiciary the authority to review decisions. If any pre-constitutional or post-constitutional laws are found to be in violation of any of the provisions of Part III of the Constitution, the highest court in the land has the authority to declare those laws unconstitutional.¹⁹ Under Article 226 the High Court and under Article 32 the Supreme Court are granted with the authority of Judicial Review, and they have the authority to declare a statute unconstitutional if it is incompatible with any of the provisions of Part III of the Constitution.²⁰

¹⁵ *Id.* at 337.

¹⁶ F. L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89, 90(1988).

¹⁷ Martin M. Shapiro, *Judicial Review in France*, 6 J.L. & POL. 531, 537 (1990).

¹⁸ *Supra* note 13

¹⁹ S.R MYNENI, CONSTITUTIONAL LAW-I 276 (Asia Law House 2011).

²⁰ *Id.*

Judicial Review takes place from a complex web of eight doctrines. They are (1) Pith and Substance, (2) Colourable Legislation, (3) Severability, (4) Liberal Interpretation, (5) Limitations of Stare Decisis, (6) Eminent Domain, (7) Unconstitutionality and Eclipse, and (8) Waiver.²¹ Thus, the Indian court can ensure that legislation authorised by the federal or state governments is legitimate and complies with the Constitution's requirements by using its power of judicial review.

The Indian judiciary has historically followed the directive principles when interpreting the law. The directive principles functioned as a reference where there was no authority on a subject. In the following legislations, the courts followed the orders and maintained the law.

1. Article 43 was used to support the validity of limits imposed by the Minimum Wages Act of 1948, and
2. Article 48 was used to determine the acceptability of the ban on cow slaughter and calves.
3. In two decisions, the Supreme Court used article 47 to determine the reasonableness of limits, while the High Courts of Patna and Madras did not.²²

In *Kesavanand Bharati v. State of Kerala*²³ the Supreme Court of India held that Judicial Review is the basic structure and fundamental feature of the Indian Constitution and therefore cannot be taken away by amending the constitution.²⁴

In the Case of *Bihar v. Subhash Singh*,²⁵ the Supreme Court of India observed that, In India, judicial review is held in such high regard that it has been dubbed a "fundamental component" of the Constitution that cannot be repealed even by using the constituent power.²⁶

In *I R Coelho v. State of Tamil Nadu*²⁷, the question raised was whether the basic structure test would include judicial review of the ninth schedule laws on the touchstone of fundamental rights? The court delivered a unanimous verdict, upholding the authority of the judiciary to

²¹ Shekhawat, Vibhuti Singh, *Judicial Review in India: Maxims and limitations*. 55 IJPS 177, 178(1994).

²² P. Sharan, *Constitution of India and Judicial Review* 39, IJPS 526, 536 (1978).

²³ AIR 1973 SC 1461.

²⁴ S.R MYNENI, *supra* note 19, at. 277.

²⁵ AIR 1997 SC 1390.

²⁶ M.P JAIN, *INDIAN CONSTITUTIONAL LAW* 12 (LexisNexis 2018).

²⁷ (2007) 2 SCC 1

review any law, which destroys or damages the basic structure as indicated in fundamental rights, even if they have been put in the 9th schedule.

So it can be observed that India's federal structure includes judicial review, which might be seen as a feature. With the division of authority between the Central and the States, it is essential to check that each side does not go beyond its boundaries. And to that end, judiciary is seen as the final arbitrator of the country.

Conclusion

Judicial Review can be said as the checks and balances by the Judiciary when there is an arbitrary invasion to the constitutional provisions by the legislative or executive. Starting from U.K it has now extended its importance to many countries like USA, India, France etc. even though the direct judicial review is not the case for France. In India, judicial review is considered as the fundamental and basic structure of the Indian constitution includes. It aids the courts in maintaining a check and balance over the other two branches of government to prevent abuse of authority and ensure that they operate in accordance with the constitution. Judicial review serves as a guardian for the Constitution and protects the fundamental rights guaranteed under the Constitution.