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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

JUDICIAL REVIEW IN INDIA & U.S.A.: A COMPARATIVE STUDY

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ABSTRACT

The most significant law in the nation is the Constitution. It is the "fundamental framework" of the state, according to Hans Kelson. The Constitution of a state functions as a normative framework, validating all other laws and actions since the law lends power and validity to all other norms. Additionally, the Indian Constitution has endorsed the idea of the rule of law, which serves as the supreme law of the state. Any law that conflicts with this supreme law is deemed unlawful and void. In order to check this contradiction and any other arbitrary steps, rules, regulations, laws or by-laws, or any other legislative or administrative activities, our Constitution allows for judicial review of such acts. The Court's authority to assess legislative, executive, and judicial acts is referred to as Judicial Review.

The Court is crucial in deciding the impact of the constitutionality of legislative and executive actions taken by the federal and state governments. This study compares and does an analysis of judicial review in India and the United States of America (U.S.A.). The goal of this study is to paint a complete picture of the differences between and how strictly the United States and India adhere to judicial review in actual practice.

This study discusses the origins of judicial review, its emergence, features, cases and lastly the comparison between the two systems of two different states.

Keywords: India; U.S.A; judicial review; comparison

INTRODUCTION

A judicial review is the zeal with which the Supreme Court and the High Courts examine the legality of state and federal official requests as well as acts of the Parliament and state legislative bodies. A statute declared by the Supreme Court to be unlawful cannot be approved by the government, and it can be declared ultra-vires of the constitution if it is proven that any of its provisions violate the constitution's provisions.

It is a fundamental aspect of the Indian Constitution that cannot be changed, even if it is amended. Articles 32, 13, 143, 131-136, 226, 145, 246, 251, 254 and 372 of the Constitution guarantee judicial review of legislation. It is enshrined in Articles 226 and 227 of the Constitution in relation to High Courts. The notion of judicial review is embodied in the Supreme Court by Articles 32 and 136 of the Constitution. Part III includes Article 32 as a basic right that can be used to enforce the fundamental rights granted under Part III.

The judiciary by using this power keeps the legislative and executive organs within the purview of constitution. The operation of the separation of powers in a contemporary political structure is demonstrated by judicial review (where the judiciary is one of three branches of government). Varied jurisdictions have diverse interpretations of this principle, and they also have different perspectives on the order of governmental rules. As a result, judicial review's process and purview vary from nation to nation and state to state.

ORIGIN AND HISTORY OF JUDICIAL REVIEW

In the United States, courts have the power to review laws, executive orders, and court decisions. Review whether they violate applicable law, state or federal constitutions. Courts with executive powers, e.g. For example, the United States Supreme Court can decide to remove or invalidate any law, regulation or decision. against a higher authority. Judicial review is a component of the checks and balances system, in which the government's court checks and balances the legislative and executive branches. According to researchers and commentators, John Marshall, one of the most prominent Chief Justices of the United States Supreme Court, was responsible for forming the authority of Judicial Review. Judicial Review was meant to be established by Marshall's decision in *Marbury v. Madison*.¹ However, famous Historian Edward Corwin gave a clear definition of "Judicial Review" as the Courts' ability and obligation to overturn all legislative or

¹ 5 U.S.(1 Cranch)137(1803)

executive acts of the federal or state governments.² According to Chief Justice Marshall, the supreme law of the land is the Constitution, which must take precedence over any provision that contradicts it.

Judicial review is significant in light of the fact that it permits the higher courts to audit the results of the lower courts. It assists with keeping an eye on different parts of the government. The arrangement of common freedoms that we are aware of today would be altogether different without judicial review.³

Judicial Review in U.S.A. on the basis of constitution

The US Constitution is the most important rule that everyone must follow in U.S.A. The Supreme Court has the ability to interpret it and ensure its comparability, preventing Congress and the president from overturning it. Such an arrangement was the starting point for the intensity of the judicial review of the Supreme Court. "Judicial Review" is a rule and power that gives the Supreme Court of the United States the ability to invalidate or set aside any law passed by Congress or the states. As this power shows, the Supreme Court of the United States rejects or invalidates a law that is sometimes inconsistent with, or incompatible with, or violates the Constitution of the United States. This was regarded as the most infallible quality and ability of the Supreme Court. In summary, judicial review can be well said to be the intensity of the Supreme Court to judge about the protected legitimacy of government and state laws when they are previously tested in a legal process. Ultra vires is considered the ability to reject such laws.

The Supreme Court lacks the authority to make such a decision of Judicial Review under the American Constitution. Some writers have questioned the Court's authority to exercise it. President Jefferson declared that the founding fathers' plan to create three independent government departments and give the judiciary the power to review Congress and President acts were not only a violation of the doctrines of separation of powers and limited government but also a betrayal of the Constitution's framers' goals. However, most of the Philadelphia Convention members favoured judicial review, according to evidence. They did not add a particular provision because they considered the power was implied in the text of Articles III and VI. Article VI Section 2 states, "This constitution and the laws of the United States adopted in pursuance thereof, as well

² The Origins of Judicial Review, or How the Marshall Court made more out of Less, Washington and Lee Law Review (Volume 56/Issue 3, Gordon S. Word)

³ <https://blog.iplayers.in/judicial-review-administrative-rulemaking-powers-india-usa-comparative-study/>

as any treaties formed under the authority of the United States, shall be the supreme law of the land." "The judicial power shall extend to all situations, in law and equity, arising under this Constitution, the United States' laws, as well as the, and the treaties made or to be formed, under this authority," says Article III section 2.

Judicial Review in India on the basis of constitution

The essential thought of Judicial Review is that law ought to be the generator of harmony, joy and amicability; the ruler has no lawful power to incur torment, torment and oppression on the administered and to usurp the fundamental privileges of opportunity and freedom of individuals which are established in the antiquated Indian development and culture. The primary object of Judicial Review is to guarantee the assurance of privileges, evasion of their infringement, financial inspires and to make the council aware of being in similarity with the Constitution. In India, such a soul was predominant.⁴

The old concept of Indian law is that the law is the master of the rulers and nothing can be higher than the law by which even the weak conquered the strong. The Vedic idea of finance was that the state was a trust and the ruler was the legal manager of individuals. The position of individuals at the moment of coronation to the ruler and the response of the blessed lord to his relatives in a typical Abhishek (royal feast) of the Yajur Veda reveals the idea of sovereignty and majority rule. the idea of the rule of law respected in the principles of Legal Review. Thus, Judicial Review can draw inspiration from the core idea of law and governance, which required old India. According to experience, no republic has had as rich a heritage of judicial review as India.

The foundations of Judicial Review go long once more into antiquated India, in antiquated India, the Rule of Law had a firm stand which implied that the law was over the ruler furthermore that the public authority had no sacred power to authorize any discretionary or overbearing law against the public authority. Consequently, individuals of antiquated India envisioned and appreciated the incomparability of law and not the incomparability of the lord. In the frontier courts, the lawfulness of law in a few occurrences was passionately tested based on the rule articulated by Chief Justice Coke. By this technique, India has set up a Constitution which has its singularity and uniqueness to the extent that it sets down new principles of established rule in the cutting edge world. Patanjali Shastri of the Supreme Court of India commented, "while the court normally

⁴ Jha, Chkradhar, op.cit., p.113

appends an extraordinary load to the administrative judgment, it can't abandon its obligation to decide at last legality of a criticised resolution".⁵

The Emergence of Judicial Review in India

The Indian Constitution is a hybrid of American and British law. The Indian Parliament, unlike its English counterpart, is not a sovereign law-making body. Our religious framework "brilliantly embraces them through media between the American arrangement of legal incomparability and the English standards of peerless legislative quality" as a result of this.⁶

The most important part of the Constitution of India is the right to judicial review. India has created and a limited electoral system that limits the use of force by state authorities and allows the majority of to avoid tyranny and interference. The Indian Constitution's Preamble ensures that all Indian citizens are treated fairly and equally and that the country's laws are subject to judicial scrutiny. The Constitution of India is an incomparable standard that everyone must follow and all other laws are based on it. No provision in the Constitution of India declares the Constitution as the supreme law to be obeyed by all because they believed that when all organs of government, administration and state owe their origin to the Constitution and derive their powers from it, and the Constitution cannot be changed except in the manner expressly prescribed by the Constitution. In a few articles, such as 13, 32, 131, 136, 143, 226 and 246 of the Indian Constitution, the teaching of judicial review is specifically stated. "The State will not make any law that removes or compresses the right given by this part," states Article 13(2), "and any law made in the inconsistency of this condition will be void to the degree of the break." *Sovereign v. Burah*⁷ was the principal case in which the Judicial Review of India was distributed.

Legal Review currently assumes a fundamental part in the Indian majority rules system. Under the current Indian Constitution, its activity is a genuine defence of individuals' privileges and opportunities. In India, residuary power is vested in the Union Parliament, and thus, there is an elevated fear of association inclusion. While considering the legality of a rule that abuses the Constitution's requests with respect to driving circulation, the Indian legal executive should remember this. To comprehend the development, working, and down to earth activity of the Judicial Review, a chronicled translation of the protected advancement of India, England, the

⁵ *The State of Madras v. V.G. Row*, AIR 1952, SC 196, para13.

⁶ Basu, D.D., *Commentary on the Constitution of India*, Calcutta, 1955, p.412

⁷ *Emperor v. Burah*, ILR, Calcutta, 63 (1877).

United States of America, Canada, and Australia is required. The legal survey framework showed up out of the blue; all things considered, it advanced steadily over the long haul, basically founded on sacred perspectives and thoughts during different periods of its established development.

The arrangement of judicial review is additionally appropriate in India. In spite of the fact that the term Judicial Review has not been referenced in the Constitution, the arrangements of different Articles of the Constitution of India have presented the intensity of legal survey on the Supreme Court. In like manner, the sacred legitimacy of an authoritative institution or an official request might be tested in the Supreme Court on the accompanying grounds –

1. Infringement of basic rights.
2. Outside the capability of the position which has encircled it.
3. It is hostile to the Constitutional arrangements.

Features of Judicial Review in India:

1. The Supreme Court and the High Courts exercise Judicial Review Power: Judicial Review is practised by the Apex Court and the High Courts. The Apex Court of India, then again, has the last say on whether a law is naturally legitimate.
2. Legal Review of Central and State Laws: Judicial Review can be utilised to challenge all government and state laws, just as chief orders and statutes and established corrections.
3. It just relates to lawful issues, not political ones: Judicial Review just connects with legitimate problems. It can't be utilised to address political issues.
4. Judicial Review: is not automatic: The Supreme Court does not exercise its own judicial review authority. It can only utilise it when a law or rule is directly challenged before it or when the validity of a statute is contested during a case hearing.
5. Judicial Review Case Decisions: The Supreme Court can rule on whether or not the law is constitutional. In this instance, either. The law continues to operate as before, or the statute is declared to be unconstitutional. In this situation, the legislation no longer applies as of the date of the ruling. The law is only partially or entirely invalid. Only invalid parts or parts become non-operational, whereas other portions remain operational.'

Judicial Review Cases: (U.S.A)

Plessey v. Ferguson⁸

Homer Plessey spoke to the Supreme Court after being captured and condemned for breaking the rule expecting "Blacks" to sit in isolated train vehicles. He guaranteed the alleged "Jim Crow" laws abused his Fourteenth Amendment right to "equivalent security under the law." During the legal audit, the state assured that Plessey and different Blacks were being dealt with similarly, however in various ways. The Court kept up with Plessey's conviction, deciding that the fourteenth Amendment gives "equivalent offices," not "indistinguishable offices." The Supreme Court set up "separate however equivalent" in this choice.

Miranda v. Arizona (1966)⁹

The Miranda freedoms development started in 1963 when Ernesto Miranda was confined and grilled in Phoenix, Arizona, for the assault of an 18-year-elderly person. Miranda, who had never mentioned counsel, admitted during the extended meeting and was eventually indicted for assault and condemned to jail. Afterwards, a lawyer documented an allure with the Supreme Court, saying that Ernesto Miranda's freedoms had encroached because he had no clue he didn't need to talk with the cops by any means. The Supreme Court upset Miranda's conviction in 1966. The Court reasoned that all suspects ought to be taught concerning their right to an attorney and the choice to remain silent while being tended to by law subject matter experts. As demonstrated by the judgment, any attestation, affirmation, or confirmation collected preceding enlightening the individual with respect to their opportunities would be illegal in Court. While Miranda was retried and condemned a resulting time, this important Supreme Court decision provoked the now-prestigious "Miranda Rights" being given to suspects by cops around the country.

Cases on Judicial Review: India

The essential capacity of the courts is settling disputes among people and the state or among states and the association. At the same time, the courts might be needed to decipher the arrangements of the Constitution and laws, and the Supreme Court's translation turns into the law that all courts of the land should observe. It is basically impossible to pursue the Supreme Court's choice.

⁸ Plessey v. Ferguson, 163 U.S. 537 (1896)

⁹ Miranda v. Arizona, 384 U.S. 436(1966)

Shankari Prasad vs. Union of India:¹⁰

The Supreme Court considered the issue wherein the First Amendment Act of 1951 was tested on the grounds the right to property was limited and that it wasn't possible on account of a limitation on the alteration of Fundamental Rights under Article 13 of the Constitution (2). The contention was excused by the Supreme Court, which administered collectively. "The expressions of Article 368 are totally wide and grant parliament to adjust the constitution without any special cases." In the language of Article 13, regulation alludes to rules or guidelines sanctioned under standard administrative power and alterations to the Constitution instituted under constituent power. Article 13 (2) makes little difference to changes passed under Article 368.

Vishakha v. State of Rajasthan:¹¹

For this situation, the Supreme Court set up exhaustive guidelines for all businesses and people accountable for work environments out in the open and private areas to follow to forestall lewd behaviour of working ladies in the working environment until regulation is carried out to resolve the issue. Subsequently, managers were needed to protect ladies' essential privileges under Art 14, 19, and 21.

Keshavananda Bharti case:¹²

The Supreme Court settled the Keshavananda Bharti case, regularly known as the Fundamental Rights case, on April 24, 1973. The current theme was: how much in all actuality does Article 368 of the Constitution award changing power? In the interest of Union of India, it was attested that the altering authority is boundless and that any change can be made without cancelling the Constitution. Then again, the applicant contended that the revising power was wide however not endless. Parliament is restricted from cancelling the Constitution's "fundamental element" under Article 368. An extraordinary seat of judges was shaped to hear the case. 11 of the 13 adjudicators had a troublesome and questionable essential design precept. The Supreme Court's ability to correct the Constitution under Article 368 didn't stretch out to repealing or obliterating the Constitution's essential highlights or system, as indicated by the court. Nonetheless, what the Supreme Court considered "fundamental" highlights were not spelt out or listed reliably in the different assessments given for this situation. Indeed, even before the Twenty-fourth Amendment, the larger part concluded that Article 368 included the option to change and the technique for

¹⁰ AIR 1951 SC 458

¹¹ Vishakha and others v. State of Rajasthan and others (1997) 6 SCC 241, AIR 1997 SC 3011, (1998) BHRC 261, (1997)3 LRC, (1997)2 CHRLD 202.

¹² AIR 1973 SC 1461.

doing as such.

Comparison between India and U.S.A Judicial Review system

Criticism in Indian system

1. **Absence of Clarity:** The Indian Constitution doesn't expressly characterize the legal survey framework. It is established on various articles of the United States Constitution.
2. **Authoritative Issues:** When the Supreme Court strikes down a law as unlawful, the decision produces results on its given date. When an issue of a law's lawfulness emerges for a situation under the steady gaze of the Supreme Court, may it be exposed to Judicial Review? Following five or ten years, or more, after the law's execution, a claim like this can be brought under the gaze of the Supreme Court. Accordingly, assuming the Court rules it illegal, it causes managerial issues. A judicial review can cause a bigger number of issues than it addresses.
3. **Makes the Parliament less capable:** Critics accept that Judicial Review can make Parliament untrustworthy by permitting it to depend on the Supreme Court to decide the defend ability or sensibility of a charge it has endorsed.
4. **The Supreme Court's inversion of its own choices:** The Supreme Court has turned around its previous decisions on different events. The Golaknath case brought about the first decisions being upset, and the Keshavnanda Bharati case brought about the Golaknath case being toppled. A similar demonstration has been proclaimed substantial, invalid, and legitimate once more. The component of subjectivity in the appraisals is reflected in such inversions.

Criticism in U.S.A. system

1. **It has become a non-elective legislature:** The first point of criticism is that it has constituted the Supreme Court as a non-elected super legislative. It's referred to as the "third chamber" by Laski. While deciding cases, the Court acts as a quasipolitical body, determining not only the constitutionality of legislation but also their propriety and justice. Many laws have been deemed unconstitutional by the Supreme Court because they were not fair, just, or reasonable, according to the Court. And, because the concept of justice and fairness is influenced by "due process of law," what is just and fair is a political rather than a legal concern.

2. Judges act as politicians: Judges have acted like politicians in the past, as evidenced by the Supreme Court's history. Roosevelt's attempt to load the Supreme Court with his own men was defeated thanks to Chief Justice Hughes and his associates. When judges enter politics, the judiciary's prestige is harmed, and it loses its function as keeper of the constitution.
3. It has clogged social progress: The critics claim that judicial review has slowed progress and hampered the implementation of social and economic changes. On this issue, some American presidents, including Jefferson, Jackson, Lincoln, and Roosevelt, have publicly opposed the Court.
4. One man tyranny: A majority vote reached the Court's decisions. This has frequently resulted in a one-man rule. The statutes have been deemed unconstitutional by "five to four rulings," that is, judgements in which five of the judges hold it to be unlawful. In other words, a single judge's decision can overturn the actions of the legally elected Congress and the President. Detractors describe it as "one-man tyranny and so an undemocratic structure." Because five out of nine judges can cause havoc, the Court is labelled an "archaic" and aristocratic political institution. The Supreme Court's 5-4 judgment overturned the Florida Supreme Court's ruling on a recount of ballots in the Bush vs Gore presidential election exhibited 'one-man dictatorship.

CONCLUSION

As the Supreme Court of the United States, so does the Supreme Court of India recognises the strength of the law, and the constitution expressly recognises this strength. In any event, we can see that it has less influence than the American Supreme Court based on the "legal assessment" of the enactment. Even while judicial review is a powerful tool available to the courts, it cannot be used in a discretionary manner. The courts' ability to evaluate the laws passed by parliament is limited, just as the legislative body's capacity to produce laws is limited. The constitution provides the legal executive with its powers, just like other branches of the government do, and the nominated officials are just as subjected to it as everyone else. They are able to interpret and contradict laws, but they are unable to pass them themselves. They are also unable to apply their work to any other institution or person than the government and local assemblies. Additionally, the courts cannot defend clearly illegal actions.

Despite the various flaws in judicial review, it cannot be denied that by keeping the federal government and the states in separate circles, it has played a key role in ensuring the nation's

sacred government. By giving the Constitution new importance, it has also given the Constitution the ability to alter in response to evolving circumstances.

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