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JUDICIAL REVIEW: A COMPARATIVE ANALYSIS OF INDIA, THE UNITED STATES, AND THE UNITED KINGDOM- Vartika Lal¹**ABSTRACT**

Judicial review in India refers to the pre-eminence of the law. There is an evaluation of judicial, legislative, and executive functions by the courts. Any law or order that violates the Constitution can be declared unconstitutional, null and void by the court. Severability, Eclipse, and Prospective Overruling are only a few of the judicial review theories discussed here that have been adopted by the Supreme Court. This article examines the judicial review provisions of Articles III and VI of the United States Constitution. In the absence of a written Constitution, "Parliamentary Sovereignty" will be discussed as the guiding principle of constitutional government. Parliament's acts are immune to judicial scrutiny in the United Kingdom because the will of the people is absolute. The Judicial review of primary legislation is restricted by Parliament to matters involving human rights and individual freedoms. Legislation that serves as a secondary law can be challenged in court. Executive and administrative decisions can be reviewed by UK courts.

Examining Judicial Review in India, the US, and the UK as a Comparative Study**CHAPTER – 1****INTRODUCTION**

The "Supremacy of Law" is emphasised in the Indian Constitution. The Indian Constitution is unique in its implementation of the "doctrine of judicial review". The importance of "judicial review" under the Indian Constitution is often overlooked since it is not recognised by the government. With the use of "judicial review," the courts keep an eye on Congress and the president. The purpose of judicial review is to guarantee that all citizens are treated fairly by those in positions of power. The Judiciary review is the process by which a court determines whether or not a statute is constitutionally based on precedent and, if

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found to be unconstitutional, issues a declaration of nullity to the affected party. For this reason, the courts should never uphold legislation that is itself unconstitutional.

A strong commitment to the rule of law underpins India's commitment to judicial review. The GGC's ability to disregard laws was limited by the "Government of India Act, of 1858" and the "Indian Council Act, of 1861," but no judicial review was allowed. All a court could do was indict. In 1877, with "*Emperor v Burah*" Judicial Review was first created in India. The court ruled that the plaintiff may sue over an Act of Legislation, passed by the Governor General Council that went beyond his authority under the Imperial Parliament. The High Court and Privy Council reached the same conclusion, in this case, saying that Indian courts indeed have judicial review authority. In "*Secretary of State v. Moment*", Lord Haldane concluded that the Indian government could not revoke citizens' protections under the "Government of India Act, 1858". The Privy Council's decision in "*Annie Besant v Government of Madras*" was relied on by the Madras High Court, which stated that the Imperial Parliament's legislative powers were separately assigned to the subordinate Indian Legislature and that any act of the Indian Legislature in excess of transferred powers or in violation of the imperial Parliament's limits would be null and invalid.

Research Methodology

For the purpose of this research project, researchers have preferred doctrinal research methodology. Majorly the data collected is secondary i.e. from books, articles, journals, case laws and various e- resources.

Objective

1. To understand the concept of judicial review.
2. To analyse the current situation of Judicial Review in India, the USA & UK.
3. To critically examine the system of judicial review in the USA and in India
4. To examine the key difference between judicial review in the US, UK and India.

Review of Literature

Books:

1. Basu DD, Comparative Constitutional Law, Third Edition 2014, Lexis Nexis.

The aforementioned book helped the researcher understand that even if a case does not fit into one of the aforementioned categories for appeal, the SC may, at its pleasure, grant special leave to appeal from any decision or final order passed by any court or tribunal within the territory of India. Because of a law

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pertaining to the armed forces, this does not apply to the verdicts. Art 136 of the Indian Constitution addresses requests for exceptional leave.

2. Jha, Chakradhar, "Judicial Review of Administrative Acts," ed.1974, B.M. Tripathi Private Limited, Bombay.

The above text helped the researcher grasp the Judicial Review of Administrative Acts, which limits government authority and relies on Rule by the majority to protect against autocracy and arbitrariness. Judicial Review is a core component of the Indian Constitution. The "Indian Constitution" Preamble promises equality and fairness to all residents and that Indian laws can be questioned in court. Some impartial body is needed for maintaining democracy since, to be habituated to dictatorship, the majority dominates despite the best rule is typically discovered.

3. Raman, Sunder, in his "Judicial Invalidation of Constitutional Amendments in India".

According to Sunder Raman's book "Judicial Invalidation of Constitutional Amendments in India", the legislature is the most important branch of government since it stores the collective will of its citizens and makes laws. If the ideas are to be valuable and endure, they must reflect the culture and time in which they were conceived. Despite the Constitution's supremacy, the extensive amending authority of the legislature is justified by the belief that the Constitution should develop organically in response to people's needs and hopes.

4. In *Sankari Prasad Singh Deo v Union of India*, (1952), *Sajjan Singh v State of Rajasthan* (1965), *I C Golaknath v State of Punjab*, (1967):

Legislation followed the SC ruling. Another ruling nullified the act's impact. This country saw several similar incidents. Other concerns have been addressed. The two branches of government fought over the ability to change the Indian Constitution.

CHAPTER – 2

THE CONCEPT OF STUDY

The 1935 Government of India Act did not have a Judicial Review clause, but constitutional difficulties required a larger definition. The "Constitution of India, 1950", Art.13, Art.32, Art.131–136, 143, 226, 227, 245, 246, 372 etc. define Judicial Review. Article 13 guarantees judicial examination of new and old laws.

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This Article inherits the most important judicial review ideas, including severability and eclipse. Art. 226 and Art.32 of the Indian Constitution allow the SC to review and strike down legislation that violates the third section. Courts used Judicial Review to construct doctrines like Pith and Substance and Colourable Legislation. They include:

Doctrine of Eclipse

"Doctrine of Eclipse" describes the concept of the laws passed before the Constitution's ratification. Article 13 of the Constitution declares that all pre-Constitution legislation that contradicts Part III (1) would be void. Such legislation was first constitutional and binding. Article 13 nullified them. If the constitutional ban is lifted, the statute is reinstated.

There was a ruling in the case *Bhikaji Narain Dharkras v. State of M P* that said a State law allowed governments to outlaw commercial motor transport providers. A component of this law was null and void as of the Constitution's effective date because it violated Art.19 (1) (g) and could not be justified under Art 19 (6). The First Amendment Act of 1951 modified Article 19 (6) to authorise government monopolies. The Supreme Court held that changing clause (6) of Art. 19 made the unconstitutional Act valid and operational and enforceable.

Doctrine of Severability

The doctrine of Severability is based on the phrase "to the degree of violation" in Article 13 of the Indian Constitution. The theory enumerated herein specifies that if a portion of a statute is found to be unconstitutional, the court may strike that section without invalidating the remaining portions of the statute. If at all feasible, the rest of the law should continue to be in effect. A whole provision is considered null and void if its valid and invalid portions are so intertwined that separating them would be impossible. Sec 14 of the "Prevention of Detention Act" was ruled unconstitutional in *A.K. Gopalan v State of Madras*² The Supreme Court decided only Sec 14 of the Act, and not the entire Act itself, must be annulled. It was also decided that the Act is separable since the removal of Sec 14 would not affect the Act's purpose. With the theory of severability in place, the Supreme Court struck down the challenged statute.

²A.K. Gopalan v State of Madras AIR 1950 SC 27.

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The doctrine of “Prospective Over-ruling”

The term "prospective over-ruling" is used when a previous judgement is reinterpreted to meet the demands of the present, but not to bind the original parties or anyone else bound by the precedent. This theory supersedes a previously established precedent, but only with respect to future situations; the old precedent still governs all prior occurrences. Simplified, this indicates that the court is creating a new rule of law. The Indian case of *Golak Nath v State of Punjab*³ advanced this theory. A society that moves quickly requires a theory like prospective overruling, which is why it was developed. The Supreme Court also ruled that the validity of the First, Fourth, and Nineteenth Amendments will be unaffected by this ruling, so long as it is applied prospectively only.

Review of the Judiciary in the United States

The concept of Judicial Review is not stated anywhere in the U.S Constitution. Judicial review in the U.S began with a judicial ruling and has since spread thanks to a number of conventions. Under Chief Justice John Marshall's leadership, the Supreme Court issued a series of landmark decisions that did much more than establish the principle of Judicial review of Federal Legislative action; they also provided interpretation for key structural provisions of the Constitution, like the Commerce Clause, that set boundaries between the powers between the states and the newly formed federal government. The U.S. Supreme Court didn't rule that a congressional statute giving the courts power that wasn't explicitly provided in the Constitution was unconstitutional until the landmark decision of *Marbury v. Madison*.

Judicial Review under the US Constitution

In the United States, there is both a federal government and the governments of individual states. The legislative branch, which consists of two chambers with roughly equal authority, the executive branch, headed by a president, and the judicial branch, which performs the judicial review, all have equal status at the national level. The Court's judicial power is enshrined in Article III of the United States Constitution, which states that federal courts have original, appellate, and matters ascending under law and equity jurisdiction.

Article VI of the Constitution USA states that

³*Golak Nath v State of Punjab* 1967 AIR 1643.

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The Constitution designates the sole lawful governing entity. Article VI contains The Constitution as the supreme law. SC opinions have produced judicial review, which is not in the US Constitution. The SC reviews congressional and state laws that cede legislative authority to the executive branch.

In the United States, a democratic equilibrium has been established thanks to the due process of law, which has nullified unconstitutional legislation. The right to due process equips the American court with a powerful tool in the battle against an authoritarian presidency. In *Marbury v Madison*, the SC reaffirmed the principle of judicial review, which states that the courts have the final say in determining whether or not a law is constitutional.

CHAPTER – 3

Comparative Analysis

JUDICIAL REVIEW IN THE UK

Legislative Supremacy and Parliamentary Sovereignty govern the UK. Before the “European Convention on Human Rights”, judicial review in the UK was limited.⁴ “Human Rights Act, 1998” mandates domestic courts to defend individual rights. The UK has no written Constitution. In UK's constitutional democracy "Parliamentary Sovereignty" reigns. In England, the people own full authority and are sovereign. People wrest authority from the Monarch, who answers to Parliament. This is the fiction that makes up England's constitutional system. Parliament can legislate on any subject, and the Constitution imposes no limits on legislation. No authority may question a parliamentary act, no matter how wrong. UK Parliament has infinite power. UK law isn't subject to judicial review. Primary Legislation is the legislative Act of Parliament; while Secondary Legislation is the Parliamentary delegated authority with clear legislative instructions. Secondary legislation is administrative in character and susceptible to judicial review in the UK.

Parliament enacts primary laws. Ministry regulations, directives, and acts are secondary legislation. Primary legislation is not subject to judicial scrutiny unless it encroaches on EU law. After the EU and HRA 1998, certain main legislation is subject to judicial scrutiny. Secondary legislation is judicially reviewable.

Secondary legislation is unavoidable. The court can declare all executive and administrative operations, rules, and regulations ultra vires and illegal.

⁴ Ashish Bhatt & Asst. Prof. Kuljit Singh, JUDICIAL REVIEW : A COMPARATIVE LEGAL STUDY, XII Journal of Xi'an University of Architecture & Technology, 2860, 2878-2880, 2020.

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Judicial Review in India

The Indian Constitution takes effect on January 26, 1950, after British control ended in 1947. It's the world's longest-written constitution and one of the oldest written self-governing constitutions in the world, having influenced constitutions in other areas, notably Asia. Same in India, Members of the Indian Constituent Assembly like Shri B N Rau and Sir AlladiKrishnaswamyAyyar, used the U.S. Constitution as a model for India's written constitution, even though England has no written constitution.

The “Government of India Act, 1858” and the “Indian Council Act, 1861” limited the powers of the Governor General in Council to evade laws, However, there was no Judicial review by the judiciary until *Emperor vBurah*⁵ In this case, the court determined that an "aggrieved party" might seek a reversal. *Annie Besant v Madras* Because the Privy Council established a distinct divide between the imperial Parliament and the subordinate Indian Legislature, the Privy Council decreed that any act carried out by the latter that went beyond the bounds of the former's authority or that violated the limits of the former would be deemed illegal.

Constitutional provisions of “Judicial Review” in India

The “Government of India Act, of 1935” did not include a provision specifically for judicial review, and the constitutional issues that were brought before the court forced them to embrace judicial review in a broader context.

Art. 13 and Power of Judicial Review

All laws are defined as being rules, regulations, ordinances, bylaws, notifications, customs, and usages under Art.13 of the Indian Constitution. If any of these laws are contradictory or opposed to the constitution, the Supreme Court and High Courts can declare them ultra vires. Article 13 justifies basic rights and provides the basis for judicial review. It's a crucial piece of the Constitution because it gives legal force to the idea that the state can't violate people's basic rights through legislation or executive order.

Judicial Review of Administrative Actions

The Indian Constitution includes provisions for judicial review, and any citizen may petition the High Court or the Supreme Court to uphold their constitutionally protected rights. Regular courts have the authority to

⁵*Emperor v. Burah ILR, Calcutta, 63 (1877).*

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overturn the executive branch or government actions that are illegal or otherwise unjust. As a general rule, the judicial branch cannot overturn decisions made by administrative officials acting within the scope of their discretion. However, this does not imply that the court has no authority over executive discretion. In India, administrative acts can be reviewed on the basis of a lack of discretion as well as a misuse of judgement.

Judicial Review of Constitutional Amendments

Parliament can modify the Constitution's provisions, but not its structure. *Shankari Prasad v. Union of India*⁶ decided that basic rights cannot be altered under Art. 368. *Sajjan Singh v State of Rajasthan*⁷ overruled the court's previous decision that Article 368 constitutional changes are outside judicial review. In *Golak Nath vs Punjab*, the SC overruled *Shankari Prasad vs Sajjan Singh*'s plea and ruled that a constitutional change that breaches Article 13(2) is invalid. *Keshavananda Bharti vs State of Kerala*⁸ examined Article 368 amending power. Parliament can change fundamental rights but not the Constitution's framework, under Article 368.

*AnuradhaBhasin v UOI*⁹, The Supreme Court has ordered the Union Territory of Jammu and Kashmir to immediately review all decisions suspending internet services; any orders found to be in violation of the law must be reversed. According to the Supreme Court, Art.19 (1) (a) and Art.19 (1) (b) of the Constitution guarantee people's right to free speech and the right to engage in any lawful profession, trade, business, or occupation over the internet (g). Any limitations on these basic liberties must be in line with the requirements of Article 19 (2) and Article 19 (6).

Situation pertaining to Judicial Review in India

Modern Supreme Court decisions are widely relied upon, and the concept of judicial review has become deeply embedded in Constitutional Law as a whole. It was decided in the case *Joseph Shine vs Union*¹⁰ of *India* that "Section 497" of the "Indian Penal Code" is against the law. The constitutionality of Section 377 was challenged on the grounds that it infringes basic rights in *Navjot Singh Johar vs Union of India*¹¹,

⁶*Shankari Prasad v Union of India* AIR 1951 SC 458.

⁷*Sajjan Singh vs State Of Rajasthan* 1965 AIR 845.

⁸*Keshavananda Bharti vs State of Kerala* AIR 1973 SC 1461.

⁹*AnuradhaBhasin v Union of India* 1, AIJACLA, 464, 464-167, (2021).

¹⁰*Joseph Shine vs Union of India* 2018 SC 1676.

¹¹*Navjot Singh Johar vs Union of India* AIR 2018 SC 4321.

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another case heard by the Supreme Court of India.¹² As a result, the unconstitutionality of the Indian Penal Code Section 377 led to its decriminalisation.

CHAPTER – 4

Comparison of Judicial Reviews in India and the US

In US SC can declare any statute unconstitutional if it violates due process. Judges are unable to review the reasonableness or policies of legislation that has been approved by the relevant legislature since parliament and state legislatures hold supreme power in their respective realms of legislative authority; they are only able to invalidate a statute if it violates the Constitution. The Supreme Court of India has stated that it will not intervene in the legislative process unless there is a violation of the natural, social, or political rights of persons and such injustice is expressly prohibited by the Constitution. The court has stated that it will not make this decision because it has refused to declare the legislative actions of parliament to be unconstitutional. Art.13, 32, 131–136, 143, 226, 227, 245,246, and Art.372 of the Indian Constitution detail judicial review. While not explicitly specified, judicial review is implicit in these Articles. It is an implication that the Constitution is supreme since Articles III, IV, and V incorporate the judicial authority of the Court, constitutional supremacy, and the fact that all legislation is subject to the Constitution. Court formulation is judicial review in the US.

The separation of powers theory, a central tenet of the American Constitution, was a huge boon to the Supreme Court in this case. There is a parliamentary government in India, which guarantees the executive's accountability to the legislature and reduces the likelihood of internal strife. However, with regard to constitutional interpretation, the attitude of the Indian court is essentially the same and, to a large part, parallels that of the United States.

Conclusion

India's Judicial Review mechanism is broader than in the U.S. and U.K. Despite the Constitution's brevity, its terminology and idioms are ambiguous and general. The Constitution is strictly enforced. The Indian Constitution is stringent and flexible due to its length and many provisions. The Indian Constitution uses specific language and vocabulary. The UK lacks a codified constitution, limiting judicial scrutiny. India has three types of judicial review. Changes to the Constitution, Laws, and Regulations Can Be Challenged in

¹²Singhvi, A., Gautam, K. Judicial Independence and Economic Emergency in India. In: The Law of Emergency Powers. Springer, Singapore, (2020). https://doi.org/10.1007/978-981-15-2997-9_4

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Court, the stringent requirements of the US Constitution mean that it's seldom reviewed and amended. The Supreme Court can evaluate any constitutionally-violating legislative or administrative act. The UK courts can examine secondary legislation, but not parliamentary legislation.

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