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Judicial review powers in India and the UK: A comparative analysis

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Abstract

Judicial review is one of the most significant instruments in constitutional democracies, designed to maintain checks and balances between organs of the State. While India has a written Constitution with entrenched fundamental rights, the United Kingdom operates under an unwritten constitution shaped by statutes, precedents, and conventions. This paper making efforts to study a similar analysis of judicial review in India and the United Kingdom by examining their historical roots, constitutional frameworks, scope, and limitations. It argues that while both nations recognize judicial review, its application reflects their distinct constitutional philosophies constitutional supremacy in India versus parliamentary sovereignty in the UK.

In England (UK), there has always been claimed the sovereignty of the Parliament. The judiciary was not expected to review the matters or affairs or actions of the Parliament, as the Parliament is highest or greatest to all. Judicial review remained limited to the executive actions. The Judiciary was guardianship in keeping the activity or work of the executive in line with the Constitutional significance and its desirability though un-written in Britain.

Keywords: Constitutional guardianship, evolving nature of judicial review, public bodies, Basic Structure Theory, and Brexit deal

Introduction

The Constitution of the Country is the paramount or greatest document of Law, according to Hans Kelsen's pure theory of law considered the "grundnorm" of the State; it means the Constitution is founding principle of the Law, all the other laws of the State are obtain or acquire, drawn from the Constitution. One more jurist expressed his views as the jurist, H.L.A Harts, places it "the Constitution works as the standard or benchmark and yardstick or touchstone of the other laws".

The main function of the Constitution is to be verify the other laws of its effectiveness, and legality, in case law in question is not in trace with according to standards lays down under the Constitution the law is to be announced or proclaimed as unconstitutional. The same parameter is also applied for executive activities or performances. The executives are restricted to pass any orders, which breaches or disobeys the basic norms outlines under the Constitution. The judiciary playing vital role to examine or inspect the legal or constitutional validity of the laws and performances by the executives. In this connection the concept "Judicial Review" termed as performing important role to exercise its powers to examine and determine the activities of legislature or executives are in line with Constitution or Constitution values. Judicial review is pertaining to securitize the legitimacy of the legislative acts, executive decisions, and administrative governance. This doctrine contains main objective or aim of "Constitutionalism" confirming the powers applied by the executives or legislatures are within constitutional boundaries. Primarily,

- a. The concept of Judicial review are emerging from articles 13, 32, 226 and supported or boosted by the Doctrine of Basic Structure in India; and
- b. In case of United Kingdom the idea of Judicial review was developed or advanced by the common law traditions, with judiciary, the courts securitizing or examine the executives and administrative performances and its decisions, although the Parliament of UK unchanged as sovereign

Meaning and understanding of "Judicial Review"

The concept of "Judicial Review" is termed as power of examine or verify the other divisions of the government, especially the court powers to nullifies or annuls the orders passed by the legislative or executives bodies.

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Even it is duty of the court to sustain or preserve the separation of powers by applying the tool of judicial review, the judicial review can be understand by various parameters which are underlined by the judiciary from time to time in India are as follows;

- a. Judicial review of constitutional amendments passed by the Parliament of India;
- b. Judicial review of Legislative acts, ordinances, laws, published by Parliament and State legislature;
- c. Judicial review of Executive orders of Union and State governments and subordinates;
- d. Judicial review of Sub-ordinate legislation;
- e. Judicial review of Contractual basis; powers of court to inspect or review the terms and conditions with respect to contract or agreement entered on behalf of the State, the court is concerned to explore if there is infirmity with decision making process;
- f. Judicial review in Disciplinary Proceedings: Court can exercise its powers to examine whether the conclusion is based on evidence or no evidence, at the end the purpose of judicial review is ensure that "fair treatment";
- g. Judicial review of the quantum of punishment: it is powers of court to ask the disciplinary actions reconsider the punishment passed by the authority, in case if it contrary to moral standards;
- h. Judicial review of order passed by the clemency power: generally court will not interfere with matter of clemency order passed by the President of India/Governor of State, but verify if order taken place without application of mind to the relevant factors, or founded irrelevant considerations; and
- i. Suo Motu judicial reviews: the court comes to the conclusion if certain orders passed by based on the illegality, irrelevant, or arbitrary or against the conditional values.

Positive reflections for upholding of judicial review is as follows

- a. The idea judicial review is very necessary in terms of promoting federal Constitution, it is constitutional duty of the Supreme Court of India, through the judicial interpretation retains or preserves organs and department of the governments within their boundaries, without the this judicial review, the federal structure may be damaged, thus judicial review is needed for sustainable of federal form government system under Indian Constitution;
- b. It is fact that this judicial review keeps assurance on judges of their competence and honesty. Judges are also part and parcel of the society many times judicial institutions proved their honesty than any other organs like legislature or executives, where as many scandals are witnessed and reported by media, news papers in legislature and executives but not same in judiciary;
- c. Judicial review will rescue the country from various illegalities, arbitrariness and dominant behavior of the executives or legislatures in form passed various orders in contrary with Indian Constitution, assume if there is no judicial review, most of the legislative and executives are probabilities commit corruptive practices

and divided the people and country into many divisions based on caste, creed, or religion;

- d. The concept of judicial review keeps pressurized to avoid the vested interest of executives and legislature;
- e. Judicial review is performing and promoting democratic values and keeps democracy alive through this concept and retain the others organs within own limits;
- f. Justice Frankfurter observed that Judiciary is a accountable to the people the consumers of the justice;
- g. Indian judiciary saved the democratic values of the country through its decision and interpretation various provisions under Indian Constitution, judicial review provides protections against arbitrary actions and excesses using powers behind their limitations;
- h. Through judicial decisions and orders of the Supreme Court of and High Courts are well considered and found balanced the democratic values even the Article 137, the apex courts itself have provision to review of its own judgments and orders passed by the same court, its shows that accountability and transparency in justice delivers system, many times the Supreme Court and High Courts are witnessed the overruled and set aside judgment and orders passed by the same court; and
- i. Justice Chandrachud opined in famous basic structure case "Judicial Review" is core in sustainability of federal structure of polity and democratic set-up of the country.

History and Development of Judicial Review in India

The notion of Judicial Review primarily began and invest in the United States of America, the term was introduced by the famous America historian and educator Arthu Schlesinger Jr. in year 194, later the principle of judicial review was introduced in mid of the 1970s. There many Judges of the Supreme Court of India who contributed and developed this concept notably Justice V.R. Krishna Ayyer, Justice O Chinnappa Reddy, Justice P.N. Bhagavathi, and Justice. D.A Desai, basically this concept was developed through famous case *Marbery V Madison* ^[1] by the Supreme Court of U.S, and U.S. Constitution did not contain a provision concerning to Judicial Review but Justice Marshal stated the Constitution and fundamental rights playing important role in protecting the essential rights and basic human of the country. In this connection it is duty of the judiciary towards safeguarding the essence of the constitution through its decision or judicial review in other words the promoting justice and protection of rights is main objective of the judiciary.

In *Shankari Prasad v. Association of India* ^[2], notably this case called as IX schedule case, through the Constitution (First Amendment) Act, 1951, Article 31A and Article 31B was inserted, these two are concerning to land reforms and acquisition of estate, if any contrary with fundamental rights law should not be stuck down, for this protection it has been placed in IX schedule, if they conflict also with fundamental under the part III of Indian Constitution, there is no effect and remain valid and enforceable and protected from judicial review under article 13 of Indian Constitution.

¹ 5 U.S. 137 (1803)

² AIR 1951 SC 458

In *I.C Golaknath v. State of Punjab* ^[3], In this case, the Supreme Court of India over ruled all earlier case by applying the doctrine of prospective over ruling, this doctrine was accepted by the many countries like United States of America, and England, highlights of the case as follows,

- a. Power of the parliament to amend the Constitution derived from Article 245, 246 and 248 not from article 368, because its deals with only procedure;
- b. Amendment of the Constitution is also refer as 'Law' under within the meaning of article 13 of the Constitution;
- c. The Supreme Court declared that Parliament of India will have no power from the date of this decision to amend any provision of the part-III of the constitution as its take away or abridge the fundamental rights of the citizens; and
- d. Therefore it is necessary to provide expressly that parliament has no power to amend the constitution especially relating to part-III.

Consequence, this decision the parliament of India moved to inserted article 13 (4): Nothing in this article apply to any amendment of the constitution made under article 368. And article 368(3): Nothing in article 13 shall apply to any amendment made under this article through the Constitution (Twenty fourth Amendment) Act, 1971 ^[4]. However, the Parliament of India amendment through the Constitution (Twenty fifth Amendment) Act, 1971, and the Constitution (Twenty ninth Amendment) Act, 1972, by inserting various provisions including article 31 C, 39 (b) (c) and added many laws/legislations/actions to IX schedule for exempting from judicial review.

The landmark decision relating defining the "Basic Structure Theory" was developed through all these amendments by the Parliament of India, i.e. *Keshvananda Bharati v. State of Kerala* ^[5], the Kerala Government was introduced land reforms act to acquire some set of land which belongs to Keshvananda Bharati, challenged before the Court alleging contrary to laws passed by the Kerala Government, and this was become a landmark mark judgment in the history of Indian Judiciary, and defined the nature of basic structure of Indian Constitution as well as power of Judicial Review.

Indira Nehru Gandhi v. Raj Narain ^[6], challenging the constitutional validity of the Constitution (Thirty ninth Amendment) Act, 1975, Raj Narayan filed a case alleging against the then Prime Minister Smt. Indira Gandhi, for challenging Article 329 (A) relating to election of Prime Minister and Speaker can't be question before the law directly, finally the Supreme Court applied the "Basic Structure Theory" and declared unconstitutional through judicial review.

Scope of Judicial Review in India

Judicial review playing a very crucial role as a guardian for fundamental rights, if in case judiciary, executive or

legislature damage the constitutional values or contradict with rights of the citizens, this is tool to use the set right contrary issues within constitutional boundaries, Article 13: Declares that laws inconsistent with fundamental rights shall be void. And Article 32 & 226: Provide individuals with the right to constitutional remedies. Article 131, 136, 141, and 142: Empower the Supreme Court to interpret and enforce constitutional provisions.

Judicial Review in the United Kingdom

The idea of judicial review used to challenged the decisions and orders passed by the public bodies, it is procedure of the administrative court or high court in United Kingdom, when the public bodies such as local bodies, central government performances against law or acts unlawfully, court can accept application from any person expect you to have some sort of "Standing" and showing issue relating to public importance. Public bodies are established for purpose of serving to the public of its needs and requirement, public bodies including;

- a. Government ministries;
- b. Police departments;
- c. Prison department;
- d. NHS Trusts;
- e. Educational departments;
- f. Regulatory bodies;
- g. Courts and tribunals; and
- h. Any public established under public legislation.

General provisions relating to judicial review are found under part 54A PD of the practice directions, sections 31 of the Senior Courts Act, 1981, and the Human Rights Act, 1998, judicial review can be filed before the court under the Civil Procedure Rules, under CPR 4.1. speaks about various stages of N norms followed to file a case before court of law, including claim form, acknowledgement of service, application for urgent service, applications for directions venue administration etc.

The judges and deputy judges in the administrative court are hearing the case particularly relating to judicial review, the procedure for claiming under judicial review is rigorous, parties must be competent to understand the procedure, their claims and their approach methods, as para 32. of the CPR guide litigants and legal representatives must be carefully consider the parties, para 173.3 speaks the parties must comply rigorously in case submitting urgent applications for consideration, even the administrative court can be decline the applications at first instance, in the submitted their applications in wrong format as per the para. 73.9, 20.46, and 22.61 of the guide.

Judicial review in England is now very expensive and risky, because various comply provisions, court fee, legal representatives fee, expert fee, if you lose the case and you need pay fee of the other parties also this is more expensive and risky, even in England there are alternative method are followed instead of judicial review, i.e. ombudsman schemes, this is most affordable method for litigants.

In case of suspension of parliament (*R (Miller) v The Prime Minister and Cherry and others v Advocate General for Scotland* ^[7] court held that: Prime Minister Boris Johnson

³ AIR 1967 SC 1943

⁴ This 24th Amendment was passed by the Indira Gandhi government to reassert Parliament's power to amend any provision of the Constitution, including fundamental rights. It also made it mandatory for the President to give assent to any constitutional amendment bill,

⁵ AIR 1973 SC 1461.

⁶ AIR 1975 SC 2299

was advice to prorogue (suspend) parliament for five weeks in relation to Brexit deal in 2019, this was challenged before the court of law by business women Gina Miller of Scotland, heard by the Supreme Court of U.K on September 2019 by eleven judges panel found that suspension of parliament for five weeks was lacked reasonable

justification and effect on hindering of parliamentary scrutiny finally declare its unlawful, void and no effect on parliamentary business and directed resumed the September 25,2019.

Comparative Analysis: India and the UK

Sl. No	Aspect	India	United Kingdom
1	Constitutional Framework	Written, supreme, with entrenched fundamental rights	Unwritten, based on parliamentary sovereignty
2	Judicial Review of Legislation	Permitted; unconstitutional laws struck down	Not permitted; Parliament remains supreme
3			
	Judicial Review of Constitutional Amendments	Allowed under the Basic Structure Doctrine	Not applicable; no codified constitution
4	Human Rights Protection	Fundamental Rights (enforceable)	Human Rights Act 1998 (limited to declarations)
5	Judicial Philosophy	Constitutional Supremacy	Parliamentary Supremacy
6	Grounds of Review	Violation of Fundamental Rights, basic structure, arbitrariness	Illegality, irrationality, procedural impropriety, proportionality (post-HRA)

Contemporary Developments of Right to Review between India and UK

- a. India: Judicial activism continues in areas like privacy (*Puttaswamy case, 2017*)^[9], electoral reforms, and environmental law. Recent debates concern judicial overreach vs constitutional necessity.
- b. UK: Brexit-related challenges, such as *Miller v. Prime Minister (2019)* on prorogation of Parliament, highlight judicial intervention in constitutional matters without written limits.

Conclusion

Judicial review remains central to upholding constitutionalism in both India and the UK, albeit within different frameworks.

- a. In India, judicial review derives legitimacy from constitutional supremacy and has evolved into a robust safeguard against legislative and executive excesses.
- b. In the UK, judicial review functions within the boundaries of parliamentary sovereignty, focusing largely on administrative legality and human rights.

While India embodies a rights-centric model of judicial review, the UK reflects a sovereignty-centric model, both tailored to their historical and constitutional traditions. A comparative study reveals that despite differences, both systems strive to preserve the rule of law and democratic accountability.

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