

## CONSTITUTIONAL REVIEW: STUDY OF AMERICAN MODEL AND EUROPEAN MODEL

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### I Introduction

CONSTITUTIONALITY MEANS limiting the power of the government. A country that has a developed civilization will include some form of technique to put a check on the power of the government so that it does not act arbitrarily. Constitutional review is one among them. The power of constitutional review is given to one institution to check the legality of the act of the government. Globally there are two prominent models of constitutional review: first is the American judicial review where the reviewing power is with the judicial court and it is authorized to declare any act of legislature or executive unconstitutional. The other model is the European model of constitutional review. Countries following this model have separate constitutional courts that decide the constitutionality of the acts of the executive or any legislative enactment. It is interesting to note that these courts have very limited jurisdiction and they decide only matters which are challenging the constitutionality of the act and don't sit as appellate courts like the American judicial courts.

The paper is an effort to study these two models of constitutional review. The paper is divided in three major parts; Part one discusses the American model of constitutional review, part two discusses the European model of constitutional review, and part three is an effort to narrow down the core difference between these two models. Part two which discusses the constitutional courts of the European countries had a separate section to briefly discuss the constitutional review approach in the east European countries.

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## II Constitutional review in America

The courts in the United States (US) whether federal courts or the state courts are governed by the written constitution which mandates division of power among the various branches of government that is legislative, judiciary and executive.<sup>1</sup>

This division of power creates the foundation for the doctrine of judicial review.<sup>2</sup> The doctrine of judicial review means that the courts have the authority and obligation to determine the legitimacy of the executive and legislative act and if the court found them to be contrary to the constitutional principles they can declare them void.<sup>3</sup> The attribute of judicial review is found both in the federal and state constitutions.

The origin of the doctrine can be found in the famous decision of *Marbury v. Madison* of 1803 where it was held that if the constitution is a legal document then the judiciary has the power to interpret them, as Marshall CJ asserted, “it is emphatically the province and the duty of the judicial department to say what the law is.”<sup>4</sup>

The power of the courts to invalidate laws that infringes constitutional mandate also emanates from the principle of ‘higher law concept’. The constitution makes provision that when there is a conflict between the higher law and the lower law, operating in the same field, the higher law will prevail. As the constitution is of juristic nature it is considered to be the supreme law of the land which will prevail over any contradictory statutory law.<sup>5</sup>

Before the *Marbury* case there was confusion whether the court has the power to declare any law as void but *Marshall*, CJ placed the doctrine of judicial review upon a sure footing. He said that, judges by taking oath, as directed by the constitution, bind themselves to uphold the sanctity of the constitution and any act or action that violate the paramount law will be declared void by the court.<sup>6</sup>

Thus in the American model of constitutional review the judicial courts are assigned

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<sup>1</sup>Alvin B Rubin, “Judicial Review in the United States,” *La. L. Rev.*, 40(1) (Fall 1979).

<sup>2</sup>*Ibid.*

<sup>3</sup>*Ibid.*

<sup>4</sup>5 US 137 (1803).

<sup>5</sup>*Ibid.*

<sup>6</sup>DD Basu, *Comparative Constitutional Law* (Lexis Nexis, 3<sup>rd</sup>edn. New Delhi, 2014).

the task of constitutional review. What is unique when contrasted with the European system is that it is purely a judicial body unlike the European constitutional court which may or may not be purely a judicial body. This component of the courts is further discussed in the next section.

### III Constitutional review in Europe

According to Tom Ginsberg the emergence of the American constitutional review was the first wave of the constitutional review as many countries followed this model. In the nineteenth century there was second wave of constitutional review that happened in the European continent with the foundation of constitutional courts and the European style constitutional review.<sup>7</sup> The European style constitutional review and constitutional courts are the invention of great jurist Hans Kelsen. He was the drafter of the Austrian constitution and he embodied this idea of constitutional review in the constitution. On his instigation this model was incorporated in the Austrian second republic (1920-1934).<sup>8</sup> Kelsen model of constitutional review is based on the theoretical foundation that keeps the judges on a lower pedestal from the Parliament and he believed that constitution shall be interpreted by an authority different from the traditional courts. He manifested this idea by the imagination of separate constitutional courts that will best protect the constitutional order.<sup>9</sup>

According to Alec Stone (2003) Kelsen's idea can be traced to the political developments that were taking place at that time. There were two separate wings at that time divided on the idea of constitutional review. On the one hand there were political elites who by no means wanted to import the American style judicial review, and on the other hand there was group of legal intellectuals who were smitten by the American style constitutional review.<sup>10</sup> Kelsen provided a synthesis of both the ideas by proposing constitutional courts that will be subordinate to the Parliament, thus not becoming legislators themselves, and at the same time doing the function of

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<sup>7</sup>Tom Ginsburg, "The Global Spread of Constitutional Review", Keith Whittington and Daniel Keleman (eds), *University of Chicago Law School Draft for Oxford Handbook of Law and Politics* (2008).

<sup>8</sup>*Ibid.*

<sup>9</sup>*Ibid.*

<sup>10</sup>Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter" 101 (8) *Mich. L. Rev.* 2744-2780 (Aug., 2003)

constitutional review.<sup>11</sup>

This kind constitutional court will serve both the purpose primarily it will act as a reviewing authority and at the same time preserve the sanctity of the sovereign state. Keeping in mind that these courts shall do the function of judicial body judges and law professors are recruited. But in some countries the composition of constitutional courts includes professional legal persons and non-legal persons. It is interesting to know that Kelsen's idea was not much appreciated outside Austria and the countries were not keen to have some institution that will determine the legitimacy of the parliamentary act as it was believed that Parliament is a body that cannot do any wrong. But the destruction of two world war forced these countries to rethink the idea that legislature cannot do any wrong. After these developments they were much fascinated with the idea of a separate institution checking the legality of the legislative acts. The experience fascism in Italy and Germany before the war undermines the notion that Parliament is always right.<sup>12</sup> As democratic rebuilding proceeded, constitutionalism became the core political philosophy. The destruction of World War II has forced the European countries to realize the value of human right and they have moved a great distance to codify human right norms.<sup>13</sup> These developments have made the constitutional courts an institution of great relevance, protecting the rights codified by the countries. To get a better understanding of the constitutional court, it will be helpful if we can appreciate the nature and structure of the some constitutional court in European countries.

### **France**

France is one of the countries which have a constitutional court known as *Conseil Constitutionnel*. It is the highest authority for deciding constitutional matters.

The constitutional court came into existence by the Constitution of Fifth Republic, on October 4, 1958 and is entrusted with the power to uphold the constitutional mandate by reviewing the legislation and determining their constitutionality. It does not fall in

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<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

the hierarchy rather it is a separate court with special function of constitutional review.<sup>14</sup>

There are two kinds of provisions for review: Mandatory and Optional.

The Mandatory review is in article 61 paragraph 1 which is an *ex ante* review means the acts are reviewed before promulgation. Article 61 sub-paragraph 1 reads,

Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.

The next is Optional review which also falls in the category of *ex ante* review which means the review is undertaken before the act is done. It is found in article 54 and article 61 sub paragraph 2. The article 54 makes provision that if any international undertaking is referred to the constitutional court and the court found it to be contrary to the constitutional provision then the court may give authorization to ratify only after amending the constitution.<sup>15</sup>

Similarly article 61 sub paragraph 2 gives option to the executives and the member of the legislative body to refer any legislative act of the Parliament, before its promulgation, to determine its constitutionality.<sup>16</sup>

Article 56 to 63 of the French Constitution defines the power and the structure of the constitutional council.<sup>17</sup> According to article 56 the constitutional council shall be

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<sup>14</sup>Who may apply to the Constitutional Council?, *available at*:<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/who-may-apply-to-the-constitutional-council-/who-may-apply-to-the-constitutional-council.137219.html> (last visited on Jan. 15, 2015).

<sup>15</sup>Constitution of the French Fifth Republic, art. 54 is worded as: "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution."

<sup>16</sup>*Id.*, art 61 sub para 2 is worded as: "Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators."

<sup>17</sup>Constitution of the French Fifth Republic adopted on Oct. 4, 1958, *available at* :<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleVII> (last visited on Jan. 15, 2015).

consist of nine members and their terms shall be fix for non-renewable nine years. It is very interesting to note that the President of the Republic, the President of the National Assembly and the President of the Senate each appoints three members of the constitutional court. The appointments made are then submitted to the standing committee for further consultation. In addition to the nine members of the court the former Presidents of the Republic are the ex-officio life members of the constitutional court.<sup>18</sup>

This shows that the constitutional court is not a purely judicial organ. It has both judicial and political component.<sup>19</sup> Studies have shown that the constitutional court of France has acquired a prominence over the years.<sup>20</sup>

### Italy

The constitutional court of Italy as *Corte costituzionale della Repubblica Italiana* is a Supreme Court of Italy. The constitutional court is composed of 15 judges who has fixed term of nine years. It is interesting that the appointment of the judges is the prerogative of the executive, legislature and the judiciary as each of the branch appoints five judges making it 15.

The judges are appointed from various backgrounds unlike the American and Indian courts where the judges are from judicial background only. These judges are either lawyer or law professor or had been a judge in the administrative, civil or criminal court.<sup>21</sup>

Like the other constitutional court this court is also mandated with the task of judicial review which is the most vital function of the court. To file a claim in the court two provisions are available that is known as *principaliter* and *incidenter*. The Central Government and the regions can file a claim directly in the court using the *principaliter* proceeding. Whereas in the *incidenter* proceedings the claim is filed by

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<sup>18</sup>*Id.*, art 56.

<sup>19</sup>Yves Meny and Andrew Knapp, *Government and Politics in Western Europe: Britain, France, Italy, Germany* 329 (Oxford University Press, Oxford, 3<sup>rd</sup>edn, 1998).

<sup>20</sup>F. L. Morton, "Judicial Review in France: A Comparative Analysis" 36(1) *Am. J. Comp. L* 89-110 (Winter, 1988).

<sup>21</sup>Available at: <http://www.thecourt.ca/2007/02/02/report-from-italy/> Report from Italy February 2nd, 2007, by Justin O. Frosini and Sara Pennicino, available at: [http://www.cortecostituzionale.it/ActionPagina\\_321.do](http://www.cortecostituzionale.it/ActionPagina_321.do) (last visited on Sep 15, 2015)

an ordinary court judge and the trial takes place in the regular manner.<sup>22</sup> When the court declares a law unconstitutional its effect is that the law is now null and void and by the principle of *erga omnes* the decision is binding. But the law does not take retrospective effect by the doctrine of *res judicata*. On the other hand if a law is not declared to be unconstitutional then the decision is binding *inter partes*.<sup>23</sup>

Major changes were brought by the amendment of 2001. Now the regional governments were given power to approve regional statutes of autonomy and regional electoral laws. Before the 2001 amendments the laws were reviewed by the constitutional court if the claim was filed by Central Government.<sup>24</sup>

#### IV Constitutional review in east European countries

Countries of the Eastern Europe have also constitutional courts like the western European countries. These courts are structured on the line of the western European constitutional courts but their political histories and experiences have shaped their functioning. A brief discussion of the constitutional courts in these countries will enlighten us with the kind of constitutional review take place in these countries.

Rhett Ludwikowski gives a brief account of the development of constitutional courts in Eastern European countries.<sup>25</sup> According to him in Marxist ideology legislature is the supreme will of the people and any other body cannot restrain it. Legislation is the only source of law as supremacy of legislative body is the fundamental principle. This ideology has shaped the institutional outcome and because of this whatever kind of administrative tribunal existed in these countries it cease to exist in the post war era. It ceased to operate in Bulgaria in 1944, in Romania in 1948, and in Hungary in 1949, Czechoslovakia's was officially closed in 1952.<sup>26</sup>

Ludwikowski further says that by 50s the political attitude became liberal to certain extent and judicial review was incorporated in a much broader way. Gradually statutory provisions were introduced in the communist countries to challenge the administrative decision. Yugoslavia in 1952, Hungary in 1957, Romania in 1967 and Bulgaria in 1970 enacted laws in their countries which gave power to individuals to

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<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.*

<sup>24</sup>*Ibid.*

<sup>25</sup>Rhett Ludwikowski, "Judicial Review in the Socialist Legal System: Current Developments" 37(1) *Int'l & Comp. L.Q.* 89-108 (Jan. 1988).

<sup>26</sup>M. Wiersbowski and SC McCaffrey, *Modern Legal System Cyclopedia* 8, 159(1985).

bring matters to the court if they violated their rights.<sup>27</sup> But the right that was given was not absolute rather there were many areas that were kept out of the judicial review. In Romanian law matters related to defense, security, public order, central planning, epidemics, public calamity, tax and insurance were kept out of the preview of the judicial review.<sup>28</sup> In the USSR constitution also provision were made that if any official act in contravention to his official duty his actions can be challenged according to the prescribed law.<sup>29</sup> This shows that there was a gradual acceptance of judicial review in these countries and the incompatibility of this development with the Marxist-Leninist ideology paved way for far reaching changes in the judicial review system.

But whatever kind of judicial review was introduced in these countries it was subordinate to the peoples interest embodied in the legislative will and any authority having the capacity to declare law as void had no place in the communist country.<sup>30</sup> Judicial activism only becomes possible when political transition started taking place in these countries. The countries started moving towards democratisation in the late 90s and they started adopting constitution for the governance of their country. The constitution of these countries made provision for constitutional court and mandated them with the power of constitutional review. But the constitutional courts are not as autonomous institutions as the courts of Western Europe and the judicial activism that is taking place in these countries are not institutionalized as a system rather they are more like political behavior.<sup>31</sup> Political ideology embodied in the historic precedent has more influence than the constitutional mandates. But whatever be the outcome of the constitutional courts there, it is expected that it will eventually yield to a more transparent independent body.

### **V Comparison between two models of constitutional review**

Today two basic model of constitutional review exist in western legal system: the American and European.

Alec Stone Sweet has divided the European model of constitutional review into four

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<sup>27</sup>*Ibid* .

<sup>28</sup>*Ibid*.

<sup>29</sup>USSR Constitution, art. 58.

<sup>30</sup>Shannon Ishiyama Smithey and John Ishiyama, "Judicial Activism in Post-Communist Politics" 36 (4) *Law & Soc'y Rev* 719-742 (2002).

<sup>31</sup>*Ibid*



basic components which can be clearly contrasted with the ordinary courts.<sup>32</sup>

- i. Constitutional judges alone has the authority to review, means the courts can invalidate acts if it is in contravention to any constitutional rights. Whereas the ordinary courts does not have this power.
- ii. The jurisdiction of the constitutional courts is limited to deciding the constitutional validity of any act. Whereas ordinary courts preside over litigation and appeal.
- iii. Constitutional courts are separate bodies either part of judiciary nor legislature and
- iv. The reviews of constitutional courts are abstract review, as the courts decide the validity before it is enacted. Any judge, member of opposition or any elected official can refer the Acts to the constitutional courts. This kind of review is called a priori review as the review is done before the enactment.

Lee Epstein, Jack Knight and Olga Shvetsova,<sup>33</sup> in their article explained the differences of both the model in a tabular form. Although the article was in a different context but reproducing the table is helpful for our purpose.

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<sup>32</sup>*Supra* note 11 at 3.

<sup>33</sup>Lee Epstein, Jack Knight and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," 35(1) *Law & Soc'y Rev* 117-164 (2001).

<b>Characteristics</b>	<b>American system</b>	<b>European system</b>
<b>Institutional structure</b> (who has the power to engage in constitutional review?)	<b>Diffused:</b> ordinary courts can engage in judicial review; that is, they can declare an act unconstitutional.	<b>Centralized:</b> only single court (usually called a ‘constitutional court’) can exercise judicial review: other courts are typically barred from doing so, though they may refer constitutional questions to the constitutional court
<b>Timing</b> (when can judicial review occur?)	<b>A posteriori (sometimes called Ex Post):</b> courts can only exercise judicial review after an act has occurred or taken effect.	<b>A Priori (sometimes called Ex Ante) and A Posteriori:</b> many constitutional courts have a priori review over treaties; some have a priori review over government acts; others have both a priori and a posteriori review, while still others have either but not both
<b>Type</b> (can judicial review take place in the absence of a real case or controversy?)	<b>Concrete review:</b> courts can resolve only real case or controversies	<b>Abstract and concrete review:</b> most constitutional courts can exercise review in the absence of a real case or controversy; many can exercise concrete review as well
<b>Standing</b> (who can initiate disputes?)	Litigants, engaged in real case or controversy, who have a personal and real stake in the out come, can bring suit	The range can be broad, from government actors (including executive and members of legislature) to the individual citizens.

**Concentrated/ Centralised and Diffused:** European countries have centralized form of constitutional review and there is a separate organ or body to check the constitutionality of any law. In America there is no separate body to check the constitutionality of legislation. Any court or any judge has the power to check the constitutionality or to review any law. This is known as diffused form of constitutional review.

**A posteriori (sometimes called ex post) and A Priori (sometimes called ex ante) and A Posteriori:** in America courts can conduct a constitutional review only when there is a claim for enforcement of constitutional law. In European countries, even if there is no claim of infringement of constitutional law, constitutional courts have a

priori review over treaties and government acts.

**Concrete and abstract:** in America the judicial review is concrete. It means litigation for judicial review cannot be initiated until and unless there is any injury to the litigant. The court will not allow standing to the party if he cannot show any violation of constitutional right. In contrast to the American review the European constitutional review is abstract. It can be initiated in the constitutional court before any injury has happened. Actually these courts are established with the purpose that they will review acts prior to enforcement. There is no litigation but the review is undertaken so that there is no future harm done.

**Standing of the parties:** For any litigation the court determines the standing of the party. In the American judicial system unless the party has a standing the matter cannot be pursued further. The party must show how his interest can be determined conclusively by the review of the legislation. In the European system the idea of standing is not applicable for constitutional review. Any judge, member of opposition party and any other official authority can activate the review, if he reasonably thinks that the act is unconstitutional. The court cannot try any case before it rather it only determines the constitutionality of the legislation.<sup>34</sup> Whenever any question arises before a presiding/ referral judge his job is to determine whether it is a matter of constitutional interpretation, framing the constitutional question for referral and finally determine the dispute based on the interpretation given. The constitutional courts are purely for constitutional matters unlike the American and Indian courts. Their task is to resolve dispute about the meaning of the constitution.<sup>35</sup> Thus although the function of constitutional review is same in both the models, the manner of its performance and the structure of the institution is different.

## VI Conclusion

It is interesting to know that how a similar task can be approached in two ways. Both the American and the European model courts are entrusted with the task of constitutional review. The composition of the constitutional courts in the European

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<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.*

continent, the background of the judges and the method of appointing them shows that it has evolved as a political system of check and balance to so that other organs of the state does not exceed their constitutional boundaries. Whereas American have purely judicial courts. The difference give a chance to think critically whether the judicial review power be entrusted to the judiciary alone. It is not that one system is better over the other but it gives the glimpse that how much has developed in the field of constitutional adjudication. India has chosen to adopt the American style constitutional review but in recent times where lot of debate is going around 'judicial over activism' in the name of judicial review, time may not be far away when the legislature may start anticipating European style constitutional review.