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JUDICIAL REVIEW IN INDIA, USA AND UK: A COMPARATIVE STUDY

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ABSTRACT

Judicial Review is the power vested in the court of law to review the actions of the Legislature, the Executive and the Judiciary. This power is based on 'Limited Government' and 'Supremacy of the constitution wherein the ordinary law should confirm to it.' Countries practicing constitutional democracy emphasize constitutionalism. The judiciary protects the Constitution and the rights of the citizens from arbitrary actions of the legislature and Executive for which the judiciary has assumed the onerous role of a watchdog of the Constitution.

This article discusses in detail about the concept of Judicial Review, Judicial Review in India and further compares the concept of Judicial Review in India to that of the United States of America and the United Kingdom.

INTRODUCTION AND MEANING OF JUDICIAL REVIEW

The term 'Judicial Review' means the power of court to review the actions of the Legislature and Executive. This power is a facet of Rule of law. Judicial Review keeps a check on other organs of the government and hence helps to maintain the Separation of power. The Judicial Review is based on the principle of 'Limited Government' and 'Supremacy of the constitution' as it declares laws inconsistent with constitution as void and prescribes that the ordinary law should confirm to constitution of the country,

The concept of Judicial Review and limited Government involve three main elements

Firstly there should be a written constitution defining the scope and limitation of the organs of the Government. Secondly, there should be supremacy of the Constitution whereby the other organs should derive their powers from it. Thirdly, a deterrent by which the violation of superior law should be restrained or prevented or even annulled.

Though the legislature has the absolute power to formulate law, it has to function within the limits prescribed by the Constitution. The Constitution is considered as the Supreme law of the law and duty rests on the court to interpret the Constitution in order to ensure no institution functions apart from its ambit by violating fundamental rights of the individuals.

Whenever the Legislature, Executive and Judiciary harms or denies the constitution the rights, which have been mentioned under the Constitution. Even though there must be separation of powers and all the branches of government are to be held equally accountable, the judiciary has an important role to play to protect the rights of people. It is crucial to keep check and balance of the laws passed by legislature, as to whether they uphold the spirit of the Constitution. Hence, Judicial Review is a crucial weapon to create checks and balances over the government's powers, in order to avoid arbitrary, unjust and unconstitutional laws.

DEFINITION OF JUDICIAL REVIEW

The term Judicial Review is explained by Smith & Zurcher as, “The examination or review by the Courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it, and if so, to declare them void and of no effect.”

Judicial Review is the duty as well as the power of the court to not allow any act- whether legislative or executive, if it violates the constitution as defined by Edward S. Corwin.

Professor Wade defined it as “Judicial Review is a mechanism adopted to keep public authorities within bounds and upholding the rule of law.”

ORIGIN OF JUDICIAL REVIEW

The roots of Judicial Review grew by the natural law theory propounded in Dr. Bonham's case in England. The concept of judicial review was then developed in the USA from the Marbury vs. Madison case in 1803.

Soon after that, In the early 1970 , Mauro Cappelletti mapped the spread of judicial review centered constitutionalism across the world showing the beginning of its tenacious spread across the globe alongside and as part of the spread of democracy in the post-World War II.

And in India the concept was taken from the Constitution of the USA. Dr B.R Ambedkar,

Chairman of drafting Committee of the Indian Constitution referred Judicial Review as the “heart of Indian constitution”. The Indian constitution provides this power through various provisions which empower the Hon’ble Supreme Court to review acts of other government organs.

JUDICIAL REVIEW UNDER THE INDIAN CONSTITUTION 1. HISTORICAL BACKGROUND OF JUDICIAL REVIEW IN INDIA

The power of judicial review in India was taken from the US Constitution which originated from the case of Marbury vs. Madison case in the year 1803.

In 1877, Emperor v. Burah was the first case which interpreted and originated the concept of Judicial Review in India. In this case the High court and Privy Council adopted the view that Indian courts had power of Judicial Review with some limitations.

In the case of Secretary of State v. Moment , the court held that the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. the Government of India Act of 1858. Initially, Government of India Act, 1935 had no specific provision for Judicial Review, the constitutional problems arising before the court necessitated adoption of Judicial Review in a wider perspective.

2. JUDICIAL REVIEW UNDER INDIAN CONSTITUTION

The Indian constitution provides this power impliedly under Articles 13,32,131, 136,143,226,227,245,246,372.

In India the concept of Judicial Review is based on the Rule of Law.

Doctrine of Judicial Review is the basic feature of the Constitution. Still there is no express provision for judicial review in the Indian Constitution but it is an integral part of it.

The power of judicial review has been provided in the Article 13 of the Indian Constitution. Article 13 of the Indian Constitution prevents legislatures from making any law which “may take away or abridge the fundamental rights” guaranteed by the Constitution. Any statutory law can be declared void if it is “inconsistent with or in derogation of the fundamental rights”. Constitutional basis of the judicial review has been provided by Article 13 as it confers with the

Supreme Court and the High Courts, the power to interpret the pre-constitutional laws and to settle whether they match with the values and principles of our present constitution.

Judicial Review is provided in three aspects; Judicial Review of Constitutional Amendments, Judicial Review of Parliament and State Legislation and also Judicial Review of Administrative actions of Executives. These aspect have been summarized as follows:

i. Judicial Review of Administrative Actions:

In India, an individual can approach the High Court and Supreme Court for the enforcement of fundamental rights guaranteed under the Constitution. If the executive or the Government abuses its power. If the action of the government is mala fide, such action can be quashed by the ordinary courts of law.

In India, the the superior courts are empowered to interfere with the discretionary powers exercised by the administration basically on two grounds which are

- a. Failure to exercise discretion and;
- b. Excess or abuse of discretion.

As a general rule of Separation of Powers, courts have no power to interfere with actions taken by administrative authorities in the exercise of discretionary powers. But this does not mean that there is no power of the court to control the discretion of the administration. Judiciary has the power to review actions of all the other bodies of government in order to maintain democracy and curb arbitrariness in the system.

ii. Judicial Review of Constitutional Amendments:

The Supreme Court of India is the guardian of the Indian Constitution and has authority to scrutinize the validity of constitutional amendment laws. The parliament on the other hand, has power to amend the Constitution. Parliament can amend the provisions of the constitution undisputedly but it cannot abrogate the 'basic structure' of the constitution. The question whether fundamental rights can be amended under Art. 368, had been considered Hon'ble Supreme Court in the case of Shankari Prasad v. Union of India, wherein Court held that the power to amend the constitution including the fundamental rights is contained in Article 368, and that the word 'law'

in Article 13(2) includes only an ordinary law made in exercise of the legislative powers and does not include a constitutional amendment which is made in exercise of constituent power.

Whereas, in the case of Sajjan Singh v. Rajasthan the Hon'ble Supreme Court revised its earlier view that constitutional amendments, made under Article 368 are outside the purview of Judicial Review of the Courts. It was in the case of Golak Nath vs. State of Punjab, Hon'ble Supreme Court overruled the decision given in the case of Shankari Prasad and Sajjan Singh and further observed that an amendment is a law within the meaning of Article 13(2) which included every kind of law be it statutory or constitutional law, hence a constitutional amendment which contravenes Article 13(2) will be declared void.

In the landmark case of Keshavananda Bharati vs. State of Kerala, when the question as to what extent the state had amending power conferred by Article 368 of the Constitution. The Hon'ble Supreme Court observed that, under Article 368 Parliament can amend the fundamental rights but cannot take or abridge the 'Basic Structure' of the Constitution. Eventually, the court illuminated the concept of Basic Structure case by case.

In the present scenario, the Hon'ble Supreme Court plays a very crucial role in interpreting the constitutional provisions and in present times the concept of Judicial Review became a fundamental feature of the Constitutional Jurisprudence.

In the case of Joseph Shine vs Union of India, Hon'ble Supreme Court used the power of Judicial Review and held that Section 497 of Indian Penal Code is unconstitutional.

In this way, the Supreme Court of India scrutinizes the validity of law through the Doctrine of Judicial Review.

JUDICIAL REVIEW IN USA

1. HISTORICAL BACKGROUND OF JUDICIAL REVIEW IN AMERICA

Dr. Bonham's case is said to be a great heritage to the American system of Judicial Review as well.

In 1803, the power of judicial review was again used to declare the Act of the Congress unconstitutional in the historic landmark case of Marbury v. Madison . In this case, when President John Adams did not win a second term in the 1801 Presidential Election, he utilized

the last days of his administration to make a substantial number of political arrangements. At the point when the new president took office, he told his Secretary of State not to convey the official printed material to the administration authorities who had been named by Adams. In this way the administration authorities, including William Marbury, were denied their new employment. William Marbury filed a petition in the U.S. Supreme Court for a writ of mandamus, to compel Madison to convey the commission. The main issue in the case was did the Supreme Court have original jurisdiction to issue writ of mandamus?

Chief Justice Marshall, held that it has no jurisdiction to issue Mandamus because for issuing writ of Mandamus, the court should have the appellate jurisdiction. Further, the court held that Congress cannot expand the scope of the Supreme Court's original jurisdiction beyond the scope of Article III of the Constitution. The Supreme Court has the authority to review acts of Congress and determine whether they are valid or not. It is the inherent power of the Supreme Court to determine the validity of any law. In this way, the Supreme Court of US formulated the concept of Judicial Review. This case provides the foundation of power of judicial review to the Supreme Court to determine the validity of any legislative action of Congress.

2. JUDICIAL REVIEW UNDER AMERICAN CONSTITUTION

The American Constitution is written and federal democratic in spirit. It is also based on the Rule of law. One of the fundamental processes in America to determine the validity of law is Judicial Review. In the USA, the judiciary can check the actions of Congress and the action of the President, if it is contrary to the Constitution, then the judiciary can declare it null and void. The Constitution of the USA, like Indian Constitution, does not provide express provisions for Judicial Review; it was formulated by the decisions of the Court and is implicitly incorporated in the Art. III and IV.

Article III

Article 3 of US Constitution, gives the Supreme Court judicial power over all cases arising under the Constitution.

Article VI

Article 4 of US Constitution provides that the Constitution is the "supreme law of the land" and

implies that other laws are only valid when they are “made in pursuance” of the Constitution. When interpreted together, these Articles strongly imply that the Supreme Court has the power of judicial review.

Under a clause in Section 13 of the Judiciary Act of 1789, the Supreme Court received original jurisdiction over "writs of mandamus." These may be issued to order a government official to comply with the law.

Furthermore, The concept of due process of law had created a democratic balance in the USA, by declaring the laws enacted arbitrarily as illegal laws. The 'due process' clause in the American jurisprudence has served the American judiciary in its fight against the powerful executive and this is the clause which bestowed the power of judicial review to the American judges.

The main objectives of Judicial Review in USA are as follows:

To declare the laws unconstitutional if they are contrary to the Constitution. To defend the valid laws which are challenged to be unconstitutional.

To protect and uphold the Supremacy of the Constitution by interpreting its provisions.

To check the action of Congress and the State Legislature for them delegating the essential legislative functions to the executives or to check Congress from delegating its legislative function to the State Legislatures.

In 1996, Margaret Gilleo placed a sign in the yard of her home, the sign said “Say No to War in the Persian Gulf, Call Congress Now.” The city of Ladue had a law against yard signs, and told Ms. Gilleo to take her signs down. The issue before court was whether the law against signs was unconstitutional? Answering to which Supreme Court of America held that, law against yard signs violated the 1st Amendment of the U.S. Constitution. The 1st Amendment protects political speech, and banning yard signs takes away the main mode by which people traditionally express their personal political views.

Currently, all content based law in the USA has the backdrop of judicial review and strict scrutiny in the USA.

JUDICIAL REVIEW IN UK

1. HISTORICAL BACKGROUND OF JUDICIAL REVIEW IN UK

Dr. Bonham v. Cambridge University, was the foundation of judicial review in England.

On the contrary to it, in the case of City London v. Wood Chief Justice Holt said that “An Act of Parliament can do no wrong, though it may do several things that look pretty odd”. This case somewhat restricted the power of Judicial Review in the UK. The scope of judicial review was restored in the country after it became signatory to the European Convention of Human Rights.

2. JUDICIAL REVIEW UNDER LAWS IN UK

In the UK, there is no written Constitution. Principle of “Parliamentary Sovereignty” dominates constitutional democracy in the UK. England is a democratic country but not a republic. In England, people are the source of all the powers and they are also the sovereign power. But, people snatch all essential powers from the Monarch who respond to them in Parliament.

This establishes the Doctrine of Parliamentary Sovereignty which means that the court has no power to determine the legality of Parliamentary enactments. The Act of the Parliament cannot be answerable to any authority howsoever unjust it may be. There is unlimited power with Parliament in the UK. There is no scope of judicial review of legislative Act in the UK.

After the formation of the European Convention of Human Rights, the scope of judicial review became wider. The enactment of the Human Rights Act, 1998 also requires domestic Courts to protect the rights of individuals. The UK’s membership of the European Community has brought with it significant changes to the English legal system and the UK constitution. Like, in the Administrative Court:

Claimants may challenge actions and omissions by English public authorities, and even provisions of an Act of Parliament, on the ground of breach of Community law.

Mostly, claims for judicial review may also be on the validity of administrative decisions and legislations made by the institutions of the European Union.”

In the UK the system which is based on Legislative Supremacy and Parliamentary Sovereignty

The legislative Act of Parliament is also known as Primary Legislation, primary legislations are basically enacted by the Parliament Secondary legislation provides rules, regulation, directives and act of Ministries. The delegation by the Parliament to the executive with adequate legislative guidance are known as Secondary legislation, which are administrative in nature; therefore it is subject to judicial review in the UK.

In, R v. Secretary of State for Transport , it was observed by the Court that “by relying upon the direct effect of Community law, the individual may be able to challenge national measures and can declare them unlawful. Further, it was observed that all national measures can be subject to judicial review on the grounds of incompatibility with Community law, i.e. primary legislation, secondary regulations and administrative decisions.”

Currently, The Courts in the UK are strictly following the principles of judicial review with regard to administrative actions and secondary legislations. So far as primary legislations are concerned, they are outside the purview of judicial review but with some exceptional cases. Administrative actions which are executive in nature are mostly the subject matter of judicial review in the present scenario

JUDICIAL REVIEW IN INDIA USA AND UK: COMPARATIVE

i. i. Power to strike down laws

In India, the Supreme Court has complete power to strike down any law, whether made by parliament or state legislature, if it does not conform to Indian Constitution or is arbitrary and malafide.

In the USA, when judicial review is applied to federal law, the Supreme Court can only strike that law down if it directly conflicts with the Constitution. When examining a state law, however, the court can strike it down if it contradicts either federal law or the United States Constitution. The United States Supreme Court cannot strike down a state law for conflicting with the state's constitution.

In the UK, the courts cannot overturn or quash primary legislation passed by parliament. This is because, in the UK constitution, parliament is sovereign. The courts can overturn secondary legislation, made by ministers, on the normal grounds of judicial review.

ii. Provisions for Judicial Review

In India, there are specific and extensive provisions of judicial review in the Constitution of India such as Article 13, 32, 131-136, 143, 226, 227, 246, 372, the term judicial review is not expressly mentioned in any of these Articles but they are implicit in these Articles.

USA as well has an alike aspect, the Constitution of the United States of America doesn't have any specific provision for judicial review but Article III, IV, V incorporates judicial power of the Court.

In the UK, as no written constitution is present, there are no specific provisions for Judicial Review and it has a limited purpose.

iii. Dimensions of Judicial Review

In Indian context, judicial review can be used in three dimensions; judicial review of Constitutional Amendments, judicial review of Legislative Acts and Judicial Review of Administrative Acts.

In the USA, the structure of functioning powers are rigid and hence review of Constitutional Amendments is very rarely used. The Supreme Court of America has power to scrutinize the Legislative act and Administrative Act which is contrary to the Federal Constitution.

In the UK, courts don't have power to review Legislative acts of Parliament, secondary legislations are subject to review.

iv. Supremacy of judiciary-

In countries like India and USA, which have written Constitutions and Doctrine of Separation of Powers, power of judicial review is exercised to uphold democracy of the nation and thus shows dominance of Judiciary.

Whereas in countries like the UK, where the nation has an unwritten but a large and unitary in character Constitution, there supremacy of the Parliament which ultimately results into constraints in regards to judicial review. In the UK, the courts can declare an act of parliament to be incompatible with the constitution but their judiciary cannot invalidate the law for being in accordance with the constitution.

v. Power to exercise Judicial Review

In India, power of Judicial review is expressly mentioned under the Constitution by the law makers as they were very well aware of the consequences otherwise. Hence, Supreme Court in India has ample power to overturn the legislative enactments, however the Supreme Court does not interfere into enacting the new laws, it simply decides the matter and leaves the job of enacting new laws on the legislature to ensure exercise of Separation of Powers.

In the USA, power of Judicial review is aggressively exercised, if a particular legislative enactment is found to be against the American Constitution of Principles of Natural Justice, the Supreme court while declaring the same as void, it is seen that the court enacts new provisions replacing the old.

While in the UK, power of Judicial Review is limited and the court has limited powers of reviewing the laws passed by Parliament and has no authority to declare such laws void.

CONCLUSION

The power of Judicial Review is used differently in different political systems. Despite various shortcomings, Judicial Review has helped in ensuring constitutional governments in countries. Through this power Supreme Courts have protected the Rights and Freedoms of its citizens against any encroachment by legislature of executives. However, the fact that the Judiciary is also established by the Constitution shall be kept into consideration before using Power of Judicial Review in an arbitrary manner. As Aharon Barak points out, “A judge must maintain the delicate balance, something that requires some measure of activism and some measure of restraint.”

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