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JUDICIAL REVIEW

AUTHORED BY - SHAMBHAVI SINGH¹

Introduction

The judiciary assumes a pivotal role within democratic nations, serving as the bastion of the rule of law, guardian of individual rights, and custodian of constitutional integrity. It functions as a formidable checks and balance on the other branches of government, adeptly mediating disputes and preserving the equilibrium of power. In essence, the judiciary serves as the vanguard of democratic principles, steadfastly safeguarding the rights and freedoms of citizens. Its primary mandate lies in the judicious interpretation and application of the law, ensuring equitable and impartial dispensation of justice in strict accordance with the Constitution and well-established legal tenets.

Within a federal system, the judiciary assumes the crucial role of being the equilibrium-restoring mechanism for federalism, resolving disputes that arise between the central government and individual states, as well as among states themselves. Federalism, characterized by the constitutionally defined allocation of powers between the central and state governments, epitomizes a legalistic form of governance, necessitating the presence of an impartial arbiter to maintain the delicate equilibrium between the centre and states.

In this context, the legal maxim "*Ubi jus, ibi remedium*" comes to mind, emphasizing that where there is a right, there must be a remedy. The judiciary serves as the embodiment of this principle, ensuring that when conflicts concerning the distribution of powers under the constitution arise, a remedy is readily available. Furthermore, the maxim "*Salus populi suprema lex esto*," which means "The welfare of the people shall be the supreme law," underscores the judiciary's responsibility to safeguard the well-being of the populace by diligently upholding the federal structure's integrity through its rulings and adjudications.

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In numerous nations with a codified constitution, the doctrine of judicial review prevails, signifying that the constitution holds the highest legal authority, and any law contradicting it is rendered null and void. Courts are entrusted with the role of elucidating constitutional provisions, wielding the authority to declare any legislation or administrative action incongruent with the constitution as unconstitutional and, consequently, invalid.

This judicial function emanates from the recognition that a system grounded in a written constitution would lack practical effectiveness without an authoritative, independent, and impartial adjudicator of constitutional matters. Moreover, it serves as a necessary mechanism to curtail governmental entities from exercising powers that are not constitutionally sanctioned.

Regarding the importance of judicial review within a written constitution, Schwartz makes the observation: *“A constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality. In practice, there can be no constitution without judicial review. It provides the only adequate safeguard that has been invented against unconstitutional legislation. It is, in truth, the sine qua non of the constitutional structure²”*

The doctrine of judicial review serves a dual and interconnected purpose: firstly, it legitimizes governmental actions, and secondly, it acts as a bulwark safeguarding the constitution from unwarranted intrusions by the government. These two functions are inextricably intertwined, forming a cohesive mechanism within the legal framework.

The constitutional interpretation role is fulfilled by the courts through both direct and indirect exercises of judicial review.

Direct judicial review entails courts examining individual cases to determine the constitutionality of laws, whereas indirect judicial review empowers courts to shape constitutional interpretations and impact government actions indirectly through broader legal statements and judgments. Both types of review are vital for preserving the rule of law and safeguarding constitutional principles.

². Constitutional law: A textbook, 3 (1972)

Justice Antonin Scalia, a prominent jurist, held a nuanced view on judicial review. He expressed scepticism about direct judicial review, advocating for caution in overturning laws enacted through the democratic process. However, Scalia recognized the importance of indirect judicial review through legal principles and precedents, emphasizing the role of consistent interpretations in evolving constitutional meaning. His views highlight the delicate balance between judicial review and democratic principles.

Evolution and Origin of Judicial Review

The origins of the judicial review doctrine can be traced back to the natural law theory articulated in Dr. Bonham's case³ in England. In this case, an Act of Parliament validating the Charter of the Royal College of Physicians was declared void. The argument was that if a parliamentary act contradicted common law rights, reason, or was impractical, the common law would prevail, deeming such an act null and void.

The theoretical basis for judicial review took a significant step forward with Chief Justice Marshall's 1803 judgment in *Marbury v. Madison*⁴, United States Supreme Court. Chief Justice Marshall established the principle that, in a conflict between the Constitution and a legislative statute, the court should prioritize the Constitution as the superior law and declare the statute unconstitutional. This laid the groundwork for the modern understanding of judicial review, where the court has the authority to invalidate laws that are inconsistent with the constitution.

Judicial Review in India

The inception of judicial review in India can be traced to the promulgation of the Indian Constitution in 1950. India's judicial review mechanism assumes a pivotal role within its democratic structure, endowing the judiciary with the authority to scrutinize the constitutionality of legislative enactments and governmental actions. This constitutional innovation signified a profound departure from the preceding legal order under British colonial rule and laid the groundwork for the Indian judiciary to emerge as the sentinel of the Constitution and the guardian of individual rights.

³. 8 Co. Rep. 107 77 Eng. Rep. 638

⁴. 5 U.S. 137 (1803)

The principle of judicial review finds its sanctum in the Constitution itself, particularly in Articles 13, 32 and 226, bestowing upon the judiciary the power to adjudicate and annul laws and actions that run afoul of constitutional provisions. The legal maxim "Lex posterior derogat priori" — meaning that a later law repeals an earlier one — underscores this constitutional authority, as the Indian judiciary's decisions hold sway over conflicting legislative acts. Since its inception, the Indian judiciary has played a pivotal role in the maintenance of the rule of law and the safeguarding of the foundational tenets and values enshrined in the Constitution.

Articles of the Indian Constitution that deals with the doctrine of judicial review.

1. **Article 13:** Article 13 deals with the doctrine of "judicial review." It states that any law that contravenes fundamental rights shall be considered void to the extent of the contravention. This is a fundamental aspect of judicial review in India.
2. **Article 32:** Article 32 of the Indian Constitution grants individuals the right to approach the Supreme Court for the enforcement of fundamental rights. It is a crucial provision that allows the Supreme Court to review actions of both the central and state governments to ensure they are consistent with fundamental rights.
3. **Article 226:** Article 226 pertains to the power of High Courts to issue writs for the enforcement of fundamental rights as well as for other purposes. It grants High Courts the authority to conduct judicial review of actions taken by the central or state governments and other authorities.

In India, the courts bear a constitutional responsibility to interpret the Constitution and, when necessary, declare a law unconstitutional if it violates any constitutional provision. The courts function as vigilant guardians of the Constitution, consistently monitoring its adherence and integrity.

The doctrines of supremacy of the constitution and judicial review has been expounded very lucidly but forcefully by Bhagwati J as follows in *Rajasthan v UOI*⁵

It is necessary to assert in the clearest terms particularly in the context of recent history. that the constitution is supreme lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the

⁵. *Rajasthan v UOI*, AIR 1977 SC 1361(©1977)3 SCC 592

legislature or the judiciary, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits.

In *SS Bola v BD Sharma*⁶, Justice Ramaswami has provided a rationale for the practice of judicial review-

The founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, avilment and enjoyment of equality, liberty and Fundamental freedoms and to help to create a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the constitution to meet new conditions and needs of the time.

In several instances, the Supreme Court of India has underscored the significance of judicial review. Justice Khanna, in the *Kesavananda* case⁷, emphasized this importance by stating...

While Fundamental Rights endure as integral components of the Constitution, the exercise of judicial review must persist to ensure the protection of the rights guaranteed therein. Consequently, judicial review has firmly entrenched itself within our constitutional framework.

DOCTRINES

Art. 13 of the constitution has given rise to the formulation of several doctrines:

Doctrine of Severability

The legal concept known as the Doctrine of Severability, sometimes referred to as the Doctrine of Separability or Severance, permits a judge to uphold a portion of a statute or contract while ruling that other portions are unconstitutional, void, or unenforceable. Put another way, the court

⁶ . *SS Bola v BD Sharma*, AIR 1997 SC 3127, 3170.

⁷ . *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973)

has the power to "sever," or separate, the lawful provisions from the defective ones in a law or contract that contains both.

When a provision may be divided into parts that are unconstitutional or legally void and parts that are constitutional or valid, this theory is used. The objective is to protect the legitimate sections and let them stand alone.

The Doctrine of Severability allows the court to invalidate only the unconstitutional portion of a legislation, keeping the rest of the law untouched, in the event that a statute with several parts is determined to offend the constitution. This is to prevent rejecting a contract or statute in its entirety if only a section of it is flawed.

The legislative intent will determine how the Doctrine of Severability is applied, and the court will take into account whether the remaining provisions can accomplish the legislative goal on their own or with the help of other parties.

This approach is crucial for striking a balance between upholding legally binding agreements and dealing with clauses that are unconstitutional.

Doctrine of Eclipse

The Doctrine of Eclipse constitutes a legal principle addressing the temporary inapplicability or unenforceability of a law that contravenes constitutional provisions. According to this doctrine, when a law, initially deemed unconstitutional, undergoes amendment to align with constitutional norms, it is regarded as being in a state of "eclipse" during the period when it was incongruent with the constitution.

In essence, if a law, originally found to violate constitutional precepts, is subsequently amended to rectify the constitutional concerns, the revised law is considered valid from the date of the amendment onward. Nevertheless, for the period preceding the amendment, the law is deemed to be in a state of eclipse—temporarily inert or ineffective.

The doctrine acknowledges that upon amending a law to adhere to constitutional requisites, it

undergoes a revival, and its enforceability is reinstated. Throughout the eclipse period, the law is technically devoid of validity, but its legal standing is rejuvenated following the necessary amendments.

This concept is particularly pertinent when amendments are introduced to existing laws to ensure alignment with constitutional principles. It underscores the notion that legal provisions can experience renewal through adherence to constitutional standards. The doctrine of eclipse is employed to circumvent the complete nullification of the law, providing for its reinstatement following necessary adjustments to ensure constitutional compatibility.

Doctrine of Waiver

The Doctrine of Waiver is a legal principle that pertains to the deliberate and voluntary abandonment or surrender of a recognized legal right, privilege, or claim. When an individual or entity exercises a "waiver," it signifies their decision not to assert or enforce that particular right, either explicitly or through their actions.

Crucial aspects of the Doctrine of Waiver encompass:

1. **Voluntariness:** Waiver must be a deliberate and voluntary action, free from coercion or compulsion. The party relinquishing the right must do so willingly and with a comprehensive understanding of the associated consequences.
2. **Knowledge:** The party waiving a right must possess awareness of the existence of the right and the option to enforce it. Lack of knowledge regarding the right may impede the validity of the waiver.
3. **Intent:** The act of waiver should manifest a distinct intention to renounce the right. This intent may be expressly articulated or inferred from the party's conduct.
4. **Prejudice:** In certain instances, a waiver may be deemed invalid if it causes undue harm or prejudice to the other party. Courts may assess whether the party claiming waiver would suffer detriment if the right were enforced.
5. **Contractual Waiver:** Parties frequently incorporate waiver clauses into contracts, outlining the rights that can be waived and the circumstances under which such waivers are applicable. These contractual provisions are generally upheld, provided they adhere to legal standards.

Instances of waiver encompass:

Express Waiver: A party explicitly declares the abandonment of a specific right. For example, in a contract, one party may expressly waive the right to pursue legal action for a particular type of breach.

Implied Waiver: Actions or behaviour implying a deliberate relinquishment of a right. For instance, if a landlord consistently accepts late rent payments without objection, they may be considered to have waived the right to insist on punctual payments.

Waiver of Constitutional Rights: In criminal law, a defendant might waive specific constitutional rights, such as the right to remain silent or the right to legal counsel.

The Doctrine of Waiver holds significant importance in areas such as contract law, litigation, and various legal contexts where parties may opt to voluntarily forego specific rights.

Comparative Study

India and USA

A comparative study of the judicial review systems in India and the United States reveals similarities and differences in the structure, scope, and functioning of their respective judicial review mechanisms.

1. Constitutional Framework:

India: The Indian Constitution provides for judicial review primarily through Articles 32 and 226, which empower the Supreme Court and High Courts, respectively, to enforce fundamental rights.

USA: The U.S. Constitution establishes the power of judicial review implicitly in the landmark case *Marbury v. Madison* (1803), where the Supreme Court asserted its authority to interpret the Constitution.

2. Scope of Judicial Review:

India: Judicial review in India extends to both legislative and executive actions. The courts can strike down laws that violate fundamental rights and review administrative actions for legality

and procedural fairness.

USA: The U.S. judicial review system similarly covers the constitutionality of laws and executive actions. The Supreme Court's decisions, such as those based on the Commerce Clause or the Bill of Rights, often shape the boundaries of governmental power.

3. Separation of Powers:

India: The Indian judiciary acts as a check on both the legislative and executive branches. It ensures that they function within the limits set by the Constitution and do not violate fundamental rights.

USA: The U.S. system of checks and balances involves the judiciary reviewing the actions of the other branches. This includes assessing the constitutionality of laws passed by Congress and actions taken by the President.

4. Judicial Activism vs. Restraint:

India: The Indian judiciary has been known for judicial activism, where the courts take an active role in shaping public policy and ensuring social justice. This has led to the expansion of the scope of judicial review.

USA: The U.S. has experienced periods of both judicial activism and restraint. The approach often depends on the composition of the Supreme Court and prevailing legal philosophies.

5. Public Interest Litigation (PIL) vs. Class Action Lawsuits:

India: PIL in India allows citizens to seek judicial intervention for the protection of public interest. It has been a crucial tool in bringing about social and environmental reforms.

USA: Class action lawsuits in the U.S. allow a group of people with similar claims to collectively pursue legal action. These cases often address issues related to consumer protection, civil rights, and environmental concerns.

6. Appointment of Judges:

India: Judges in India are appointed by the President based on the recommendation of the collegium system, which involves senior judges of the Supreme Court.

USA: Federal judges in the U.S. are nominated by the President and confirmed by the Senate. The lifetime appointment of federal judges, including Supreme Court justices, ensures judicial

independence.

7. Impact of Precedent:

India: Precedent is not as rigidly followed in India as in the U.S. The Supreme Court may depart from its previous decisions if it believes they were wrongly decided.

USA: Stare decisis, the principle of following precedent, is a fundamental aspect of the U.S. legal system. The Supreme Court often adheres to its past decisions to provide stability and predictability in the law.

In conclusion, while both India and the USA have judicial review systems integral to their constitutional frameworks, the differences in their legal traditions, approaches to judicial activism, and systems of precedent contribute to distinct practices within their respective judicial systems.

A comparative study of the judicial review systems in India and Britain involves examining the legal principles, structures, and practices that govern the power of courts to review and potentially invalidate government actions. Both countries have distinct legal traditions and systems, so it's essential to consider their historical context, constitutional frameworks, and evolving jurisprudence.

India and Britain

1. Constitutional Framework:

India: The Indian Constitution, adopted in 1950, provides for judicial review under Articles 32 and 226, allowing the Supreme Court and High Courts to enforce fundamental rights.

Britain: The UK does not have a written constitution, but its legal system relies on common law and statutes. Judicial review principles have evolved through case law, and the Human Rights Act 1998 incorporates the European Convention on Human Rights into domestic law.

2. Scope of Judicial Review:

India: The scope of judicial review in India is broad and includes the review of legislative actions, administrative decisions, and even private actions that affect fundamental rights.

Britain: Judicial review in the UK primarily concerns the legality, procedural fairness, and

rationality of administrative decisions. It doesn't extend to reviewing the merits of policy decisions.

3. Grounds for Judicial Review:

India: Grounds for judicial review in India include violation of fundamental rights, procedural impropriety, illegality, irrationality, and unreasonableness.

Britain: The grounds for judicial review in the UK are similar, including illegality, irrationality, and procedural impropriety. The concept of proportionality has gained significance, especially in cases involving human rights.

4. Separation of Powers:

India: India follows the doctrine of separation of powers, but there is a degree of overlap between the executive and legislative branches, and the judiciary plays an active role in maintaining this balance.

Britain: The UK traditionally has a flexible separation of powers, and the judiciary's role in reviewing administrative actions is seen as essential for maintaining the rule of law.

5. Evolution of Jurisprudence:

India: Indian judicial review has evolved through landmark decisions that have expanded the scope of fundamental rights and the power of judicial review. Public Interest Litigation (PIL) has been a significant development.

Britain: The UK has a long history of common law development in judicial review, and significant cases, such as *Anisminic v. Foreign Compensation Commission*, have shaped the legal landscape.

6. Remedies:

India: Remedies in India include writs like habeas corpus, mandamus, prohibition, certiorari, and quo warranto. The courts can issue directions, declarations, and damages.

Britain: Remedies in the UK include quashing orders, injunctions, declarations, and damages. The courts have a wide range of discretionary powers.

7. Adjudicating Bodies:

India: The Supreme Court and High Courts have the authority to hear cases involving judicial review. Specialized tribunals also play a role in administrative law matters.

Britain: The Administrative Court within the High Court is the primary forum for judicial review cases. The Upper Tribunal deals with certain appeals.

In conclusion, while both India and Britain have systems of judicial review, the differences in their legal traditions, constitutional frameworks, and the evolution of jurisprudence result in distinct approaches to the exercise of judicial review powers. Each system reflects the unique political, historical, and legal contexts of its respective country.

Conclusion

In conclusion, judicial review is a crucial aspect of legal systems in various countries, providing a mechanism for courts to review and potentially invalidate government actions. This process serves to ensure that government actions adhere to constitutional principles, respect fundamental rights, and operate within the bounds of legality, fairness, and rationality. The scope and nature of judicial review can vary significantly among countries based on their constitutional frameworks, legal traditions, and evolving jurisprudence.

Judicial review plays a vital role in maintaining the balance of power among branches of government, upholding the rule of law, and safeguarding individual rights. It serves as a check on the potential abuse of governmental authority, preventing arbitrary and unjust actions. The grounds for judicial review typically include illegality, irrationality, and procedural impropriety, with some legal systems incorporating additional principles like proportionality.

The evolution of judicial review jurisprudence is often marked by landmark cases that shape the legal landscape and influence the interpretation of constitutional provisions. As seen in the comparative study between countries such as India and Britain, the specific mechanisms, remedies, and the extent of review can differ significantly. However, the underlying principle remains consistent — the judiciary's role in ensuring that government actions align with the principles of justice, fairness, and the protection of individual rights.

In a broader sense, the concept of judicial review reflects a commitment to the idea that no branch of government is above the law and that a robust legal system is essential for a just and democratic society. As legal systems continue to evolve, the application and understanding of judicial review will likely adapt to address new challenges and ensure that the principles of justice and the rule of law endure.

