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The Concept of Judicial Review as A Process – An Analytical Study

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Abstract

The power of the judiciary to scrutinize any act of the legislative or executive bodies is called judicial review. This feature forms part of the basic structure of the constitution and without a doubt gives life to the organic document. It is appropriate to refer to this feature as a check and balance mechanism thought of by the makers of the constitution. This article discusses the evolution and significance of the concept, also the understanding of judicial review in a system of parliamentary and constitutional supremacy respectively.

Keywords: *Judicial review, Parliamentary Supremacy, Constitutional Supremacy, Judiciary*

I. Introduction

Judicial Review can be understood as the power of the courts to review the legislative acts or executive action so as to check whether there has been any breach in the constitutional principles in such act or action. The judiciary itself is subject to review of its own decisions by the same court or higher court. The power of judicial review vests with the High Courts and the Supreme Court in India. It is that feature of the judiciary with which it performs the balancing exercise with respect to the other two branches of a legal system, namely the legislature and the executive. The importance of this feature could be understood if you think of a legal system where in its different branches keep doing their respective tasks and there is no authority to ensure that their functioning is not in abeyance of the constitutional principles. So, there is a need for a strict check and balance mechanism and this is where the relevance of judicial review comes in and in India the feature forms

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part of the basic structure of the constitution as well. The concept is perceived differently in civil legal systems and in common law systems. It was not even recognised till 1600s where in UK Lord Edward Coke, in the famous Bonham case[1], discussed the concept but this was not a formal recognition given to it. The British Empire always seemed to have embraced the system of Parliamentary supremacy but judicial review often came to light and gained significance in their legal thought and discussions. Therefore, it was from the UK that the US later formally upheld the process of judicial review in Marbury v Madison.[2] The decision in the Madison case is known as one of the master strokes by Chief Justice Marshall, who is one of America's greatest Chief Justices of all times. The significance of the process of judicial review in any legal system can be understood by looking into its origins particularly. This research paper aims to deal with the evolution of the concept through the different legal systems and it deals with the importance of judicial review as an essential tool for a democratic government to regulate the functions of the legislature and the executive. It goes on to explain the process as conceived by a system of Parliamentary supremacy (case of UK) and by a system of constitutional supremacy (as is the case of India). Also explains the process as perceived by the US as the concept is said to have originated there. In short, the paper discusses the scenario in UK, US and India.

II. Understanding the Concept

1. Evolution of Judicial Review

The seed of the concept is found to have grown in the British soil first. It was part of the British Legal system even in the times where they followed a monarchical form of government. India was then a British colony and our country has been upholding this principle since then. In ancient times, the king was the supreme authority and the powers of Legislative, Executive and Judiciary was exercised by him on the advice of a group of Nobles. The king and the Nobles together constituted the Royal Council (also known as Curia Regis). This system of Royal Council then splitted to operate as three separate branches – Legislative, Executive and Judiciary and these organs were to be functioning under the supervision of the King. The Royal Courts in this system practised the system of 'review'. This system gave way to the Courts of Common Law and the feature of judicial review was carried forward. In England, later, the system of Parliamentary supremacy prevailed over that of constitutional supremacy. The English judges were guided by the Blackstonian principle 'that the power of parliament is absolute and without control'.

1 Dr. Bonham v. Cambridge University, 638 Eng. Rep. 638, 646, (1610)

2 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Nonetheless, the concept of judicial review has its origin strongly rooted in the British land. It was from the English legal system, America, Canada, and various African countries borrowed this concept. India, which was primarily a British colony, never gave up on the idea of 'review' by the judiciary.[3]

England and America having embraced the concept as part of their legal systems got this idea from Lord Edward Coke's famous decision in Dr. Bonham's case in the year 1610. Lord Coke explained the concept by reporting the Calvin's case whish was decided few years earlier. In the Calvin's case it was stated that the Moral law or the Law of Nature is the supreme law and no Parliament has the right to go beyond this Law of Nature. Sir Frederick Pollock, the eminent English legal historian, says, "The omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt's time."[4] To this, Chief Justice Holt replied in 1694 in a case before him concerning jurisdiction of courts that the judges "adjudge things of as high a nature every day; for they construe and expound Acts of Parliament, and adjudge them to be void."[5] Despite these comments by legal luminaries, there is no good evidence to infer that the British courts have ever held any Parliament Act as void for not being at par with the 'Law of Nature'. Even then we can understand that it was Lord Coke that brought to light the concept of judicial review to mean that manmade laws should always be subject to a Higher Law and there has to be a proper check and balance mechanism to ensure the same.[6]

The Americans were greatly moved by Lord Coke's decision in the Bonham case. Article VI, Clause 2 of the US Constitution is called the 'supremacy clause' that upholds the supremacy of national law. This means that all acts or administrative action should be at par with the national law and the constitution. It was during the tenure of Chief Justice Marshall of the US Supreme Court, who served the Judiciary from 1801 to 1835, that the independence of judiciary and supremacy of national law was formally acknowledged. Although the concept of judicial review originated in UK, it was Justice Marshall who, in his famous decision Marbury v Madison[7], founded the practice of Judicial Review.[8]

3 Shyam Prakash Pandey, *Evolution and Development of the Concept of Judicial Review in India: An Evaluation*, 4(4) Asian Journal of Advances and Research, 25-38, 25, 2020.

4 Pollock, A Plea for Historical Interpretation (1923) 39 L. Q. REv. 165.

5 King v. Earl of Banbury, Skinner, 517, 526-7 (K. B. 1694).

6 Dudley OdelL Mcgovney, *The British Origin of Judicial Review of Legislation*, 93, University of Pennsylvania Law Review, 1-49, 1944

7 *Supra* 2

8 Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56, Washington & Lee Law Review 787 (1999), https://scholarlycommons.law.wlu.edu/wlulr/vol56/iss3/3

Alexander Bickel, a constitutional scholar believed that Marshall had done it all. "If any social process can be said to have been 'done' at a given time and by a given act; the time was 1803; the act was the decision in the case of Marbury v. Madison".[9]

Justice Marshall's Marbury vs. Madison was inspired by Hamilton's essay in the federal papers No. 78 in 'the Federalist' (1788).[10] He wrote: "whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. The judiciary has no influence over either the sword or purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment".

The 'Due Process Clause', the 5th and 14th Amendments in the US Constitution, provided the scope to exercise the power of Judicial Review by the Supreme Court; however, the practice became an integral part of the US system post Justice Marshall's decision in Madison case.

In India, the practice of judicial review evolved gradually. The powers of the judges in the Supreme Court of Calcutta (est. by Charter of 1774) were similar to that of the Kings Bench in England. The principle is first said to have established in the case of Emperor v. Burrah.[11] Later it was not formally notified even in the Government of India Act of 1935 but in 1950 when the Constitution was framed; judicial review doctrine became a part of its various articles.[12]

2. Significance of Judicial Review

Countries like USA and India have adopted federal system of governments, i.e., there are two levels of Gov. - at the centre and state. The power of judicial review is one way of ensuring that the federal system is run effectively within the framework of the constitution. This power bestows upon the courts a right to watch over the legislature and executive. Although efficiently followed by America and India, England, France and Russia have not yet adopted the principle. It is pertinent to note that the adoption of a federal system

9 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

10 RACOLB LEGAL, http://racolblegal.com/judicial-review-in-indian-context-a-critical-analysis/, (last visited Nov. 02, 2021)

11 Emperor v. Burrah, 1877 (3) ILR 63 Cal.

12 *Supra* 3

of government by a country indicates that it has decided on overlooking the system of Parliamentary supremacy. It becomes essential that a powerful judiciary is put in place to run such a federal system in line with the Constitution and not a supreme Parliamentary body. Countries like Australia, Canada and India have embraced this feature of judicial review. "The power of judicial review is based on the idea that the constitution created a government of limited powers." This holds true for the American and Indian Constitutions.

It is imperative for any democracy to establish that its people would be protected. It is their trust in the legal system of their county that forms the foundation of any democratic rule. One can always argue that in a democracy, the people elect their government and the government is expected to serve its people and this setup is in itself sufficient for the smooth functioning of any legal system. This idea largely relies on the concept of majority rule. But can such rule be devoid of tyranny just because it was the choice of the majority. Well, the answer would be no. "With all my admiration and love for democracy, I am not prepared to accept the statement that the largest number of people is always right", says Pandit Jawaharlal Nehru, who is known for his constitutional experience. Hence there is a need for a sound judicial system with the power of judicial review so that the courts can act as the supreme arbiter of the constitution.[13]

Before looking into the importance of judicial review in the Indian legal system, it can be understood that the feature is essential for maintaining constitutional supremacy and for keeping a check on any misuse of power by the other two branches of the legal system. Independence of judiciary is protected through judicial review. It ensures that tyranny is eliminated when majority rule is in place.[14]

In India, the constitution is the law of the land and if any law passed goes against the basic structure of the constitution, the judiciary is vested with the power to hold that law as void. The term 'judicial review' finds no place in Indian Constitution but there are articles which support the process of judicial review like Art 13, 32, 336, 251,254,246 etc. In India, judicial review can be exercised at three levels, that is, to examine the actions of legislature, executive and the previous decisions of the judiciary itself. Legitimizing the actions of the government and protecting the constitution if the government tries to encroach it are two important functions of the judicial review. We can see that India is more in support of the

13 *Supra* 3

14 DRISHTI IAS, https://www.drishtiias.com/daily-updates/daily-news-analysis/judicial-review-1, (last visited Nov. 02,2021).

American understanding of judicial review than that of Britain.[15]

In the Indian Constitution, Article 13 states that any law that breaches any of the fundamental rights would be held void and unconstitutional. Art. 13(1) and (2) deals with pre-constitutional and post constitutional law respectively. This power of Judicial Review with respect to fundamental rights found formal expression in Art. 8 (2) and Art. 25 (1) & (2) in the draft Constitution, which later became the new Arts. 13 (2) and 32 (1) & (2), respectively. Dr B R Ambedkar had said that if he had to mention any one article as most important, it would be Art. 32. "It is the very soul of the Constitution and the very heart of it".[16]

III. Judicial Review: Parliamentary supremacy

To understand the concept of judicial of review in a legal system where the Parliament is supreme, let us take the case of UK. In the British legal system, no Act made by the Parliament can be reviewed by the courts. It is true that the origin of the concept can be traced from the Bonham case but later Chief Justice Holt in another renowned case made a remark that "An Act of Parliament can do no wrong, though it may do several things that look odd". However, with the formation of the European Court of Human Rights and the Human Rights Act, the scope of judicial review has widened and that it's available for secondary legislations. Primary legislations generally can't be subjected to review by the courts but in certain cases that too is allowed. An Act made by the Parliament is called as primary legislation and the rules, regulations etc. made by the executive is called as secondary legislation. It can be said that there are three pillars of the British legal system, namely, rule of law, parliamentary supremacy and separation of powers. According to this, judicial review of secondary or subordinate legislation is permitted and justified.[17]

According to Diceyan expression of Parliamentary sovereignty, the parliament can pass whatever law it chooses without seeing if that enactment goes against rule of law. Now, it is questionable whether the Parliament's enactment could be contrary to the rule of law. For this we should also see if at all the parliament should pass any such legislation, how is the judiciary to respond to the situation. The current understanding of the concept in the

15 LEGAL PEDIA, https://www.legalpedia.co.in/articlecontent/judicial-review-a-brief-analysis.html, (last visited Nov. 02, 2021)

16 Legal Services India.com http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-AndUSA.html (Last visited November 5, 2014, 2:17 AM)

17 Sargam Jain, *Judicial Review: A Comparative Analysis of India, USA & UK*, Vol 1 Issue 2 International Journal of Law Management and Humanities, 2018.

UK is a bit more flexible. The judiciary has seen to be availing their powers of statutory interpretation to disobey the Parliament's intention while holding that they are abiding by it.[18] It is mostly yet secondary legislations that are being judicially reviewed and given the case of primary legislations the same holds true only in some exceptional cases.

IV. Judicial Review: Constitutional Supremacy

To understand judicial review in a legal system that believes in Constitutional supremacy; let us take the case of US and India.

In simple terms, America takes their constitution as the supreme law of the land. And the feature of judicial review is implicit in Article III and IV though not expressly mentioned. So, the Judiciary has the power to review any Act passed by the Congress or action by the President. In 1803, it was in the historic Madison case that the principle was first laid down.

The idea behind the principle of judicial review may seem to be judicial supremacy but not purely so for separation of powers is an organic feature of the Constitution. No branch of government is supreme over the other. The concept of judicial review also stems from the popular notion that the judiciary is better equipped to watch over the executive and the legislature. The court is not just a counter majoritarian institution to support but also a mechanism to uphold the democratic impulse the country purports to uphold. Judicial review is not the sine qua non for any democracy. But In America the popular acceptance of the doctrine could be due to the nation's historical experience and the nature of their Constitution.[19]

"The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America" says Bernard Schwartz. There are three possible outcomes when a judicial review is done on any act. The Act is held unconstitutional in part or in full or is held to be constitutional. The purpose of judicial review in the US can be summarised as follows- to declare the laws unconstitutional or constitutional, to uphold constitutional supremacy, to save the legislative functions of the Congress, to prevent delegation essential legislative functions.[20]

18 Amy Street, *Judicial Review and the Rule of Law*, The Constitution Society, 2013.

19 Alvin B. Rubin, *Judicial Review in the United States*, Vol. 40 Louisiana Law Review, 1979, https://digitalcommons.law.lsu.edu/lalrev/vol40/iss1/6

20 *Supra* 17

In India, the constitution is similar to the American one than the British. For in Britain the system of parliamentary supremacy still finds place whereas in India the parliament is not supreme. "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution". says Dr. M.P.Jain. Art. 13, 32, 131-136, 143, 226, 145, 246, and 372. are specific provisions that support judicial review of legislations. The doctrine of judicial review is thus an integral feature of the Indian Constitution and has the explicit sanction of it. Article 13(2) says that "The state shall not make any law which takes away or abridges the rights conferred by this Part (Part III containing Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." Therefore, it could be said that the courts act as sentinel on the qui vive with regard to the Constitution. [21]

Under our Constitution, judicial review can be classified into three[22] :

1. Judicial review of Constitutional amendments -This has been under a series of cases including Shankari Prasad case[23], Sajjan Singh case[24], Golak Nath case[25], Kesavananda Bharati case[26], Minerva Mills case[27], Sanjeev Coke case[28] and Indira Gandhi case[29]. Any constitutional amendment should be at par with the basic structure of the constitution.

2. Judicial review of legislation of Parliament, State Legislatures and subordinate legislation -Judicial review with respect to legislative competence and violation of fundamental rights or any other Constitutional or legislative limitations;

3. Judicial review of administrative action of the Central or State Governments and authorities falling within the purview of State.

21 Judicial Review – India by Thaheera Fathima

22 Justice Syed Shah Mohammed Quadri, *Judicial Review of Administrative Action*, EBC India.com (Mar. 03, 2001), https://www.ebc-india.com/lawyer/articles/2001v6a1.htm

23 Shankari Prasad v. Union of India, AIR 1951 SC 458

24 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

25 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

26 Kesavananda Bharati v. Union of India, AIR 1973 SC 1461

27 Minerva Mills v. Union of India, AIR 1980 SC 1789

28 Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147.

29 Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.

V. Conclusion

The concept of judicial review as a process have been explained above on lines of two kinds of legal systems. One where the Parliament is supreme taking the case of UK and the other where the Constitution is supreme as in the case of USA and India. It can be understood that the main aim of the judiciary is to protect the rights of its people. In an efficient legal system, it is expected that its branches should function effectively and independently. And there is a need to watch over all the branches. The judiciary is to ensure that the legal system works smoothly and people's rights are always put on a higher pedestal than any other right. It could be said that the judiciary ensures that both individual as well as collective rights are protected and harmony is maintained in the state. A country that has strengthened its judiciary is one that has embraced the goal of ensuring freedom and liberty to its people. In UK, it was seen that the concept first took shape but later gave way to supremacy of the Parliament over the other two organs of the government. So, the judicial review subsists only in very limited sense. In US and India, the Constitution prescribes judicial review and is practised more widely than in the UK. Therefore, that one organ which acts as Guardian of the law of the land is the judiciary and judicial review becomes an essential component of a legal system that upholds federalist and democratic values.