JUDICIAL REVIEW IN INDIA, USA AND UK

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ABSTRACT

Judicial review is a very important principle, necessary to an independent and impartial judiciary. It is the inherent power of the higher courts to review and examine the constitutional validity of various acts and legislations by the parliament and orders by the executive wing of the government. The legislation, act or order under examination can either be declared valid and constitutional or ultra vires or unconstitutional rendering it unenforceable. Judicial review is a weapon of sorts in the hands of the judiciary to strike down laws that are not by the law of the land, and in turn keep a check in the legislature, executive as well as the judiciary itself. It upholds the principle of supremacy of law in its essence. The true purpose of judicial review is to uphold the concept of the Rule of Law and to maintain the mechanism of Separation of Powers by keeping a check on the otherwise unfettered powers of the other branches. In this paper, the author discusses this very power of the judiciary and the principles related to it. Furthermore, the author will draw a comparative study of judicial review in India, the United States of America and the United Kingdom.

INTRODUCTION

Judicial review is considered to be one of the most important and necessary powers of the judiciary. It is the inherent power of the higher courts to review and examine the constitutional validity of various acts and legislations by the parliament and orders by the executive wing of the government. The legislation, act or order under examination can either be declared valid and constitutional or ultra vires or unconstitutional rendering it unenforceable. Judicial review is a weapon of sorts in the hands of the judiciary to strike down laws that are not by the law of the land, and in turn keep a check in the legislature, executive as well as the judiciary itself. It upholds the principle of supremacy of law in its essence. The true purpose of judicial review is to uphold the concept of the Rule of Law and to maintain the mechanism of Separation of Powers by keeping a check on the otherwise unfettered powers of the other branches. There are mainly two broad principles in this regard, these are: 'Supremacy of constitution with the requirement that ordinary law must conform to the Constitutional law' and 'Theory of Limited Government'. Furthermore, the courts have formulated numerous doctrines to better implement judicial review expounding its scope and

application such as the Doctrine of Eclipse, the Doctrine of Severability and the Doctrine of Prospective Overruling, et al.

One of the earliest cases of Judicial Review was Dr. Thomas Bonham v. College of Physicians[1] where the learned jurist Lord Coke observed that *"in many cases. The common law will control the Acts of the Parliament"*. Afterwards, the concept of judicial review was truly explained in Marbury v. Madison wherein C. J. Marshall observed that "*it is emphatically the province and duty of the judicial department to say what the law is.*"[2] The US constitution does not per se provide for the concept of judicial review but Article III of the US Constitution mentions such power of the judiciary to review matters arising under law and equity and incorporates judicial powers of the courts. Further, Article VI states that *the "Constitution of the USA is the supreme law of the land"*.The UK on the other hand does not have a written constitution. One of the earlier applicable principles in this regard was the "Parliamentary Sovereignty" in the UK. The Parliament represents the will of the people and the primary legislations may not be under the scope of judicial review. However, secondary legislations are subject to judicial review. We will further divulge into the concept of judicial review in these three jurisdictions namely India, the USA and the UK do analyse the same in a comparative sense.

JUDICIAL REVIEW IN INDIA

The Constitution of India in its spirit upholds the Supremacy of Law and the doctrine of judicial review is considered to be a part of the 'Basic Structure' of the Constitution. Nowhere in the constitution is it stated that judicial review shall be a part of the constitution however it has been interpreted to be an integral part of the constitution. The primary aim of judicial review in India is to keep a check on the powers of authorities ensuring that the same is not abused. It is a system of checks and balances which ensures proper separation of power. Laws and provisions which are declared as ultra vires shall not be enacted and are thus considered void to that effect. In Indian jurisdiction, this concept is based on the Rule of Law. It is well settled that the first case of judicial review in India was Emperor v. Burah[3] in 1877. In this case, the Governor General's Council had allegedly exercised more power than granted to them by the Imperial Parliament, and the courts allowed the aggrieved party to

[1] Thomas Bonham v College of Physicians [1610] 8 Co Rep 114
[2] Marbury v. Madison, 5 U.S. 137, 138 (1803)
[3] Emperor v. Burah, (1877) 3 ILR 63 (Cal).

challenge the validity of the legislative act enacted by the Council. The courts then had limited power to review the legislation passed. In 1913. Lord Haldane observed in Secretary of State v. Moment[4] 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".*

In the Government of India Act 1935, there was no specific legislation that allowed for judicial review per se. However, in post-independent India, the Constitution of India, 1950 does establish the Doctrine of Judicial Review under numerous Articles such as Article 13, et al. The Supreme Court under Article 32 and the High Courts under Article 226 of the Constitution of India have powers to declare a law, provision or legislation unconstitutional in a case where it is inconsistent with the provisions of Part III of the Constitution of India. There are certain doctrines in the Indian context that will help us understand the position of judicial review in India better.

DOCTRINE OF ECLIPSE

The doctrine of the eclipse applies to mostly pre-constitutional statues, wherein Article 13 (1) of the Constitution of India states that all pre-constitutional statues which are not by Part III of the Constitution of India, 1950, shall be unconstitutional, ultra vires and unenforceable after the enactment of the Constitution of India, 1950. Therefore, such statues became eclipsed after the Constitution of India, 1950 was enacted. Removing this constitutional ban would make those statues free from the eclipse and therefore enforceable. In the landmark case of Bhikaji Narain Dhakras v. State of Madhya Pradesh,[5] the State Government was authorised to exclude all private motor transport operators from the market of transport business as per the existing state laws. The apex court held that after the Amendment of clause 6 of Article 19, the constitutional impediment was thus removed, making the impugned act enforceable and operative.

DOCTRINE OF SEVERABILITY

According to this doctrine, the court can severe or separate the part of the impugned legislation which is unconstitutional from the rest of the said legislation, keeping the constitutional part intact and enforceable. Article 13 of the Constitution of India applies this

[4] Secretary of State v. Moment, (1913) 40 ILR 391 (Cal).
[5] Bhikaji Narain Dhakras v. State of M.P., (1955) 2 SCR 589 (India)

doctrine to the *"extent of the contravention"* making this the basis of this doctrine. Unless the valid and invalid part of the impugned legislation or law is so inextricably merged that they may not be separated from each other, in which case the entire legislation, law or provision shall be ultra vires. Section 14 of the Preventive Detention Act was challenged in the landmark A. K. Gopalan v. State of Madras[6] case wherein the apex court wisely observed that section 14 shall not be struck down as a whole. The apex court applied the doctrine of severability and struck down the invalid and unconstitutional part of the provision keeping the valid part intact and enforceable.

DOCTRINE OF PROSPECTIVE OVERRULING

According to this doctrine, the courts attempt to interpret a decision in a previous case as a precedent in a way that allows it to be applicable to suit the present-day needs. It is not applied in a way that creates a binding effect upon the parties to the original case or other parties bound by the precedent. The apex court applied this doctrine in the landmark case of Golak Nath v. State of Punjab.[7] The Hon'ble Supreme Court observed that *"The doctrine of prospective overruling is a modern doctrine suitable for a fast-moving society."*

JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

The Parliament has the power to amend the Constitution. However, is this power unfettered? There arose a conflict between the judiciary and the legislature regarding the power of the parliament to amend the fundamental rights under Article 368 of the Constitution, and this question was taken up by the apex court in the case of Shankari Prasad v. Union of India[8] wherein the validity of the Constitutional Amendment Act, 1951 was challenged. The apex court held that the power to amend the Constitution including fundamental rights is within Article 368. The court further explained that the word 'law' in Article 13 shall include only ordinary laws made in exercise of the legislative powers of the parliament and shall not include Constitutional amendments. Thud, making constitutional amendments valid even in cases where they are about fundamental rights. Subsequently, similar questions were raised in Sajjan Singh v. Rajasthan[9] and Golak Nath v. State of Punjab[10].

[6] A.K. Gopalan v. State of Madras, (1950) SC 27 (India).
[7] Golak Nath v. State of Punjab, AIR 1967 S.C. 1643 (India).
[8] Shankari Prasad v. Union of India, AIR 1951 S.C. 455 (India).
[9] Sajjan Singh v. Rajasthan, (1965) 1 S.C.R. 933 (India).
[10] Golak Nath v. State of Punjab, AIR 1967 S.C. 1643 (India).

The apex court had to dwell into the matter again in Kesavananda Bharati v. State of Kerala.[11] This judgement gave us the Basic Structure Doctrine which was a Limitation on the Amending Power. In contemporary times as well, the Supreme Court has been a watchdog looking out for cases that contain ultra vires provisions. In Madras Bar Association v. Union of India[12], the apex court declared certain provisions of the Companies Act 1965 ultra vires as they did not agree with the Constitution of India. In this case and many more, the courts in India have used the Doctrine of Judicial Review in expanded ways to uphold the supremacy of the constitution and rule of law in India.

JUDICIAL REVIEW IN THE UNITED STATES OF AMERICA

The Constitution of the US is a written constitution. It has been drafted to uphold the federal and democratic spirit on which the US was formed. Judicial review, in the US, has a fundamental position in the judicial process. There is not a direct mention of the process of judicial review in the US constitution, however, they have implicitly incorporated Article II and Article IV which speak of the same. Jurist B. Schwartz wrote that *"The decision on the question of the constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America."* Judicial review in the US is considered to be a foundational doctrine well embedded in their legal process aimed primarily to protect the supremacy of the constitution and to keep a check on the actions of the Congress as well as State Legislatures. The historic landmark case of Marbury v. Madison[13] is synonymous with the inception of judicial review as a fundamental, mainstream and necessary doctrine. In this case, William Marbury filed a petition before the US Supreme Court challenging the administrative orders of President T. Jefferson. Marbury and others were denied their new employment as a consequence of the actions of Secretary of State James Madison refused to convey to the administrative authorities. Learned Chief Justice Marshall gave a landmark judgement in this regard. The highest court of the land held that it has inherent power to determine the validity of any law of the land. Further, it declared unconstitutional Section 13 of the Judiciary Act, 1789. Through this case, the US Supreme Court formulated the principle and doctrine of Judicial Review in law. Subsequently, there was a great deal of expansion to the scope of this doctrine. In 1918 a case came forward challenging the state taxation of a federal bank in

[11] Keshavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India).
[12] Madras Bar Association v. Union of India, 2015 S.C.C. 484 (India).
[13] Marbury v. Madison, 5 U.S. 137, 138 (1803).

Maryland. The court in McCulloch v. Maryland[14] held that the state may not impose a tax on a union authority. In contemporary times, the scope of judicial review in the US has widened even more. A much recent judgement of the court was Reed v. Town of Gilbert, Arizona.[15] There was a challenge to an ordinance prohibiting the display of outdoor signs except political signs creating a distinction between political signs and ideological signs. Court held that all content-based laws that target speech based on its communicative content are unconstitutional unless the state proves a narrowly tailored and compelling state interest in the same.

JUDICIAL REVIEW IN THE UNITED KINGDOM

As briefly discussed earlier, the case of Dr. Bonham v. Cambridge University[16] laid down the foundation of judicial review in the UK. However, the UK has the sovereignty of the parliament. Chief Justice Holt, in City of London v. Wood unequivocally states that *"An Act of Parliament can do no wrong, though it may do several things that look pretty odd".*

DOCTRINE OF PARLIAMENTARY SOVEREIGNTY

This doctrine in plain reading states that the courts in the UK have no power to review the legality of the enactments of the British Parliament. The judicial system in the UK is broadly based upon the doctrine of Legislative Supremacy and Parliamentary Sovereignty. It is considered that people in the UK enjoy the final say and are the source of power. The Parliament, therefore, which represents the will of the people can legislate on any matter without any constitutional restrictions. The legislative acts of the British Parliament are referred to as Primary Legislations. These 'primary legislations' fall outside the purview and scope of judicial review except in the rarest of cases wherein the legislation may affect the European Community under the European Convention of Human Rights, et al. However, secondary legislation which are legislations passed by various ministries shall fall within the scope of judicial review by the courts. All administrative and executive functions, rules, regulations, and orders can be reviewed by the court and if found to be against the law of the land, they can be declared ultra vires. In the case of R. v. Secretary of State for Transport,[17] the courts stated that the individual may challenge national measures and the courts have the

[14] McCulloch v. Maryland, 4 Wheaton 316, 32 (1819).
[15] Reed v. Town of Gilbert, Arizona, 13 US 502, 23 (2014).
[16] Dr. Bonham vs. Cambridge University [1610] 638 Eng. Rep. 638, 646.
[17] Case C-213/89, R v. Secretary of State for Transport, 1990 2 A.C. 85, 34.

power to declare them unenforceable and unlawful in relevant cases. The court observed that all national measures fall within the scope of judicial review if they are incompatible with the Community law.

In the UK, subordinate legislation is subject to judicial review as well as it does not affect the Sovereignty of the Parliament. Not only does this not violate the doctrine of Parliamentary Supremacy, but it is also is by the doctrines of Rule of Law and Separation of Powers.
In contemporary times, the UK still follows a strict application of the principles of judicial review developed in the UK wherein administrative actions and secondary legislations fall within the scope of judicial review. However, owing to the doctrine of Parliamentary Sovereignty the primary legislations are not under the scope of judicial review. In the recent case of R. (on the application of Drammeh) v. Secretary of State of Home Department,[18] the claimant had applied for a judicial review challenging his immigration detention. The detainee had a schizoaffective disorder and the courts observed that his mental condition was indeed a relevant factor to establish what constitutes a 'reasonable period' of detention. The court also observed that where the detainee can refuse to consent for his medical treatment, it put him outside the purview of the Secretary of State's policy statement as per Chapter 55.10 of the Enforcement Instructions and Guidance.

CONCLUSION

The scope of judicial review has a very different meaning in the United States of America and India as compared to the United Kingdom. While the Constitution of the United States is considered to be very rigid, it implicitly states that the judicial review process shall be fundamental to the constitutional values and the courts have backed that up in their many case laws. The constitution of India has a clear mention of judicial review and supremacy of the Constitution, more specifically Article 13, but also Articles 32, 143, 226, and 227 amongst others. In the US, Articles III, IV and V incorporate judicial powers of the courts and uphold constitutional supremacy making all other laws subject to the constitutional provisions.

The United Kingdom, on the other hand, does not have a written constitution. Moreover, it works on the doctrine of Parliamentary Sovereignty which unequivocally states that the will f

[18] R. (on the application of Drammeh) v Secretary of State for the Home Department [2015] 3 EWHC 2754.

people is supreme. The will of the people is at all times represented through the Parliament elected by the people and thus the Parliament has a free hand and unfettered powers to make laws on anything without any constitutional limitations. Judicial review is the process of enforcing the constitutional limitations but as the UK lacks the same, the Parliament shall not be checked by the courts. However, there is a distinction between primary and secondary legislation, the latter falling within the purview of judicial review doctrine in the UK. All decisions and laws, regulations, rules, et al passed by the ministries including administrative orders shall be categorised as secondary legislation thus falling within the process of judicial review. The distinction between these jurisdictions represents not only the legal similarities and dissimilarities of the legal process and constitutional provisions, but it also reflects on the type of democratic functionality and society at large. Only in a country like England wherein the Parliament bears the burden of representing the will of the people at all times, can the doctrine of Parliamentary Supremacy work. In India, the same may not work in its best applicability. Similarly, the balance of powers is maintained in each jurisdiction as they have their respective checks and balances in place. The doctrine of judicial review fits perfectly, more or less in each system serving its purpose of ensuring Rule of Law and Supremacy of the Constitution as best it can be applied.