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# JUDICIAL REVIEW IN THE INDIAN SUBCONTINENT

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Vasantkumar V Takke, Kirit P Mehta School of Law NMIMS

## Introduction

Judicial review is a concept or a doctrine which originated in the American Supreme courts where there were no express provisions in the American constitution. The concept of judicial review originated in one of the landmark judgements of the US Supreme Court in *Marbury v. Madison*<sup>1</sup> where Chief Justice John Marshall for the first time introduced the doctrine of judicial review which is an important and integral part and was needed to be added in the US Constitution, as it provided checks and balances on the legislature and executive action. Chief

Justice John Marshall said, "Certainly all those who have framed the written Constitution contemplate them as forming the fundamental and paramount law of the nations, and consequently, the theory of every such Government must be that an act of the legislature, repugnant to the Constitution is void"<sup>2</sup>. Judicial review is the power of the Courts of law where they test the validity of all legislative and government action with reference to the Constitution and if they are violative of any constitutional provision or provisions, they are declared to be unconstitutional and void. It's very interesting fact that Judicial review is not just a doctrine but a protector of the right of people and protector of the Constitution. It is a weapon in the hands of Judges of the Supreme Courts and High Courts where it may be any country within the Sub-continent where Judicial review has played a major role in protecting the Supreme Law of that Constitution. It may not be wrong to say that Judiciary with the help of Judicial review has tried to uphold the law till its last breath.

## Issues

When we see the entire system which has been created by the humans the first thought that comes to my mind is that how everything such as the concept like state, constitution, legislature, executive, judiciary and many more has come into existence. But it is simple to

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<sup>1</sup> Cranch (5 US) 137, 2 L. Ed 60 (1803)

<sup>2</sup> Ibid [16] (Lord Marshall Cj)

understand that the complex brain of humans beings were things are created and they are brought into course of action where there will be some lacuna , issues which will exist with it, as we all know nothing is perfect in this world, but still the thing goes on with certain solutions needed to be found and that issues need to be answered at the same time the doctrine of judicial review to my mind created a lot of question regarding its importance and existence in the Constitution. There are three major pillars in a nation which are the legislature who legislates the law and Executive who executes the laws and Judiciary who is the protector of these laws, it is very important to understand that the Judiciary curtails the powers of the legislature for legislating the laws as exclusively given by the constitution, thus judicial review is a weapon which reviews the laws and if they are inconsistent with constitution then declares them unconstitutional and stuck them down, thus the laws which are a serious question on the accountability and the ability of the legislative powers bound to be unconstitutional and needs to be stuck down. At the same time it's very interesting to know how Judicial review is the protector of the Constitution and what is its scope and extent. Thus, these are all the issues which are needed to be addressed in this article, and with the help of a comparative study with analysis of the jurisprudential part of the Doctrine of Judicial Review with the Constitution of different countries and their present status of judicial review and their position in their Constitution. Moreover, one also needs to examine various case laws, where various countries' Courts have propounded the importance of the constitution as the supreme law and the wide interpretation of judicial review stating its importance in public law and public accountability; and to ensure that the public power is well establish within the norms and principles of the Constitution.

## **RULE**

Comparative Analysis of Judicial review in South Asian Constitutions :-

### ***Judicial Review in India:-***

The Indian Constitution is more kin towards the US Constitution than British Constitution where British Constitution believes in supremacy of the Parliament whereas in India the Constitution is Supreme in front of the Parliament and its powers are limited and they are further divided in union and states. Where the parliament is competent to pass laws. As the constitutional courts are the protectors and the guardians of fundamental rights they arbitrate

the constitutional conflicts between union and states in respect to their powers they are in a significantly important position for exercising their power of reviewing legislative enactments administrative orders, judgements, etc.

Where the power of judicial review of any legislation or any administrative action comes before the court of law for reviewing, the courts are in very crucial position to see that they uphold the constitution and see to it that the law which is under review is not transgressing the constitution as the courts have the power to declare the enactment as invalid as the judicial review power, which is given to the judiciary derived from political theory and the texts of the constitution. Then again there are specific provision in the Indian constitution for the judicial review such as ARTICLE 13, 32, 131-136, 143,226, 145, 246, 251, 254 and 372<sup>3</sup>.

Judicial review can be categorised under three heads<sup>4</sup>

1. Judicial review of constitutional amendments.
2. Judicial review of legislative enactments union as well as states.
3. Judicial review of administrative action of UOI and state government.

Therefore, Judicial review is doctoring by the judiciary, which is enshrined in the constitution of India and thus gives immense power to the judiciary with certain restrictions while reviewing the law. All powers are capable of abuse, and the power to prevent this abuse is the acid test of effective of judicial review.<sup>5</sup>

As in India the power of judicial review exclusively lies with the Hight Court and the Supreme Court, where in the terms of power of the high court which is limited in nature and in comparison to supreme court which is much wide while exercising its review jurisdiction where they are the courts of last resort where they in a review petition have a restrictive scope to interfere which can be understood with the help of following case laws:-

Shankari Prasad v. Union of India<sup>6</sup> where the first Amendment Act of 1951 was under challenge before the Apex Court on the ground of abridged of right to property as there was

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<sup>3</sup> The Constitution of India, 1950, arts. 13,32,131-136,143,226,145,246,251,254,372

<sup>4</sup> Justice Syed Shah Mohammed Quadri, Judicial Review of Administrative Action, (2001) 6 SCC (Jour) 1.

<sup>5</sup> Wade, Administrative Law, (1994), pp. 39-41.

<sup>6</sup> AIR 1951 SC 458

a restriction on the amendment on fundamental rights under Art. 13(2) where the Supreme Court Unanimously rejected the Contention and held that the Art. 368 is perfectly legislated where it empowered the parliament to amend the laws but it should not harm the basic structure as a result that Art. 13(2) doesn't affect the amendments made under Art. 368.

I.R. Coelho v. State of Tamil Nadu<sup>7</sup> where the court held that any Act which is inserted in the 9 Schedule can be judicially can examine but only those enactments where came into existence and inserted after 24<sup>th</sup> April 1973 . even the court observed where there is an invasion of fundamental rights the courts power of judicial review come in.

### **Judicial Review in Sri Lanka:-**

The doctrine of judicial review can be seen in the light of the Art 126<sup>8</sup> enshrined in the Sri Lankan Constitution where it talks about the if there is any infringement or any Imminent infringement of the fundamental rights by the executive or the administrative actions where the Supreme Court will issues in form of writs to the authority and give relief in the matter where a constitution which is founded on democracy and rule of law here it is sacrosanct for the protection of the fundamental rights through the tool of Judicial review. In Sri Lanka where judges are borrowing the lust and fertile jurisprudence of administrative law .

As we can see in the case of Wickramtunge v Anuruddha Ratwatte<sup>9</sup> where petitioner had made an application under Art 126 of the Constitution where laid down several principle for fair conduct the public body as the they have focused more on the administrative law where they have observed that the pubic body or administrative body should act reasonably and fair not erode the value of fundamental right guaranteed by part III of the Constitution.

The entire Review doctrine which has evolved in the Sri Lankan Constitution can be referred though such case laws Gunaratne v Sri Lanka Telecom<sup>9</sup>, Surendran v UGC<sup>10</sup> where if there is any gross violation of Fundamental rights the Supreme Court has been the First to stood up and protect and secure rights of the people under Art. 126 where executive and administrative actions had made accountable and tried to keep checks and balances and see to it that fundamental rights are restored back with judicial review which exclusively like with the

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<sup>7</sup> (1999) 7 SCC 580

<sup>8</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, art. 126. <sup>9</sup> (1998) 1 Sri LR. 201

<sup>9</sup> (1993) 1 Sri LR. 109

<sup>10</sup> (1993) 1 Sri LR. 344

Supreme Court who is the last court of resort and Appeal who is the interpreter of the constitution and temple of Justice.

### **Judicial Review in Pakistan**

The Constitution of Pakistan is based on two constitutions, one is American and the other is the British Constitution, where it has borrowed from both the nations

Pakistani Constitution recognizes limited form of government. And the principle of judicial review was first time introduced in the year in 1962 under Art. 98<sup>11</sup> of the Constitution of Pakistan but eventually with amendment in the constitution Art. 199<sup>12</sup> was introduced which is the successor of the Art 98 of the 1962 Constitution where the language and the substance of the Article has not change in its true spirit and essence, as the writ jurisdiction may differ in Pakistani Constitution than the British Writ practice.

If we see all the questions which arise in Judicial review regarding the constitutional validity of the Legislative enactments arising due to administrative action which clearly states in Art. 199 i.e. the power vested in the Constitutional courts, where they sometimes direct a person performing functions in connection to the affairs of the federation or a province where they are permitted by law to do something or not permitted to do something where the courts makes effort to achieve the ends of justice and to see that no person's fundamental right has been infringed and keeps a check on the administrative bodies, thus this is the power of judicial review which can be seen in Pakistan while dealing with such petitions.

As the Judicial review doctrine in Pakistan can challenge the validity of the legislation which is violative of the Constitution but it has been evident with a case law where they have not identified the doctrine of basic structure but in Abdul Wali Khan<sup>14</sup> and Pakistan Lawyers Forum v. Federation of Pakistan<sup>13</sup> but if the constitutional amendments can only be challenged it they are unconstitutional.

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<sup>11</sup> The Constitution of Islamic Republic of Pakistan,1962,art.98

<sup>12</sup> The Constitution of Islamic Republic of Pakistan,1973,art.199 <sup>14</sup> PLD 1976 SC 57

<sup>13</sup> PLD 2005 SC 719

## Judicial Review in Nepal

The Kingdom of the Nepal believed in the concept of separation of the powers where in Nepal Judiciary is an independent body and for the first time in the case of *Bisheshwor Prasad Koirala v Government of Nepal Kathmandu Magistrate*<sup>14</sup> where the Supreme court had an occasion to deal with the constitutionality of the sawal of Kathmandu Magistrate on the constitution where they held that sawal of Kathmandu Magistrate was violative of constitution as it violated the principle of independence of judiciary where for the first time the Supreme court of Nepal observed that any Act which is violative or contrary to the Constitution is declared as unconstitutional.

Under Article 88<sup>15</sup> of the Constitution the power of judicial review is vested with the Supreme Court where Art 88(1) says that any law or any part of it which is inconsistent with the Constitution and violates on the enjoyment of fundamental rights will be declared void, Similarly under Art. 88(2) writs can be issued, and so the concept of judicial review is for harmonizing constitutional culture and values where the aim of the supreme Courts is that the door of the Courts should not be closed for poor and needy people whose rights have been infringed and where they will suffer injustice and where the governmental bodies will be more and more arbitrary and where the true essence and aim of the constitutionality and rule of law will not be able to achieve.

## Analysis

While comparing the five Asian countries constitution and the doctrine of judicial review it seems to me that judicial review has played a major role in the constitution and has been an important aspect in the protection of the fundamental rights and the basic structure of the constitution as it is very important doctrine which exists in the constitution where it keeps a check and balance on the legislative and administrative actions where the drafters of all the above mentioned countries' Constitutions has been very smartly drafted, and the existence of the provision of judicial review reaffirms the fact that they have foreseen the future where there should be some tool in the hands of the Judiciary to keep a check on the Legislative and administrative actions as otherwise it would be a havoc and the nobody would have to abided by the constitution. As Dr M P Jain said "The doctrine of judicial review is thus firmly rooted

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<sup>14</sup> NKP 123 (2016)

<sup>15</sup> The Constitution of Kingdom of Nepal, 2015, art. 88

in India, and has the explicit sanction of the constitution."<sup>16</sup> In the same way the doctrine judicial review has its importance as it's a weapon in the hands of judiciary with which it keeps a watch on the act which are violative of the constitution and declares them void. In a way we can say judicial review is the protector of the constitution where it upholds its sanctity in its true sense and even the protector of the fundamental rights as every country has recognized limited form of government and they are all more kin towards the U S Constitution where the constitution is Supreme than the Parliament as we can see in each and every Constitution there are specific provisions which are dedicated for the Judicial Review and the important task of Reviewing lies with the Constitutional Courts or the Supreme Court where they play a major role in interpreting the constitution and being the last court of resort protecting the constitution and seeing to it that laws are in consonance with provisions of the constitution. It does not in way curtail the power of legislature where we know we have a chapter of presumption where we presume that legislature has enacted an Act with some intention behind it but sometime the presumption may go wrong which need to be rectified with the help of judicial review.

## Conclusion

Judicial review is a very essential element in every constitution of any nation as it is sacrosanct and very integral part of the constitution where with such a tool the Judiciary is empowered to declare disputed Acts as void, which are inconsistent with constitution. Where the judiciary also plays an important role in staying within the boundaries which are marked by the constitution and keeps a check and balance on the legislature and executive and administrative acts and protects the constitution and the fundamental rights of the citizens from getting violated, this great doctrine which is given to all the Asian countries by the Chief Justice John Marshall in the celebrated precedent of Marbury vs. Madison<sup>19</sup> here today we can see the importance of that doctrine which is used for achieving the ends of justice for people of the nation and as the Constitution which is a document which is equally sacred, just like the holy text it has been the guard which has provided a shield of the highest Order that is the Constitution from getting invaded by the ultra vires Act. Hence judicial review is important as it keeps the balance of rule of law and democratic values and finally the most important constitutional rights of the citizen<sup>17</sup>.

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<sup>16</sup> Judicial Review and The Indian Courts, Chinmoy Roy, January 23, 2012  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990601](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990601), Accessed 10.11.21 <sup>19</sup>  
Marbury (n 1)

<sup>17</sup> Judicial Review in Nepal, Apurba Khatiwada, March 28 2006,  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=893803](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=893803), Accessed 13.11.2021