
Judicial review the bulwark against arbitrary state action (April, 2025)

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ABSTRACT Law making is the prerogative of parliamentarians or the people or officials on whom such power is conferred or delegated by constitution. Making law is not a doddle, it requires deliberations, valuable insights and deference to the constitution. The laws made by the legislature is the law of land which is to be followed by each and every citizen of a country. The topic for analysis is what would happen if the law suffers from legislative dysfunction or is without due deliberations, will it still be followed or declared unconstitutional. Judicial review is the panacea for the laws which are afflicted by legislative dysfunction or the laws which are ultra vires. The present research paper provides an insight on judicial review and its historical background. Further, this paper discusses the importance and scope of judicial review in Indian legal jurisprudence. It's ambit in India and the United States of America. At the end the paper attempts to delineate on the views against the use of judicial review by the judicial department.

INDEX TERMS Deference to Constitution, law of land, legislative dysfunction, Judicial Review.

I. INTRODUCTION

Law is not just a word or set of norms and guidelines which is followed by everybody. Rather, it is the principle which governs the life of individuals, their rights, entails duties and provide remedies for whoever is being aggrieved by formation and implementation of unjust laws or by administrative action of the state which are against policies and rule of law. All the three sects of government be it legislation, executive or judiciary have defined sets of roles to be performed by them within the territory they operate. Each and every country at their top has a legislative body called parliament often known by different names in different countries. The role of parliament is apparent, to make laws for governance of various activities and that of executive to implement the laws framed by legislature. The judiciary is assigned with the role

of interpreting the constitution and to protect the rights of people. The belief and principle that the constitution is supreme lex, the permanent law of land, there is no authority above it grants the judiciary the power to check laws made, the manner in which the law or legislation is made and the implication it can have on life and liberty of people. This power of the courts is popularly known as judicial review which in some jurisdictions are expressly provided in the constitution like India or derived from the provisions of the constitution like the United states of America (USA).

A. *Judicial review and its historical background*

Rights are moral or legal entitlements that protect individual freedom and interests which are enforced through courts. The Constitution guarantees rights to the citizens of a country, these rights may be abridged or curtailed or affected by a law made by legislature or an executive order. The citizens are the ultimate brunt bearers of such kinds of actions and to protect citizen's rights and interests the courts are entrusted with inherent powers of which judicial review is one among them. Judicial review, the power of the judiciary to examine the constitutionality of legislative enactment and executive order, which if found violative of constitutional provisions or found to be ultra vires, can be declared unconstitutional or null and void. The doctrine of judicial review is needed to uphold the principle of supremacy of law (there is no one above law) to check that government authority does not transgress their authority and to protect the rights of citizens.

The power of judicial review is a time-tested theory practiced from inception of the constitution in some jurisdictions and in some even before that. The famous case of *Marbury v. Madison* (1803), USA is often believed to be the originator or proponent of the concept of judicial review, but perusal of several research papers tells a different story and establishes the practice of the concept of judicial review even before the *Marbury* case. We will be looking at some cases which can provide instances of use of judicial review before *Marbury*.

The first case, *Holmes v. Watson* (1780), involved the challenge to statutes limiting jury trial. The New Jersey supreme court invalidated a state statute which authorised seizure of loyalist property and stated that the trial to determine the impugned property, whether it belonged to loyalist person or not would consist of a jury of six men only. It was against the constitutional provision of New Jersey which provided for twelve jurors for a trial. The court declared that

such a jury as determined is not a constitutional jury and thus the statute is unconstitutional

In another case, in the New Hampshire Ten pounds case the state legislature in (1785) passed a legislation named "The ten pound act" which stated that action for debt and action for trespass not involving title to land would be tried without a jury, if damages claimed were less than ten pounds. The said statute was held unconstitutional which was later repealed by the Hampshire legislature.

In *The Symsbury* case, the superior court of Litchfield county declined to give effect to an act of the state assembly that purported to resolve a land dispute. The intent of the decision was that the legislature could not resolve a boundary dispute between rival claimants.

Prisoner's case, in this case the petitioners were three loyalists convicted of treason. The House of Delegates granted pardon to them while the Senate had refused to do so. The state statute provided that the assent of the general assembly, the general assembly consist of both the house of delegates and the senate. The question was whether assent of house of Delegates is sufficient or assent of both the house is required. The prisoners challenged the statute to argue that assent of the House of Delegated is sufficient, the arguments were regarding the interpretation of constitution whether it should be interpreted according to textual sense or it should be according to the intent of the legislature. Two judges ruled in favour of prisoners and rest uphold the constitutionality of the statute.

In a British case, known as *Bonham's case* Lord coke opined that if an act of parliament is repugnant or against the common right and reason, the common law will control it and may declare such act to be void. (however, due to unwritten constitution British follow the supremacy of parliament and law made by them cannot be challenged)

The above mentioned cases (although there are many more) present the instances of use of judicial review by the courts even before Marbury. The first two cases involved the invalidation of statutes which tried to alter the provisions which dealt with power of court (jury trials). The third case involves an act of legislature in a property matter dispute which was invalidated by the courts. The fourth case is slightly different from the first three cases as it involved the challenge to a statute which does not deal with provisions of the court's power.

However, it cannot be said that all the jurists or legal philosophers were on the same note about the use of judicial review by the courts. Some jurists believed that statute should be invalidated only when they are clearly in contrast with the constitution. Some believed that such powers should not be exercised by courts while some stated if a statute is against the spirit of constitution, it should be declared unconstitutional.

Marbury v. Madison

A landmark case in US supreme court which popularised the term judicial review however the power of judicial review was widely used before Marbury. In 1801, William Marbury was appointed as justice of peace but his commission was not delivered before president John Adams term. The new President Thomas Jefferson ordered secretary of the state James Madison not to deliver the commission. Marbury filed a petition in the US supreme court to command Madison to deliver the commission. The supreme court ruled in favour of Marbury and stated that Marbury is entitled to commission, Madison's refusal to deliver the commission was unlawful. The court also established its power to review laws and the state actions on the basis of constitutionality, reinforcing the principle of separation of power between executive, legislature and judiciary affirming constitutional supremacy.

II Judicial review in Indian legal jurisprudence

The independence of India from the Britishers led to slew of changes, among which the formation of the constitution of India was the most significant step. The nation whose citizen's freedom, interest and rights were subjugated to the maximum level, was to provide the citizens of this country with rights and freedom to which they were deprived off through social revolution. The commitment to social revolution lies in part iii and iv of the constitution of India. Another magnificent step was the replacement of the Federal court by the Supreme court of India as the highest court of appeal in India with varied powers to ensure justice.

Unlike USA, Indian constitution itself confers the power of judicial review on the supreme court and high courts through various articles of the constitution, such as article 13(it says that any law which is inconsistent with the fundamental rights guaranteed in part iii is void), article 32(empowers supreme court to issue writs for enforcement of fundamental rights), article 136(it says that supreme court can review its own judgement, orders and those of subordinate courts), article 131(it provides for original jurisdiction of supreme court), article 226(empowers high court to issue writs, for enforcement of fundamental rights and other legal rights). Regarding the rights of people and citizen courts are assigned the role of sentinel on the qui vive.

The doctrine of judicial review in India can be used to check the constitutional validity of a legislation enactment or an executive action by the Supreme court and high courts on three grounds (i) It infringes the fundamental rights, (ii) It is repugnant to the constitutional provisions, (iii) when it is outside the competence of authority which has framed it.

India follows a parliamentary form of government also known as Westminster model of government in which a party specially in India if

secures majority of seats in Lok sabha forms the government and leader of the party is elected as Prime Minister, which further chooses his/her cabinet either from Lok sabha or from Rajya sabha. To become a minister the membership of either of the houses is a sine qua non. This shows the interdependence between executive and legislature. As stated making of laws is not a doodle, it requires due deliberations, valuable insights and deference to the constitution. This interdependence may weaken the parliament and impede it from performing its function independently without maintaining adequate checks and balances on the executive. To mention a few, the frequent passage of bills through parliament, subversion of procedures that are meant to facilitate deliberation, sometimes the bills which do not find much support are passed through voice votes. The best illustration is of the agricultural reform bills which were passed without required deliberation and it resulted in the nation witnessing a protest of farmers. Such conditions make use of judicial review necessary to stop the sects of government to transgress their power and authority.

The case of *Champakam Dorairajan v. State of Madras* (1951) establishes the use of judicial review in India, the Supreme court declared Madras government order reserving seats in Medical college for certain communities unconstitutional, as the order violated equality provision.

In *Puttaswamy v. Union of India* (2017) supreme court affirmed that right to privacy is a fundamental right recognised under article 21 and struck down mandatory linking of aadhar with various services.

In *S.R. Bommai v. Union of India* (1994) supreme court struck down the imposition of president's rule in Karnataka holding it was unconstitutional.

A. Money Bill

Article 110 of constitution of India which provides that any bill dealing with taxation, government spending and borrowing or those bills which fulfil the conditions mentioned under the article, with prior permission of president can be introduced in Lok sabha and there is no requirement of a money bill to be introduced in Rajya sabha for any deliberation by the members of Rajya sabha. Such important bills should not be passed without taking insights from Rajya sabha as it is a pertinent part of the legislature. It may be the case that a bill not fulfilling the definition that article 110 stipulates may be passed as a money bill just to skip the scrutiny of the upper house. I argue that in such a situation in which due process to make a legislation is not followed the role of judicial review becomes paramount, several times courts have struck down sections and provisions within a money bill that were unconstitutional.

B. Judicial review and the 9th schedule

The acts and regulation which were included in the Ninth schedule were saved from being challenged and invalidated as unjust by article 31B. schedule 9 contains acts and regulation which deal with land reforms and social welfare legislation. It provided a blanket protection to acts and regulations and limited the scope of judicial review. However supreme court in *I.R. Coelho v. State of Tamil Nadu*, 1997 (2007) the supreme court ruled that blanket immunity cannot be granted to acts and regulations included under 9th schedule on and after April 24 and they are open to challenge if they violate the article 14, 19 or 21. The supreme court will use either "rights test" or "the essence of rights test" to determine whether the law enacted by the government violates any fundamental rights or essence of a right. If the law fails to pass the test it can be declared unconstitutional while action taken or transaction done under the challenged act are not open to challenge.

C. National Judicial Appointment Commission (NJAC) case.

In the year 2014, government of India came up with national judicial appointment commission (NJAC) act, 2014 which was to replace the collegium system of appointing judges to higher judiciary. The NJAC would consist of members of judiciary and executive both to appoint judges to supreme court and high courts. This particular law dealt directly with power of court judiciary which was challenged on the ground of harming the independence of judiciary and thus violates basic structure of constitution. The supreme court using the powers under judicial review struck down the 99th constitutional amendment on the ground that it harms independence of judiciary, which forms part of basic structure of constitution.

The cases mentioned, discussion about money bill and the 9th schedule represents use of judicial review in India by the courts to protect rights of citizens, independence of judiciary, curb the arbitrary actions and establishes the importance of judicial review in Indian legal jurisprudence. The supreme court of India which is the highest court of appeal has used powers of judicial review to struck down laws which suffers from legislative dysfunction and laws which infringed on fundamental rights. The supreme court has declared the judicial review as a part of basic structure of constitution which means that even a constitutional amendment cannot curb this power of the judiciary. In a country like India where there is interdependence of executive and legislature which can lead parliament to dysfunction or favour a particular ideology to cater to needs of only majoritarian the judicial review is bulwark against such kinds of actions.

III Ambit of judicial review in India and United States of America (USA)

India follows parliamentary form of government where there is interdependence of executive and legislature in contrast USA which follows Presidential form of government where there is

clear demarcation between all the three sects of government also both the countries follow different concepts to protect individual rights and maintain rule of law to ensure justice. India follows the concept of “procedure established by law” as mentioned in the constitution to ensure justice. “procedure established by law” pertains to specific procedures and rules that govern administration of justice, incorporating statutory procedures, regulatory framework and court procedures. On the other side the united states of America (USA) follow the presidential form of government and there is clear separation of power in government. The constitutional 5th amendment brought the concept of “due process” which refers to principles of fair trial and just treatment to individuals, encompassing fair notice, impartial hearing, opportunity to defend and protection against arbitrary action. Both the concepts are different in their respective scope as “due process” is much broader concept which give wide scope to the supreme court of USA to grant protection to the rights of citizen. Also, supreme court of USA can declare law violative of rights null and void not only on the substantial ground of being unlawful but also on procedural ground of being unreasonable. However, in India laws which are violative of rights can be declared null and void only on the substantive ground of being unlawful, they are not to question the suitability and implications of the policy. The above mentioned points clearly shows the difference in scope of use of judicial review in India and USA.

IV Views against the use of judicial review

As we have discussed about the use of judicial review in the constitutional law by mentioning of cases even before Marbury, its importance in Indian legal context and scope of use of judicial review in Indian and USA. Let us illuminate on the views against the use of judicial review by the courts. People by the way of regular election held at fixed interval choose their representatives to make them stand in parliament to take part in policy and law making for them. One of the arguments put forward against the use of judicial

review is the overturning of decisions taken by elected representative by the unelected judges through the use of judicial review. By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights. Making of law by judiciary in certain conditions is known as judicial activism but law making is the exclusive right of the legislature, another argument put forward is by the use of judicial review judges may enable their own views and preferences rather than interpreting law. Policy making is a herculean task requiring expertise and the judges may not have expertise to make decision on complex policy issues. Accountability is must in a democratic society which is ensured through regular elections or if we talk about Indian condition it is ensured by having parliamentary form of government by its constitutional framers. Critics argue that judges are unelected and hence they are not accountable to the people therefore they should not have power to overturn policies and decisions taken by elected representative.

Conclusion

The candid conclusion cannot be drawn on the use of judicial review as it involves declaring of arbitrary legislative and executive action unconstitutional while not blurring the line of separation of power. The concept of judicial review is in use even before Marbury, however legal philosophers and jurist were not on the same note regarding the use of judicial review which is seen even today. The Indian constitutional framers wanted to the judiciary to have such powers which are also provided expressly in various articles of Indian constitution. Courts are the sentinel on the qui vive of the fundamental rights of the citizens and in the Indian context where there is interdependence of the legislature and the executive the importance of judicial review is paramount. One of the argument put forward against the use of judicial review is that judges may not have required expertise to assess

the policies or the action taken but the judges in the courts take decision about the legality of the manner in which the concerned or impugned policy is brought or about the competence of the authority which has brought it, this makes the use of judicial review by the courts justified as it will acts as a check on the powers of legislator and the executive to stop them whenever they transgress their conferred authority. The importance of judicial review in constitutional law is imperative to ensure constitutional supremacy, to protect fundamental rights, encourage good governance and safeguard democracy however the powers of judicial review should be used judiciously by the courts.

Citation

[1] William Michael Treanor, Judicial Review before "Marbury", Vol. 58, Stanford Law Review, pp 455-562, pg.21, No. 2 (Nov., 2005). December, 2024. [hereinafter "before Marbury"].

[2] Id at 22.

[3] Before Marbury, supra note 1, at 34.

[4] Id at 36.

[5] Before Marbury, supra note 1, at 15.

[6] William Marbury v. James Madison, secretary of state of the United states, 5 U.S. (1 cranch) 137 (1803).

[7] Indian const. art. 13.

[8] Indian const. art. 32.

[9] Indian const. art. 136.

[10] Indian const. art. 131.

[11] Indian const. art. 226.

[12] Chamapakam Dorairajan vs state of Madras, AIR 1951 SC 226.

[13] Justice K.S. puttaswamy (Retd.) v. Union of India, (2017) 10 SCR 569.

[14] S.R. Bommai and ors v. Union of India and ors (1994) 2 SCR 644.

[15] Indian const. art 110.

[16] Indian const. art 31B.

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[21]

