Judicial Review: A Shield and Not a Sword

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Abstract

JUDICIAL REVIEW is the power of courts to pass upon the constitutionality of actions taken by any of the coordinate branches of government.

Alexander Hamilton once wrote that the judiciary is the least dangerous branch because it has neither the sword nor the purse. As asserted more than two centuries ago, by John Marshall, C.J. in Marbury v. Madison [5 U.S. 137(1803)] that it is the duty of the judicial branch of the Government to lay down authoritatively what is the law, is considered to be the source of judicial review as it exists today. However the judgment does not explain the scope, ambit and limits on that power (if any). The recent decision of the Supreme Court of India in CPIL v. Union of India[Writ Petition(Civil) No. 423 of 2010], famously known as the 2G spectrum case has raised various questions on judicial review by the court in cases involving questions of policy. In this paper, the researcher tries to examine, the consequences of such interference, by the Judiciary. The intent is not so much to show the scope of judicial review in India, but to examine the exercise of this power by the Indian Supreme Court, in the light of the errors committed by the American Supreme Court, when it tried to explore and interfere in policy matters. For this reason very often U.S Supreme Court has been criticized as being an 'unruly horse,' or the 'third legislative chamber'. In the process, an attempt is also made to understand the limitations on the extent of judicial review. This analysis is made predominantly in the light of the legal position in the United States; the prevailing legal position in other legal systems is also analysed.

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Introduction

"....the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them...the judiciary…has no influence over either the sword or the 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; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment".[2]

The Indian Supreme Court, in the field of judicial review has covered more distance,thanthe American Supreme Court, in less than one-fourth the time.[3]A judiciary which is alert and checks any transgressions of the limitations on powers by any of the organs of the State, often faces the allegation of being "activist". If we trace the path travelled by the Supreme Court of India since its inception it is not surprising to say thatit is the most powerful Court in the world,[4] and therefore it is no stranger to this allegation. Though Dr B.R Ambedkar clarifying the role of judiciary, in constituent assembly, had observed that the judiciary can only act as a guide for the Parliament but if there arises a conflict, it is the Parliament which will prevail.[5]

This paper attemptsto analyse the expanding horizons of judicial review over a period of time with reference to policy question.For this purpose the paper had been divided into three parts; the *first* section deals with the nature of *separation of powers and judicial review.* The *second* part deals with the *policy question and judicial approach in United States*.The *third*part puts forward the process of *judicial review in India*.

[2]Alexander Hamilton,The Federalist No. 78, (August 2, 2012), http://www.constitution.org/fed/federa78.htm.
[3]Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr, AIR 1973 SC 1461.
[4]Raju Ramchandran, *The Supreme Court and the basic Structure Doctrine*, 107-134 in SUPREME BUT NOT INFALLIBLE(1st ed.Oxford University press, 2010).
[5]Id.

Separation Of Powers And Judicial Review

The three branches of the government are in the form of three-tier filtration check, if the Legislature acts in defiance of the Constitution, the President can deny his assent to a particular legislative enactment, in case of failure of exercise of such power by the President, when it comes to the execution of the law, the Court will stand as a guard against acting in contravention to the Constitutional principle[6] this is called judicial review of state actions, upholding the idea of constitutionalism. So, in this manner the effective check is guaranteed against any infringement of Constitutional principles. Now,how far the courts can go when it sit to judge the actions by the other two branches of the government, will be analysed in due course.

Judicial review, in its most widely accepted meaning is defined as the power of the court to consider the constitutionality of an act of any co-ordinate organ of the state.[7] In English law this only extends as against the executive and the will of the Parliament cannot be questioned in any court of law,[8] even though efforts were made by *Justice Coke* in *Bonham's case*, where he said that, '*even the parliament cannot go against the well settled principles of common law'*[9]still this prepositionwas never used to overrule a legislature enactment.[10]Much has been attributed to the decision of the United States Supreme Court in *Marbury v. Madison.*[11] This great case had its antecedents in the colonial experience and its taproots in the declaration of fundamental rights of Englishmen back to *Magna Carta* (1215).[12]

Marbury v. Madison[13], inaugurated judicial review, finding justification in terms of Constitution itself,as Justice Marshall pointed out '*it is emphatically the province and duty of the judicial department to what the law is…and the federal judiciary being supreme every officer under the supreme law (constitution) is committed by oath taken in pursuance of Art VI sec 3 to support the constitution*'[14] but the question as regards the manner and extent of such exercise and the interpretation of the constitution was left open. There have been

[6]Marbury v. Madison, 5 U.S. 137 (1803) [*also see*] A.K. Gopalan v. The State Of Madras1950 AIR 27.
[7]CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 3-4 (8th ed. 2002).
[8]A.V DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 34-35 (10th ed. 5th Indian reprint, 2008 Macmillan Press 1897).
[9]Theodore F.T Plucknett, *Bonham's Case and Judicial Review,* 40Harvard L.R. 30, 30-32 (1926).
[10]*Id.* at 51.
[11]MADISON, *supra* note 8.
[12]Warren E. Burger, *The Doctrine of Judicial Review, Mr. Marshall, Mr. Jefferson, and Mr. Marbury, in*VIEWS FROM THE BENCH7(Asian Books reprint., Chatham House publisher 1987) 1985.
[13]MADISON, *supra* note 8.
[14]U.S. CONST. art III, §1; INDIAN CONST. art 141; Malbury v. Madison 5 U.S. 137, 177-178 (1803).

frequent contractions and extensions in this field as per the situations and circumstances governing it, as Cardozo says[15], the tending inclination of the Court depends largely on the social conditions prevalent at that point of time.[16]

Policy Question And Judicial Approch In United States

The concept of judicial review has always been there in American constitutional system[17] even though it is said to be established in *Marbury v. Madison.*[18]Earlierscrutinising the constitutionality of a particular act the courts confined themselves in determining whether the legislative policy is in consonance with the constitutional policy but now they even go the extent of suggesting or justifying their own political ideologies in terms of the Constitutional policies thereby holding an act of legislature as constitutional or unconstitutional. The said approach of the court was never intended by Chief Justice Marshall in *Marbury v. Madison*[19].

The doctrine reached its full extent in *Lochner v. New York*[20] where by a majority the Court struck down a state law limiting bakery worker's maximum hours to sixty per week and ten per day.[21] The court being least bothered with the intent of the legislature, struck down the law on the ground of violation of liberty of contract. Though the court admitted that the hours of workers could be regulated only to protect the interests within the police power—health, safety, welfare, or morality, but still failed to understand the nature of the law which was made in furtherance of police power. This approach of the court was not only illogical but it also concluded a false impression of court being the better judge of the people's need (popularly a ground for 'policy decision') more than the legislature. Contrary to the court's opinion in *Lochner case*, one of the most powerful opinions was given by *Justice Holmes* in his dissent, where he said,

> '*A Constitution is not intended to embody a particular economic theory of Herbert Spencer. . . . It is made for people of fundamentally differing views…….and the legislature is the best judge of the people's need and not the courts….. the purpose of*

[15]*See generally*Benjamin N. Cardozo, The Nature of The Judicial Process,(Aug. 2, 2012), http://www.constitution.org/cmt/cardozo/jud_proc.htm.
[16]LEONARD W. LEVY & KENNETH L. KARST, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, VOLUME I, 1449(2d. ed. 2000)
[17]Kamper v. Hawkins I Virginia Cases 20, 38 (1793); Van Horne Lessee v. Dorrance 2 Dallas 304, 309 (1795); Bowman v. Middleton, I.Bay 252, 254 (1792); Chisholm v. Georgia 2 U.S 419 (1793).
[18]MADISON, *supra* note 8.
[19]*Id.*
[20] Lochner, *supra* note 32 *[also see]*Adkins v. Children's Hospital, 261 U.S. 525 (1923).
[21]*Id.*

> *the court is not to suggest what the court thinks to be an appropriate policy but to check whether the said policy even though harsh is made in the exercise of police power*'[22].

In the light of above observations, a major concern still left unanswered is, when should the court exercise judicial review irrespective of the policy adopted by the legislature. To this there is no exact or certain answer but then the circumstances and the situation prevalent will determine how and to what extent the power can be exercised in policy questions, sometimes in the interest of justice the courts may feel compelled to overstep their boundaries. Works of *Louis Hinkins* on constitutionalism[23] can be referred even though it is on a different concept. According to him, courts should exercise judicial review in policy matters when there is a clear violation of basic individual rights as in cases of abortion, reproductive rights and discrimination without any reasonable differentia. It may also exercise its power where there is violation of rule of law, democratic principles and separation of power even though the matter relates to policy. Contemporary constitutional changes existing in the society not recognised by the legislature can also be answered by the judiciary by means of judicial activism. These grounds are not exhaustive but mere illustrative and any ground can be added but it should be *ejusdumgeneries*in gravity to the grounds stated above.

The Nature Of Judicial Review In India

In India, the judiciary in its initial days exercised a greater degree of judicial restraint than seen after 1970s.[24] It was a continuous unconstitutional (word used in context of constitutional spirit than on constitutional provisions) action of the Parliament which leads to the formation of various theories in Constitutional law by the court to limit the power of the Government.[25] The problem of drawing a line between judicial and legislative power is always a difficult one in any legal system wherein the Courts as ultimate arbiter has a power to preview legislative actions. On one hand, there may a danger of judiciary overstepping its boundaries and on the other there may be a scenario wherein the judiciary may become so subservient to the legislative will so as to render nugatory the constitutional safeguards to individual liberty. After more than 60 years of working of the Indian Constitution there is still

[22]*Id.* at 75-76.
[23]Louis Henkin, *New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 Cardozo L. Rev. 533 (1992 - 1993)
[24]See, A.K. Gopalan v. State of Madras, AIR 1950 SC 27, R.C.Cooper v. Union of India, AIR 1970 SC 564, Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[25] See: Kesavananda Bharati v. State of Kerala, (AIR 1973 SC 1461) wherein basic structure doctrine was evolved to impose limitation on the power of the Parliament to amend the Constitution.

a need to strike a harmony between these two extreme positions. The inception of problem manifested itself from the very beginning in India in 1951 with the arrival of 1st amendment. The First Amendment Act was introduced within year and half of its working to nullify certain judicial decisions and forestall future judicial action. The Courts never shied away from asserting authoritatively that in case of grave constitutional violation by the Legislature the Court are well within their powers to intervene and declare such act to be invalid. Way back in the year 1950 itself, the Supreme Court in *A.K. Gopalan v. State of Madras*[26], held that

> *"The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."*[27]

Such illustration where the situation forced the Court to take a stance against Legislature is not just confined to amending power, the Court in *S.R Bommai v. Union of India*[28] established judicial review in cases falling within the purview of Art 356, the Court held that

> *"…President cannot exercise this power under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature...if there be no basis or justification for the order under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena..."*[29]

Furthermore, in *State of Rajasthan v. Union of India*[30], the Court held that

> *"The guiding principles...should be the welfare of the people at large and the intention to strengthen and preserve the Constitution....Clause (5) of Article 356 of the Constitution does not imply a free licence to the Central Government to give any advice to the President and get an order passed on reasons which are wholly*

[26]AIR 1950 SC 27
[27]AIR 1950 SC 27, 34
[28]AIR 1994 SC 1918
[29]AIR 1994 SC 1918, 1966
[30]AIR 1977 SC 1361

> *irrelevant or extraneous or which have absolutely no nexus with the passing of the Order. To this extent the judicial review remains."*[31]

In *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha &Ors*.[32], the Court duly extended the power of judicial review to matter relating to parliamentary privileges:

> *"it should be a matter of presumption, that Parliament would always perform its functions and exercise its powers in a reasonable manner. But, at the same time there is no scope for a general rule that the exercise of powers by the legislature is not amenable to judicial review. This is neither the letter nor the spirit of our Constitution. We find no reason not to accept that the scope for judicial review in matters concerning Parliamentary proceedings is limited and restricted..."*[33]

Furthermore, it was pointed out that the

> *"...in case of gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited..."*[34]

In *Kehar Singh's* case[35] Chief Justice Pathak maintained that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram's*case[36], wherein it was citated :-

> *"It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematise arbitrariness and obey and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power."*[37]

In *E.P. Royappa v. State of Tamil Nadu*[38], Justice Bhagwati, explaining the scope of executive power and concept of equality stated:

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a*

[31]AIR 1977 SC 1361, 1441
[32](2007) 3 SCC 184
[33](2007) 3 SCC 184, 360
[34](2007) 3 SCC 184, 362
[35] (1989) 1 SCC 204, 217
[36] AIR 1980 SC 2147, 2169,2170
[37] Id.
[38]AIR 1974 SC 555

> *positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.*[39]"

In *Ashok Kumar Thakur v. Union of India*[40], the Court expressed discontent to the contention of the respondent that the Courts cannot enter into policy question. In *Indra Sawhney v. Union of India*[41], wherein the Court did not refrain from laying down the quantum of reservation, such action was all the more complimented by the failure on part of the Legislature to reach a justified position in this regard. In *B.R Kapur v. State of Tamil Nadu*[42], however the Court initially refrained from entering into the political thicket, still went further and added that if such question relates to a constitutional interpretation, the Court will decide the issue irrespective of the fact that answer to such question will have a political impact.

More activist approach by the courts can be seen in cases relating to environmental matters, starting from *Rural Litigation and Entitlement Kendra v. State of U.P*[43] down the line till *Indian Council forEnviro-Legal Action v. Union of India*[44], the Supreme Court has taken a stern approach as regards failure on the part of the State and lack of seriousness with respect to implementation of environmental laws. In *A.K. Gopalan v. State of Madras*[45], the phrase "procedure established by law" was interpreted to mean "procedure prescribed by law of the state". However, in *Maneka Gandhi v. Union of India*[46], the same phrase was interpreted to mean due process of law which means a procedure which is right, just and fair.[47]

Every case is unique in itself, and on the basis of decisions above mentioned one can easily conclude that a decision should not be analysed in isolation, there may be instances where judicial intervention is not required but judiciary oversteps its boundaries and equally there may be instances that to undo the miscarriage of justice the judiciary will have to come to go beyond the black letter of law to ensure justice to the people. The separation of powers is complimented and supplemented by checks and balances, and therefore the organs of the State, though separate, act as a brake on each other.

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[39] AIR 1974 SC 555, 583
[40] (2008) 6 SCC 1
[41] AIR 1993 SC 477
[42] [2001] 7 S.C.C. 231
[43] AIR 1985 SC 652
[44] AIR 1996 SC 1446
[45] AIR 1950 SC 27
[46] AIR 1978 SC 597
[47] See, Fazl Ali, J. Dissenting in A.K. Gopalan v. State of Madras; AIR 1950 SC 27; Also see, Krishna Iyer, J. in Sunil Batra v. Delhi Administration; AIR 1978 SC 1675

Conclusion

The judicial power has always been a weapon of last resort. It is generally resorted to as a weapon of defence, and not of attack. When the legislature and the executive, on whom lies the primary responsibility to dispense justice, fail, that is when the judiciary steps in, to approximate 'is' (fact) to the 'ought' (law). The above discussion clearly highlights this fact. It however, also shows that things become complicated when in the process of approximating 'is' (fact) to the 'ought' (law), the Courts start playing the role of law-makers. This is a temptation hard to resist, but which needs to be avoided, for the judge must decide a case with regard to the principle and not to the policy.[48]

[48]RONALD DWORKIN, TAKING RIGHTS SERIOUSLY(4th Ind.Reprint, Universal Law Publication 2008)