

Judicial Review- Scope, Ambit and Dimensions

Judicial review, is in a sense, the very life breath of the Constitution of a vibrant, working constitutional democracy. It is that which provides sinews for enforcement of rights, protection of liberty and upholding the rule of law.

Judicial review is the exercise of power by superior courts to test the legality of any governmental/ State action. It is the exertion of the Court's inherent power to determine whether an action is lawful or not and to grant appropriate relief. As Prof. Wade points out judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law.

History

Judicial review has its roots essentially in Common Law. We hear the earliest echoes of judicial review in Chief Justice Coke's judgement in Dr. Bonham's case (1610)- that the common law would control Acts of Parliament and the Court could declare an enactment void if it was against common right and reason. But that was before the Glorious Bloodless Revolution which established the supremacy of Parliament in England. Significantly Coke himself did not follow this view later and has not, mentioned Bonham's case in his Institutes.

{Coke's Institutes are four volumes- published in 1628-by Sir Edward Coke- extensive commentaries on the laws of England- considered a rich mine of valuable learning of the Common Law- Land laws, Magna Carta, Parliament Acts, Crown Pleas and species of Courts- including High Court of Parliament.}

But it had immense influence across the Atlantic- it found fertile ground in the U.S. with its written Constitution.

1793- Judge Spencer Roane of Virginia Court in Kamper v. Hawkins(1793)1 Virginia Cases 20 said: If the legislature may infringe this Constitution(of Virginia),it is no longer fixed;.....& the liberties of the people are wholly at the mercy of the legislature.

1798- Samuel Chase, J in *Calder v. Bull*- drew support from the principles of a higher law and judicial review to enforce limitations outside the written constitution on legislative power.

1803- Marshall CJ in *Marbury v. Madison* 5 U.S. 137 expounded the Court's duty in case of conflict between an ordinary law and the Constitution in which the Constitution would prevail.

Prof. Edwin Corwin- in his Paper: *The Higher Law Background of American Constitutional Law* (1928-29) XLII Har.L.R.149 to which all later writers are indebted and his Lecture: *The Debt of American Constitutional Law to Natural Law Concepts*, remarks that the dictum in *Bonham's* case is the most important single source of the notion of judicial review. He explains the important contribution of the common law tradition to the development of judicial review in US.

The higher law concept of the Constitution- The principle is that all laws are to be tested on the touchstone of a higher law which in earlier times was the natural law and the Common Law and whose role is today ordinarily filled by a constitutional document. Thus the idea of judicial review is anterior to a written Constitution.

Thus the principle is if there is any conflict between the higher law and the ordinary law, the former prevails, the latter is struck down as unconstitutional. The power & duty of invalidating unconstitutional laws belongs to the judiciary which has to administer both the laws.

In countries with a written Constitution and an entrenched Bill of Rights, Government and Parliament have enumerated-limited powers. The Constitution creates three branches of Government-legislative, executive and judiciary- each supreme in its own sphere.

Constitutionalism is limited government under a fundamental law. It emphasises the concept of a written Constitution as a higher law. All organs have limited powers. The judiciary is constituted the guardian of the Constitution and the arbiter of the functions of all organs and the limits of their powers as grantees under the Constitution.

Judicial review is an incident of and flows from the concept of a fundamental, higher law. This is in one sense the doctrine of *ultra vires* in Constitutional law. Judicial review and the power to invalidate validly enacted laws on the touchstone of the Constitution is what is broadly and perhaps euphemistically called Judicial Supremacy. But in a democratic country governed by a written Constitution it is the Constitution which is supreme and sovereign. What obtains is Constitutional Supremacy.

Whereas in countries like England till recently governed by the doctrine of Parliamentary Sovereignty (now the European Convention and the Human Rights Act have made deep inroads into the concept) you have the rule of law, ie, generally the subordination of executive power to law- legislature-that any action should have the backing of law, in countries like the U.S. and India we have also the absolute reign of law which is the subordination of legislative power to constitutional rights and limitations.

The concept of limited government and judicial review constitute the essence of our constitutional system. It involves three main elements- i) a written Constitution setting up and limiting the organs of Government ii) the Constitution functioning as a superior law or standard by which the conduct of all organs to be judged iii) sanction by which any violation of the superior law may be prevented or restrained, and if necessary, annulled. That sanction in modern Constitutional law is judicial review.

Though our legislatures have plenary powers, they function within the limits prescribed by the Constitution. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. But it is the duty of the Court to interpret the Constitution for the meaning of which the Court is the final arbiter.

The purpose of public law is to discipline the exercise of power. Judicial review is the means of achieving that objective. The citizens are entitled to resist unlawful actions as a matter of right and to live under the rule of law and not of discretion.

Public law in modern times has advanced from a culture of authority to a culture of justification.

Range and Reach of Judicial Review

Judicial review has developed to the point where it is possible to say that no power- whether statutory or under the prerogative- is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of public power, its scope and its substance. Even when discretionary powers are engaged they are not immune from judicial review – deSmith.

No power is inherently unreviewable and in a constitutional democracy wedded to the rule of law, unfettered and unreviewable discretion is a contradiction in terms- Wade.

All this has been quoted with approval by the Supreme Court.

This is the position even in England without a written Constitution and Bill of Rights. The position is all the more reinforced in India.

Judicial review which has its foundations essentially in Common Law is, in India, enshrined in the Constitution- Art 13 read with Arts 32,226,227 expressly confer that power.

The Constitution is the supreme law from which all organs derive their authority and within whose confines they have to act. It is for the Court to uphold constitutional values and enforce constitutional limitations. Judicial review does not mean supremacy of the judiciary but that of the Constitution.

It is universally recognised that the range of judicial review exercised by the superior Courts in India is perhaps the widest and most extensive known to the world of law.

We have judicial review of –purely executive action, of statutory orders and statutory discretion, quasi judicial orders, subordinate legislation, plenary legislation and also constitutional amendment. There is also judicial review of other constitutional functions like imposition of President’s rule. Emergency, removal of Governors, formation of Government, appointment of Ministers and Judges, assent to bills, parliamentary proceedings. The range and intensity standards and tests of judicial review of all these vary.

A Constitution Amendment can be challenged on procedural grounds of non-compliance with Art 368, ie, not passed by the special majority provided in Art 368 or not ratified by the Legislatures of the required number of States.

The only substantive ground of challenge of a Constitutional amendment is violation of the basic structure of the Constitution and this doctrine is confined only to challenge Constitutional amendment.

Grounds of challenge to legislation-plenary i) Lack of legislative competence- Doctrine of colourable legislation would come within this as it is essentially a question of power. ii) Violation of fundamental rights Part III or any other constitutional requirement or limitation (like for eg. President's assent. List III-repugnancy).

Challenge to subordinate legislation- All grounds on which a plenary legislation can be assailed.

Non-conformity with the parent statute or any other plenary law.

Excessive Delegation.

Manifestly arbitrary and unreasonable – the principle in *Kruse vs Johnson* (1898) 2 QB 91 and *Indian Express Newspapers*- AIR 1986 SC 515.

Substantive *ultra vires* and procedural *ultra vires*.

Unconstitutionality is a species of the doctrine of *ultra vires*.

Substantive *ultra vires* :

Transgresses the limit set by the parent statute.

Repugnant to its other substantive provisions or its general purpose.

Repugnant to any other plenary statute.

The doctrine is to be reasonably applied. Whatever may be fairly regarded as incidental or ancillary to or consequential upon what the legislature authorised, ought not unless expressly prohibited to be held by judicial construction to be *ultra vires*.

Procedural *ultra vires*:

Procedure prescribed by statute- mandatory and directory

Publication, consultation, laying, condition precedent, manner of performance.

Either forms of ultra vires- result-nullity.

No estoppel against law-plenary or subordinate.

Grounds of challenge to Administrative action/Quasi judicial :

Substantive and Procedural ultra vires.

Jurisdictional ground- absence, excess, refusal to exercise, erroneous exercise.

Natural Justice

Fraud

Non application of mind

Fettering discretion or addicting discretion

Malice in law-seeking to achieve something not permitted Improper motives

Malice in fact- actual ill will, animosity.

(But not in the case of a legislation- no transferred malice in the field of legislation. AIR 1985 SC 555)

Proportionality

Promising estoppel – (not against legislation)

Legitimate expectation- (not against legislation)

Lord Diplock's formulation in GCCQ case (1984)

Illegality- main substantive areas of ultra vires.

Irrationality- Wednesbury unreasonableness (taking irrelevant consideration leaving out relevant considerations; outrageous in its defiance of logic; no one properly instructed in the relevant law and properly directing himself could have reached)

Procedural Impropriety -Procedural wrong doing- failure to follow prescribed statutory procedure or rules of natural justice.

Even where the formation of opinion is subjective, the existence of circumstances relevant to the inference as the sine quo non for action must be demonstrable. cf. Barium Chemicals case

Ordinance- same as a plenary law- Propriety not for Courts.

The Court cannot act as a super legislature- that would be judicial despotism.

Lord Devlin's statement that the British are as much desirous to be governed by judiciary as they are to be judged by the legislature/executive is profoundly true and holds good everywhere.

It is only a Constitution Amendment and not any ordinary law that can be assailed as violating the basic structure of the Constitution. Indira Gandhi 1975; Kuldeep Nayar 2007; Ist MBA 2010.

The reason for this is not far to seek or discern.

Every measure/action has to conform to the limits set by the Constitution. It is open to challenge and scrutiny on recognised grounds.

The ultimate power and responsibility of law making vests with the legislature. But Parliament exercises not only legislative power but also constituent power under Art 368- the product is a Constitution amendment not amenable to a substantive challenge on any ground on which a law can be challenged. Hence the basic structure doctrine has been judicially and judiciously evolved as a substantive ground to challenge a Constitution amendment- only to ensure that by a process of amendment the Constitution is not denuded of its core or made to suffer a loss of identity.

Invoking this doctrine to challenge an ordinary law would be expanding the grounds of challenge which has no legitimacy or legal support. It would open a Pandora's box. But above all it would pervert the constitutional scheme and would undermine and destroy the Constitution's basic structure.

The constitutional fascination for the basic structure doctrine cannot be made a Trojan horse to penetrate the entire legislative camp.

Constitutional functions like imposition of President's rule: Emergency, removal of Governors, grant of pardon are all based on Cabinet advice. The President/Governor is the sole judge of the sufficiency of facts and propriety of the action. Yet, while the advice is constitutionally immune from scrutiny, the material which formed the basis is open to examination- whether such material was relevant and was such that on its basis a reasonable man could have come to the conclusion. It is to be examined whether the facts were verified- whether it was bonafide. Governor's report and President's action-- Legal malafides, irrationality, extraneous considerations are all grounds of challenge of a Presidential proclamation- though approved by Parliament- it is not legislative unlike an Ordinance (which is not susceptible to such challenge).

Doctrine of pleasure also hedged in by constitutional limitation. Not a licence to act arbitrarily. Discretion conferred on a public authority in absolute and unfettered terms will necessarily have to be exercised reasonably and for public good. See *B.P.Singhal's case* 2010.

Need for a cause vis-a-vis need to disclose a cause. It is imperative that a valid cause must exist.

Judicial scrutiny is for the limited purpose whether the reasons bear rational nexus to the action. Absence of reasons or bad reasons can destroy a possible nexus and vitiate the order on the ground of malafides. Thus the Court will interfere for absence of reasons or irrelevant reasons or where the exercise of power is vitiated by self denial or wrong application of the full amplitude of power or the decision is arbitrary, discriminatory, malafide.

Power to admit new States into the Union (Art 2) is very wide and guided by political issues of considerable complexity not always judicially manageable- yet not unreviewable and immune from judicial scrutiny.

All power is indeed a matter of performance of official duty.

Inspite of a finality clause it is open to examine whether the impugned action is ultra vires-for –contravention of a mandatory provision of law conferring the power, is vitiated by malafides or is a colourable exercise of power based on irrelevant and extraneous considerations.

Legislative proceedings including exercise of privilege not immune from judicial review. Immunity is restricted to what is said or done in a legislative body or committee thereof. Further the immunity is confined to matters of procedural irregularity as distinguished from substantive illegality or unconstitutionality. The manner of exercise of privilege is also open to scrutiny.

The scope of fundamental rights has been expanded over the years- and all action including exercise of privilege should be tested on the anvil of all fundamental rights relevant in a given case.

While the legislature is the best judge of its privileges, it is not the sole or exclusive judge of the existence, extent and manner of exercise.

Judicial review permissible on limited grounds such as jurisdictional error, violation of fundamental rights- Arts 14,19,21 arbitrariness, capriciousness, malafides.- (great deference and restraint by judiciary)

Assent /non assent to Bills justiciable ? Submitted it is.

Government formation-choice and appointment of ministers as also appointment of judges- open to judicial review on the narrow ground of eligibility as contrasted with suitability – *Manoj Narula (2014)*; *High Court of Madras v. R.Gandhi(2013)*.

Of course there are areas which the Court does not enter- there are matters which the Court does not take up because it is not equipped to deal with them- they do not admit of judicial review by their very nature- matters concerning foreign policy, relations with other countries, defence policy power to enter into treaties with foreign powers, issues relating to war and peace.

Different standards and tests are applied in adjudging the legality of different actions. The range, intensity and depth of judicial review is also different.

Judicial review is about decisions too, not only the decision making process. It is loosely stated and chanted as an incantation that judicial review is concerned not with decision but with the decision making process. The statement is to be appreciated in its setting and context.

Both cases: *Evans* and *Mahajan* purely administrative law cases, did not touch fundamental rights. Testing the reasonableness of restrictions (Art 19) or

testing a law or the validity of a constitutional amendment- not process, but substance.

Judicial review-is to test the legality and keep public authorities within the limits of their power- lawful or unlawful? No examination of merits.

The difference between judicial review in administrative law and constitutional law is one of degree.

The difference between judicial review and appeal is one of kind.

An appeal is a creature of statute- the appellate power being circumscribed by the statutory provisions conferring the power. "Where a question arises as to the scope of an appellate jurisdiction, the statute by which the jurisdiction is conferred must ordinarily be the Court's first port of call; and will very often be the last."

In exercising appellate power Court concerned with the merits- whether right or wrong. The Court independently examines the matter and comes to its conclusion often times substituting its views for those of the authorities/ Court appealed from.

The distinctions are well known and real though the exercise of both the powers may sometimes yield the same result.

The essence of constitutionalism may be said to be limited government- disciplining power and confining public authorities within the limit of their powers. Thus constitutionalism requires control over the exercise of power. The sanction for this is judicial review exercised by issue of appropriate writs. While there may be no unanimity on the source, scope and limits of judicial power, there is no gainsaying that it is essential as long as it does not breach its embankments. The genius is to find its limits.

While in judicial review generally it is an objective assessment, in the narrow area of testing the reasonableness of restrictions on fundamental rights the Court enters the arena of merits and there is a subjective element. Judicial response to different fact situations varies and it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the judges' value preferences respond to the multi

dimensional problems of the day. An awareness of history is an integral part of those preferences. Thus the evaluation of diverse, sometimes elusive factors, inevitably brings into the judicial verdict the judge's own values and preferences. In that sense to a limited extent the difference of kind between judicial review and appeal may imperceptibly collapse.

The simple truth is that the jurisdiction is inherently discretionary and the Court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind. But as Mathew, J pointed out they are not too elusive for judicial perception; great judges are those who are most capable of discerning which of the gradations make genuine difference.

However the protection and enforcement of fundamental right and freedoms is both the power and duty of the Courts, it is not discretionary but obligatory. "To remit the maintenance of constitutional right to the area of judicial discretion is to shift the foundation from rock to sand." The extent and depth of review will depend upon and vary with the subject matter. In law context is everything.

It is important to bear in mind that unconstitutionality and not unwisdom is the narrow area of judicial review. For the removal of unwise laws appeal lies to the ballot box and the process of democratic government.

Any doubt regarding the validity of a law must be resolved in favour of its constitutionality. "The question whether a law be void for its repugnancy is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgement would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and it acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." (*Fletcher v. Peck*)

"Let the goal be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are

not prohibited but consistent with the letter and spirit of the Constitution are constitutional.” (*McCulloch v. Maryland*)

The limited task of the Court is to interpret the Constitution as it is, not to venture starry eyed proposal for reform. What the Constitution should contain is not for the Courts to decide that is a question of high policy and the Courts are concerned with interpretation of laws, not with the wisdom of policy underlying them. Even so the Court’s interpretation must be a glow with the insightful observations of Chief Justice Marshall. “We must never forget that it is a Constitution which we are expounding, a Constitution tended to endure for ages and consequently to be adapted to the various crisis of human affairs.”

A commitment to the legalities of law and their enforcement for public good is to be realized. The Court must always be careful in maintaining the right balance between the different wings of Government. Mistrust of Government is violative of comity between instrumentalities. Courts must be tempered by the thought that while compromise on principle is unprincipled, applied Administrative Law in modern complexities of government must be realistic. There must be a sensible approximation, there must be elasticity of judgement in response to the practical necessities of government which cannot foresee today the developments of tomorrow in their nearly infinite variety.

Judicial humility and deference are as much necessary and important concomitants of constitutionalism as the robust exercise of judicial power. In short, in law context is everything. Constitutional adjudication and the exercise of the power of judicial review is a delicate task requiring balancing of different principles and values calling for vision and statesmanship, something which requires a measure of activism and a measure of self restraint. When this assignment is judiciously performed in the manner indicated by great judges, “the court can be regarded,” to quote Prof>Robert McCloskey, “not as an adversary, but as an auxillary to democracy.” Or as Justice Mathew put it, paradoxical though it might appear, the judiciary is both an ally of majoritarianism and its critic and censor.

Judicial power also has its limitations- not a panacea for the ills of society and the failure of the other branches of government. The attitude of judicial humility is to restraint is not an abdication of the judicial function; it is a due

observance of its limits. Losing sight of this profound truth will be dangerous and an invitation to judicial despotism.

The democratic integrity of law depends entirely upon the degree to which its processes are legitimate. A judge who announces a decision must be able to demonstrate that he began from recognised legal principles and reasoned in an intellectually coherent and politically neutral way to his result. To give in to temptation to do something desirable or expedient solves an urgent human problem, but a faint crack develops in the foundation of our system.

Durga Das Basu in his Tagore Law Lectures observed that one cannot but emphasise the importance of the composition of Courts and of proper personnel for the success of judicial review. When judges are required to pull the constitutional strings the preparation and equipment for that wide ranging task was very eloquently explained by Learned Hand, “ I venture to believe that it is important to a judge called upon to pass on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton with Macchiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with books that have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can nearly pour everything he will. Men do not gather figs or thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.”

“In the field of Constitutional Law the delicate balance between the various institutions whose sound and lasting quality Dicey in the Law of the Constitution likened to the work of bees when constructing a honey comb is maintained to a large extent by the mutual respect which each institution has for the other. This is as much a prescription for the future as it was for the past.” This is equally relevant in India too.

