

Constitutional Law and Public Administration in India

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Judicial Review – I

It is already known that the power of the court and the power of the judiciary are defined and laid down by the constitution of India. The judiciary can supervise public administration, it can review the activities of public administration, it can check abuse of power of the public administration. Because it is considered as a court of record, the Supreme Court records are kept perpetually, and it is evidence for the future generation and the future administration of the country. Once the Supreme Court has laid down a law, it cannot be challenged in any other form, because that is the finality, though we say that within the Supreme Court, there is a review that is possible. For example, in the Supreme Court, if a divisional bench that is a bench of two judges gives this judgment, it can be asked before the court to review it before three judges. If that also is not something that is satisfactory, then it can be referred to a constitutional bench. And in the current times, the constitutional bench consists of five judges. Apart from that, the Supreme Court, to render justice or to correct injustice has designed something of its own called the curative petition. A curative petition is something that is allowed to cure any kind of miscarriage of justice.

So, despite exhausting all the reviews within the Supreme Court itself, if again, the citizens or a group of victims would want the Supreme Court to revisit the case, then a curative petition can be filed before the court. So, this kind of legal precedent that is laid down by the Supreme Court is the law of the land, it is the legal reference for jurists, scholars, and others. And hence, the orders of directions of the Supreme Court are supposed to be followed, and there is no choice in this matter. That is the reason why the contempt powers are given to the court. In case there is willful disobedience of any judgment, order, writ, or any other process of the court, or if there is a willful breach of undertaking given to the court, then you would say that it is a civil contempt.

Whereas, if someone publishes of some kind of scandalous matter of a court or of a judge, or someone tries to lower the authority of a court or a judge, or prejudicially interferes with the due process of judicial proceeding or involves himself or herself in the interference or obstruction of the administration of justice in any manner, he will face what is known as criminal contempt of court. However, innocent publications and distribution of fair

reporting and accurate reporting of judicial proceedings, fair and reasonable criticism of the judgment, not of the judge are something that are permissible under the freedom of speech and expression, and they would not amount to any kind of a contempt of court. So, you do have the right to comment, but you do not have the right to defame or bring down the dignity and the majesty of the court as the case is. In case of criminal contempt of court, you can face imprisonment up to six months and a fine of 2000 rupees, and the Supreme Court has the power to punish. But, this kind of a power to punish can be given to the High Court or to the Subordinate courts or to tribunals that are functioning in the entire country.

So, the judicial power clearly vests with the court, the power of judicial review of administrative action. And hence, the constitutionality of legislations, the constitutionality of executive orders or actions, both at the center and the state are finally to be examined by the courts and the courts will determine the legality, the constitutionality, and the validity of any such legislative and executive actions. And hence, what is not going to be enforceable as a matter of public policy under the constitution is something that the judiciary will always intervene, test, and set the tone. When you talk about the Supreme Court of India, the Supreme Court has performed various other functions, or has other numerous duties to intervene.

For example, very often than not, where the government has altered the qualifications of each of the election commission and election commissioners. In those matters, finally, whether the government has done it right or wrong is going to be decided by the Supreme Court. The Supreme Court is a final authority on all positions that are constitutional positions, be it the position of the governor, the election commissioners, or the role of central vigilance commission. It could also be in terms of determining the age and qualification of members of the Public Service Commission because Public Service Commissions are those bodies that select the executive branch of the government. And hence, what should be the set of criteria, when can they be disqualified, the Supreme Court has rendered a lot of service that has helped the government decide all of these matters. The Supreme Court has always agreed that it may not always be correct. And hence, the court is willing to review its own decisions. Hence, what was decided sometime in the 1980s can now be reviewed. And that could be a course correction.

So that is where the courts or the judicial decisions have the beauty of it. The beauty is that nothing of the court decision is going to be powered, it is permanent for the time being. Therefore, once the review happens, it can change as well. The courts generally entertain petitions, you can withdraw the cases, in case it is a civil case or it is a private case. You can ask the court to transfer the case from one court to another, because that is what judicial review of the judiciary happens to be.

In many matters, the litigants say that they do not have confidence in the judge or forum. So, if they want the case to be transferred from that place to another place, sometimes they

will say that the forum is inconvenient. And hence, the cases must be transferred. For example, under the Family Courts Act, the place where the divorce litigation will happen is the place where the wife resides, or where the marriage took place. So, it is a forum convenient for women.

That will be the forum where the family matters will be decided for. So, such kinds of transfer of cases or review of the judicial work, which is usually an administrative function of the Supreme Court, the Supreme Court and the various High Courts keep performing those administrative functions as well. So that is always two sides of the judiciary's judicial function as against administrative functions as well. The Supreme Court is also involved in what we call as the supervisory jurisdiction of tribunals. Now, tribunals or what we call as tribunalization has happened in India post the 1990s.

So, we have created these quasi-judicial bodies or statutory bodies who adjudicate disputes. These are specialized bodies created under those laws. For example, under the Right to Information Act 2005, we have created the Information Commissions which decide about the implementation of RTI 2005, whether the information ought to be given or not to be given, whether the denial of information was done intentionally or not. So, these are tribunals that are functioning under the specific legislation.

However, the proper court that is the proper judiciary is always a supervisory body over these tribunals. They can decide whether the tribunals are doing right or wrong. They can decide who should be part of this tribunal or not, etc. All those functions, which we would call the superintendence and control over all these tribunals within that territory are there with the High Court and within the territory of India, it is there with the Supreme Court of India. There are other different functions that the Supreme Court does from time to time. For example, the Supreme Court has a special examination for lawyers to practice before the Supreme Court. This is called the advocate on records examination. So those who want to appear in the Supreme Court have to pass this examination. They are considered as advocates on records. They are the only ones who have the right to file cases in the Supreme Court.

So, making that examination, giving those kinds of designations to lawyers are something that the Supreme Court does from time to time. The Supreme Court also engages itself with a bar council, which is the body of lawyers or advocates. Among the advocates in the bar, every year or once in two years, the courts decide or designate lawyers as senior advocates. Generally, a designation of a senior advocate is a distinguished practitioner in that court. And he is considered to have achieved a degree of success and has a standing before that bar.

And hence the judges are the ones who decide the designation of a senior advocate as well. So, these are some of the very interesting functions that the Supreme Court does from time

to time and what the judiciary is all about. Now, has the Supreme Court come up with some principles of constitutional interpretation? The constitution is a written document, and it is quite a large document. However, the words of the English language that are used in the constitution may have more than one or two kinds of meaning in the context of which it is being used. Or maybe there needs to be an application of that kind of an article in the constitution. The Supreme Court has come up with some very interesting doctrines and principles for the constitutional interpretation or the reading of the constitution. What this does is that these principles and doctrines, they put the constitution into working, they make it workable. And that is why the process is constitutionalism. This gives the constitution an application role.

Some of the important doctrines that have been evolved by the Supreme Court are:

- a) doctrine of severability
- b) doctrine of waiver
- c) doctrine of eclipse
- d) doctrine of territorial nexus
- e) doctrine of pith and substance
- f) doctrine of colourable legislation
- g) doctrine of implied power
- h) doctrine of incidental or ancillary power
- i) doctrine of precedent
- j) doctrine of occupied field
- k) doctrine of prospective overruling
- l) doctrine of harmonious construction
- m) doctrine of liberal interpretation.

While comparing the Indian Supreme Court with the American Supreme Court, the American Supreme Court does not have the advisory jurisdiction as the Indian Supreme Court has. The appellate jurisdiction of the American Supreme Court is only for constitution matters. In India, it is a wide range of matters. So, there are a lot of distinctions between how the Indian Supreme Court functions and how the American Supreme Court functions. And of course, both protect fundamental rights. And that is the reason why they are called supreme in the other sense. In India, the judges of the Supreme Court have a retirement age, whereas in the American Supreme Court, the judges do not have a retirement age, they are judges for life. So, they would either end their tenure on their death or until the time they would like to resign from their job. Coming to judicial review; the doctrine of judicial review was also developed in the United States. It was for the first time propounded in a very famous case called the *Marbury v. Madison* case of 1803. It was delivered by the then Chief Justice of the American Supreme Court by name, John Marshall.

In India, the judicial review is something that we must give to the constitutional courts. And this, has been also said to be the basic structure or feature of the Constitution of India. And this kind of a power cannot be curtailed or cannot be excluded by any constitutional amendment. Judicial review is the power of the judiciary to correct and keep a check of laws that are being introduced by the executive and by the legislature. It is not only the legislature that makes law, it is the executive that can also make law.

What law is made by the legislature is called substantive laws. And the name of these is in the frame of an Act. Whereas, delegated legislation, which means the Act must have rules, regulations, guidelines, notifications, circulars, etc. These put the act in force, they make the Act implementable. Most of these laws are made by the executive. So, Article 13(3) of the Constitution defines a law to include Acts, rules, regulations, notifications, circulars and byelaws. So, these are all laws and these laws that are made either by the legislature or by the executive can be part of the doctrine of judicial review. So historically, judicial review has been able to protect liberty and has been able to establish what we call as the limited government and maximum governance. So, it has enhanced the efficacy of legal bindingness. The respect for law has definitely come about. And it is important that the judiciary tries to keep a check on the two other organs of the government. And wherever there is some kind of conflict, the court must resolve those kinds of conflict.

So, the limitation of the government is the attempt of judicial review. And judicial review of administrative actions is not only limited to state governments, but it can also extend to union governments, it can also extend to local governments. Now, we have the municipalities, the panchayats and so on and so forth. So, all of these can be brought into existence. Judicial review has checked policies or policy consideration. So, the policy is a vision statement, it is a policy of welfare, it could be an economic policy or a social policy, whatever be the policy, judicial review of the policy has always taken place.

And, the courts can decide whether the policy is in tune with the constitutional mandate, or with public policy. These are certain aspects that the court can intervene, though they would not want to do so. From time to time, they have said that they do not want to intervene in public policy matters, but they can check whether the policy has been made with the authority to make it, whether it is sound or whether it results in any kind of violation of constitutional rights. One of the policies, which underwent judicial review was this most famous policy of bank nationalization that happened in 1970. So, some of the banks that were private were nationalized by the government. This was the time when socialism was at its peak, whether a nationalization is appropriate as per public administration, as per public policy of the land was the question before the court, which said yes. So that was also part of the judicial review process. Judicial review maintains the principles of the supremacy of the constitution and it talks about maintaining federal equilibrium between the center and the state. And three, it protects fundamental rights. That is the purpose of judicial review. The importance of judicial review was laid down in the

Kesavananda Bharati case, where Justice Khanna said that judicial review has become an integral part of the constitutional values and the power has been vested in the High Court and the Supreme Court to decide the validity of the provisions of certain statutes. So, striking down certain provisions, which violate the constitutional principle, is an inherent power of the judiciary.