Pakistan Journal of Social Research
ISSN 2710-3129 (P) 2710-3137 (O)
Vol. 4, No. 1, March 2022, pp. 657-663.
www.pjsr.com.pk

DOCTRINE OF JUDICIAL REVIEW: CONSTITUTIONAL STUDY OF AMERICAN LEGAL SYSTEM

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ABSTRACT
The paper comprehensively highlights the contours of Judicial Review, along with historical evolution of doctrine in United States of America. It also attempts to discuss transformative tendencies of judiciary from being a reticent institution to an interventionist one. Furthermore, it extensively dilates upon the conceptual anomalies of judicial review along with its ever-expanding scope in executive and legislative realm. Lastly, it holistically examines the practical limitations as well as philosophical constraints of the concept.

INTRODUCTION
The inherent principles, primary contours and foundational values of a constitution are considered supreme of all pronouncements/documents in a constitutional republic; hence its unhindered prevalence and uniform applicability is a concrete object of a political society featuring limited government. Constitution is a nuanced embodiment of national vision and a practical plan of action to optimally harness state affairs while maintaining intricate power-structure as has been originally conceived by its framers. Moreover, pyramidical hierarchy envisioned by a renowned jurist 'Hans Kelson' places constitution at the apex with other legislative enactments, rules and regulations situated underneath. It states that every document derives its validity and legality from *'grund norm'* i.e. constitution, ruling on the summit. The presupposition of such a norm helps in creating a valid law. The validity of other non-constitutional documents is derivative, while constitution thrives on popular support and nothing short of a successful revolution can displace a constitutional order (Harris, 1971). If a constitution is abrogated, repealed or in any way has its validity compromised, the legality of all other legal enactments becomes questionable. Therefore, the preservation of *'grund norm'* is significant for overall sustainability of a legal system and judiciary has been given with the responsibility to ensure compliance of all other actions with the constitution. This practice is known as Judicial Review. It is a constitutional device only exercisable by the judicial branch of a country, to determine the constitutionality of federal and state legislative enactments, presidential executive decisions and regulations. The power of judicial review includes both the power of 'declaration of irreconcilability' and 'invalidation of impugned decision'. The exercise of invalidating the unwarranted conduct of legislative or executive branches help in the preservation of bedrock principles of American constitutional jurisprudence i.e. Federalism and Separation of Powers (Presser, 2001). Judiciary is competent to review and examine the constitutionality of executive as well as administrative decisions. Similarly, legislative decisions are not immunized from judicial inquiry and have particularly two distinct manifestations (Corwin, 1910);

a. Federal courts reviewing the decisions of state legislatures
b. Courts determining the constitutionality of actions of coordinate legislatures

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Conceptual Origin

The concept find its roots in the landmark judgment by American Supreme Court in the case titled, 'Marbury v Madison' in 1803. President John Adam before losing the office to Thomas Jefferson assented to Judiciary Act of 1801, which empowered president to have more control over judicial appointments and also increased the number of judges in the court. According to the act, 42 Justices of peace and 16 Judges had been duly appointed, but Secretary of State (John Madison) refused delivery of commissions to new appointees. Marbury (an aggrieved appointee) prayed for a writ of mandamus. Court affirmed the illegality of Madison in delivery of commissions but refused to provide remedy (writ of mandamus) as the Judiciary Act of 1789 which enabled Marbury to file his claim was held to be unconstitutional, as it extended the power of judiciary beyond the parameters of Article 3, Section 2 of constitution. This was the incidence of 'Judicial Review' in the politico-legal realm. Moreover, Alexander Hamilton in the founding documents of US Constitution favored the doctrine of judicial review to protect the integrity of a newborn constitutional democracy. He said, in the federalist paper no. 78;

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute… [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

However, Thomas Jefferson staunchly opposed the idea by referring to it as *judicial despotism.* He was of the view that judicial review violates principle of separation of power by upsetting institutional balance, leading to deterioration of democratic character of republic. Also, that all institutions must ensure compliance with constitution by themselves making a decision on constitutional questions and being only answerable to public at large. Furthermore, during the first constitutional convention, a similar proposal was floated to counter legislative dominance of congress, as *'Virginia Plan'* under which a council of revision was advised to be created which shall also include Judges of Supreme Court of country. The fundamental duty of this council was to propose a new law to be made by Congress or reject any law passed by it. However, despite wide powers guaranteed to this council, Congress retained the power to veto its decisions. The plan was rejected because it had the capacity to unnecessarily cripple congressional powers by establishing judicial authoritarianism.

The doctrine of Judicial Review has often been subjected to virulent criticism by radicals who claim that the judicial power to review though finds no explicit mention in the constitution is a mere 'constitutional innovation' and therefore owes its origination to an act of usurpation by judiciary in 'Marbury v. Madison'. However, liberals vociferously contest the conservative claim by specifically pointing out constitutional provisions, conferring the power of judicial review. Also, they contend that foundational documents of US constitution appear to be favoring the concept of judicial inspection of other branches of government (Corwin, 1914).

In 1821, *Cohens v. Virginia* expanded the court's power of constitutional oversight to include the decisions of state criminal courts. Similarly, *Martin v. Hunter's Lessee* further extended the judicial power to review admitting decisions of state civil courts, which involve a constitutional question. In addition to this, *Cooper v. Aaron (1958),* unequivocally capacitated every court of law to determine the constitutionality of legislative or executive actions. It was a progressive development because previously, the power of judicial review was exercisable by Supreme Court and Federal courts only.

Why is judiciary empowered to review legislative enactments and executive orders?

American Constitution has made judiciary an independent body to determine legal controversies without any fear of favor and influence. The independence from executive and legislative departments makes it suitable for judiciary to review their impugned actions. Otherwise, if judiciary were a part of executive it would not have been empowered to inspect their decisions. For instance, Japanese judiciary under Meiji Constitution of 1889 was neither independent nor separate from executive department and therefore, was not authorized to determine the constitutionality of actions of Diet and Cabinet (Itoh, 1990).

This very predicament, as to which institution would be better equipped to oversee the constitutionality of decisions made by other departments of government, was faced by American forefathers while making the constitution who after hefty congressional debates built a consensus to adorn judiciary with this lofty responsibility. The apparent reasons of such a decision are as follows;

- **Interpretation of law**

Judiciary is constitutionally authorized to interpret laws enacted by legislature of the country. It evaluates laws by determining their legal adequacy on the touchstones of constitutional purity, so as to make them suitable for implementation by executive.

- **Impartiality**

Judiciary is an impartial institution and is semantically uninfluenced by public and political considerations. The neutrality of this institution makes it safe to be equipped with the power of oversight over other branches of government.

- **Supremacy clause**

Supremacy clause unequivocally declares constitution and all other legal instruments which are made in conformity with it, as supreme law of land. Therefore, in order to maintain the supremacy of legal structure, judiciary is empowered to assess adherence of executive and legislative measures to these supreme pronouncements. Moreover, supremacy clause links up national and state judiciaries into one system for the maintenance of constitutional supremacy. Every state court is empowered to review state regulations in relation to state constitution (Corwin, 1926).

- **Checks and Balances**

During the drafting of constitution, 'necessary and proper clause' vested immense powers in congress, while executive had already established considerable control over legislature and judiciary. Therefore, to preserve institutional balance of power, judiciary was empowered to review the acts of legislature and executive departments.

Scope of Judicial Review

With the passage of time, the scope of judicial review has grown to include several areas of governance; as follows,

1. Judicial Review of Executive actions

Executive actions are amenable to judicial review. President is the head of executive department under Article II of Constitution, hence all actions are taken and decisions are made in his name. On many occasions, presidential actions have been subjected to strict judicial scrutiny and in consequence of it are either being nullified or condoned. Courts have even set aside presidential immunities for the establishment of a greater precedent of justice. A few highly mentionable examples are as follows,

a. *Rasul v Bush*

Supreme Court determined the question of presidential power to detain people in Guantanamo bay without due process of law, and ultimately repealed it for being in contravention of due process of law clause.

b. *Clinton v Jones*

Court rejected the plea of presidential immunity from suits concerning money damages for acts committed before presidency.

2. Judicial review of legislative enactments

American courts marked a radical departure from policy of judicial non-intervention after the seminal judgment in Marbury v Madison. This policy shift from non-intervention to strict judicial oversight briefly smudged the popular sanctity of Congress but later on both institutions appeared to have developed strong political understanding within the scope of unified governance. Lately, courts have been observed to be more inclined to conduct judicial review of legislative enactments to determine their compatibility with fundamental guiding principles of constitution. Statutes which are found inconsistent are either completely repealed or if the document is rectifiable then sent back to congress with a direction of thoughtful reconsideration and amendment. To discourage the activist temperament of courts, certain devices have limited the power of courts to review legislative acts of coordinate departments of government;

- Recall of Judicial decisions
- Requirement of more than a majority of judges to invalidate a legislative act

- Proposal to introduce an amendment to empower congress to re-enact a law held void by Supreme Court (Haines, 1923).

Few examples of invalidation of legislative enactments are as follows;

a. *Roe v Wade*

State laws prohibiting abortion were held unconstitutional because it conflicted with the constitutional principle of privacy recognized in 14th amendment.

b. *Loving v Virginia*

State laws forbidding inter-racial marriages were declared to be violating equal protection clause of constitution.

c. *Obergefell v Hodges*

Court declared the prohibition of same-sex marriage void because of it disregarded due process of law clause of constitution.

3. Judicial review of administrative actions

Administrative actions are reviewable by courts; but it is subject to two exceptions. Firstly, congress by a legislative enactment precludes the court of law to review an administrative action; it is called 'jurisdiction-stripping'. Secondly, agency's administrative actions committed under just and reasonable exercise of discretion doesn't admit judicial review. However, the standard of review in administrative matters varies from situation to situation. When the administrative agency decides a case which merely involves determination of facts, then the court shall assess the validity of such a decision by applying the 'substantial evidence test', which requires substantial evidence to prove that the decision has been made in good faith. But, when a case involves a question of administrative agency's rule making powers, then the courts undergo deeper appreciation of facts and evidence. The general belief of courts, while deciding such matters is that the congressional delegation of limited legislative capacity to administrative agencies sufficiently allows them to reasonably interpret legal provisions to their fair understanding. Courts have developed an opinion that a clear statute should be followed in letter and spirit. But if a statute suffers from ambiguity then courts shall inquire, if the decision has been decided on reasonable grounds. It is called *'Chevron deference'* which gives substantial powers to administrative agencies to interpret ambiguous statutes and courts are barred to review the agency's actions if the interpretation is made on reasonable grounds. Critics argue that 'Chevron deference' interferes with court's exercise of independent judgment while interpreting statutes. However, the criticism is misguided because Chevron is a manifestation of congressional delegation of law-making. Moreover, it empowers the agency to interpret the statute for the purposes of implementing it. Here the word 'interpret' means to explain or tell the meaning of and doesn't mean giving a definitive or controlling meaning to a provision. Also, it is highly impractical for an agency to resort to the court of law every time it needs interpretive guidance (Siegel, 2018).

a. *Chevron v. Natural Resources Defense Council*

In this case, federal court reviewed Environment Protection Agency's regulations which it issued to implement 1977 amendment to the Clean Air Act. Regulations attempted to define and give a proper meaning to an ambiguous terminology in the amendment. Federal court called the definition inconsistent to the overall purpose of legislation but Supreme Court overturning the decision of lower court held that congressional delegation of law-making to agency includes the power to interpret the statute which apparently suffers from lingual ambiguity.

b. *Regent of University of California v. Bakke*

Supreme Court declared the policy of race-based preferences in state college admissions null and void for bring in violation of equal protection clause of constitution.

c. *Seila Law v CFPB*

Supreme Court held the structure of consumer financial protection bureau to be violating the doctrine of 'Separation of Power', because a single director being the head of agency is the only repository of executive power and can only be removed for-cause (inefficiency, neglect of duty and malfeasance) by president. It eliminates the influence of other institutions and threatens the democratic character of governance. In this case, Chief Justice Robert espoused a novel principle of administrative law which prohibits the concentration of executive power in a single individual unless he is removable at-will by the president (Boutilier, 2021). Court upheld the similar rationale in a subsequent case (*Collins v. Yellen*) to invalidate removal protection to the director of Federal Housing Finance Agency.

Limitations on Judicial Review

Judicial control of public bodies is often criticized as intrusion into the constitutional limits of other departments. Therefore, its application should be restricted to the protection of interest specifically affected by allegedly illegal official action otherwise it makes the proprietary of judicial intervention questionable (Jaffe, 1960). There are certain limitations to the doctrine of judicial review, as follows;

1. Jurisdiction-stripping

Congress is constitutionally empowered to oust or limit jurisdiction of court in relation to any matter so expressly defined/stated. It can be done by simultaneous exercise of court-creating[†] and court-limiting[‡] powers. Stripping or limiting a court's power to review aims to regulate judicial influence over policy, especially when congressional and court preferences differ (Chutkow, 2008). It also intends to limit the access of litigants to courts of law.

2. Doctrine of Political question

Courts of law generally don't adjudicate upon a question of non-legal character, because a politically charged question may generate a controversy bringing the apolitical quality of courts in question. It is believed that these questions can be better solved in political branches of government, and are inappropriate for judicial resolution. Courts neither approve nor reject the decisions of political establishment and let the political process take its course. In *Crockett v. Reagan,* Supreme Court refused to determine the legality of President's decision of military intervention in El Salvador and let the congress decide the matter (Redish, 1984). Similarly, In *Oetjen v. Central Leather Co.* the foreign department accorded de-jure acceptance to the Carranza regime of Mexico. The court stated that determining the legality of question is beyond the ambit of judiciary and is primarily a question of political nature. Contrastingly, sometimes the Supreme Court of America has been found to be involved in deep-seated political controversies of the country. Two such instances are given below when courts didn't pay attention to the doctrine of political question;

a. *US v Nixon* (Court directed Nixon to submit all the recorded tapes of secret proceedings in National democratic building. Court also stripped the president of his constitutional immunity)

b. *Bush v Gore* (Court determined the results of general elections (2000's) and illicitly helped George Bush top the electoral chart)

3. Presumption of constitutionality

The courts can't exercise power of judicial review until the unconstitutionality of a legislative enactment is established beyond reasonable doubt. It is a clear manifestation of 'judicial minimalism' and also accords adequate deference to the will of legislature. It is also connected to the idea of 'constitutional avoidance' which restrict the courts to resolve constitutional questions by disposing of cases on non-constitutional grounds. The principle of presumption has also a deep concern about unelected judiciary invalidating elected legislature's enactments. This phenomenon is called the 'counter majoritarian difficulty' (Dawson, 2013). Application of the principle of presumption of constitutionality alleviates the concerns of counter majoritarian difficulty.

4. Disallowance by statutory interpretation

It is a device to limit judicial review by statutory construction. It says that a statute must be construed in such a way, which reasonably preserves its validity against a constitutional attack. Therefore, if one part of a statute is found to be void and the other part sustains the process of judicial scrutiny then the court may apply the doctrine of separability.

5. Stare decisis in constitutional law

Judicial power of review is curtailed by court's earlier precedents, which are generally followed in letter and spirit. Courts prefer relying on established legal reasoning to ensure uniformity and predictability of judicial conduct. However, in recent times courts appeared reticent to pursue precedents; rather they are more inclined to superior reason and evolved experience. Some theorists contend that holding steadfast to ancient precedents is advisable because the foremost function of law, in this age of doubt and confusion, is to remain steady and promote security. But the rationale is misguided because security can only be achieved by constant change and intelligent adoption (Douglas, 1949). Holding the same disenchantment with earlier decisions, courts overruled nearly 60

[†] See Article 1, Section 8, Clause 9 & Article 3, Section 1 of American Constitution.

[‡] See Article 3, Section 2 of American Constitution.

constitutional precedents from 1937 to 1959 (Maltz, 1980).

6. Extra-constitutional tests

Courts while exercising judicial review are only concerned with the constitutionality of a decision and all other extra-constitutional considerations e.g. motive behind the decision, policy reasons, and principles of natural justice or wisdom of impugned action should not be resorted to.

7. Doctrine of clear mistake

Principle of Clear mistake restricts the power of judicial review only to those actions which suffer from a clear mistake. The mistake should be so clear and apparent that it doesn't admit rational inference. However, rectifiable and trivial mistakes are often pardoned and the action is saved from being invalidated.

8. Doctrine of strict necessity

Courts admit a constitutional question for judicial resolution only when strict necessity compels to do so. Judicial policy has put restraints on interference in the matters of other branches, unless it is by incidence of extreme necessity. Therefore, governmental conduct should be in conformity with the constitution so as to limit the appreciation of question to non-judicial branches. However, dire necessity may urge the courts of law to intervene in a restricted manner.

9. Prudential considerations

The questions involving constitutional interpretation must be legally and reasonably lying within the jurisdictional ambit of courts. The over-stretching of judicial confines is sometimes met with serious scholastic criticism and intellectual condemnation for setting bad precedents in future.

CONCLUSION

Over the years, doctrine of Judicial Review has evolved towards greater public welfare. The course of development has witnessed a peculiar oscillation between judicial restraint and judicial activism. However, predominant amount of scholarship appears to be claiming that current age belongs to the miraculous rise of *'juristocracy'* with its tentacles spreading to non-legal zones of operability and influence pervading unchartered fields. The rapid ascendancy of vivacious judicial order has made 'maintenance of institutional balance of power' and 'avoidance of institutional friction', a great challenge. Therefore, judiciary is generally discouraged from invading the constitutional spaces of other departments. It is also noteworthy that Judiciary has increasingly transformed itself into a political institution having adopted nuanced legal techniques to force its way through unpermitted domains. Furthermore, incessant trend of judicial intervention is bringing the issues of compliance and predictability of court judgments in serious doubt. It is uncertain that what future holds for judiciary but examination of historical as well as current trends suggest that the power of judiciary shall keep on burgeoning and shall make other institutions 'power-insecure'.

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