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Judicial Review: A Critical Study

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Abstract--- *The current research paper discusses the concept of judicial review and how it came to be originated with the case of Marbury v. Madison back in 1803. The paper also elucidates the various principles of natural justice before it talks about the various remedies that lie under the review such as certiorari, prohibition, habeas corpus, mandamus and quo warranto. The paper concludes with discussing the significance that judicial review holds in a democracy where the power can often go unfettered.*

Index Terms--- *DEMOCRACY, JUDICIAL REVIEW, NATURAL JUSTICE, WRITS.*

I. INTRODUCTION

Judicial review, as a concept, was not favoured by most of the European nations at first, owing to the separation of powers. Though countries like Germany, Austria and Switzerland, along with several common wealth nations were influenced by the United States and incorporated their own versions of judicial review in their legal systems. Since then, the concept has emerged and evolved as one of the governing pillars of these nations.

Judicial Review can be defined as an instrument which gives judiciary the power to analyse a legislative order or a law. The judiciary, by virtue of this power, can assess the laws being implemented by the governing bodies. A law that is not in accordance with the structure of the Constitution, the provisions laid down in it can be struck down owing to the judicial review. The countries having a written constitution face this aspect of judicial review more as the courts can more effectively assess the validity of a provision. Through Judicial review, a superior court can also revisit the decision of a lower court and strike it down if the decision is found to be erroneous.

Judicial review is a power. It enables the judiciary to reach out to the other organs of the government such as the legislature and executive and keep a check on their actions and see to the fact that nothing is done which doesn't conform to the country's Constitution. So, the function of judicial review can be said to be two fold that is, legitimizing the actions of the government and safeguarding the constitution against any encroachments.

Origin:

The origin of the doctrine is to be owed to the case decided by the American Supreme Court in 1803. The case goes by the name of Marbury v. Madison1. The facts of the case are as follows:

Back in 1800, the Democratic Republican Party won the elections defeating the Federalist Party led by John Adams. Just when his presidency was about to come to an end, John Adams had appointed justices of peace for the Columbian

[1] 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)

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district which had also been approved by the senate. The order was signed by the president and also was affixed with the official seal of the government. The commissions still needed to be delivered. When President Jefferson came to power, he ordered the Secretary of State, James Madison, not to deliver the commissions. At this, The Supreme Court was approached by William Marbury who was one of the appointees as the justices of peace. He asked the Supreme Court for a writ of Mandamus ordering Madison to show cause as to why he should not receive his commission.

Chief Justice Marshall gave the ruling that since Marbury had been properly appointed in confirmation with the procedures established by law. Because of this fact, he must be given a remedy. The Chief Justice said that a very important responsibility of the courts is that of safeguarding the rights of the individuals even against the President of the United States if the need arises. As far as the remedy of Mandamus was concerned, the court said that Marbury could not be allowed the advantage of that as according to Article III of the constitution, Mandamus applied only to cases "affecting ambassadors, other public ministers and consuls" and to cases "in which the state shall be party." The court though held that when an Act of Congress is in conflict with the Constitution, the Court's duty lies in upholding the Constitution as it is the Constitution which is Supreme.

Judicial review can be termed to be the means of checks and balances in a democracy which has its Constitution reigning above all the other entities. In India, the case of I.R. Coelho v. the State of Tamil Nadu2 the Supreme Court gave its opinion regarding the doctrine. The court held that judicial review shall be practices to check the following two things:

- Whether an amendment or a law is violative of any of the Fundamental Rights in Part II.
- If so, whether the violation found is destructive of the basic structure of the Constitution.

If the court is of the opinion that an Act or a provision of an Act is not in accordance to the principles enumerated in the Constitution, and violates the basic structure of the constitution, then such a law is liable to be declared void.
Under our Constitution, judicial review can conveniently be classified under three heads[3]:

- "Judicial review of Constitutional amendments.-This has been the subject-matter of consideration in various cases by the Supreme Court; of them worth mentioning are: Shankari Prasad case, Sajjan Singh case, Golak Nath case, Kesavananda Bharati case, Minerva Mills case, Sanjeev Coke case and Indira Gandhi case. The test of validity of Constitutional amendments is conforming to the basic features of the Constitution."
- "Judicial review of legislation of Parliament, State Legislatures as well as subordinate legislation.-Judicial review in this category is in respect of legislative competence and violation of fundamental rights or any other Constitutional or legislative limitations";
- "Judicial review of administrative action of the Union of India as well as the State Governments and authorities falling within the meaning of State. The researcher's emphasis is in this direction."

Judicial review shall not be confused with judicial control. While judicial control would be seen as restrictive in nature, judicial review should not be. "The term judicial review has a restrictive connotation as compared to the term

[2] (199) 7 SC 580
[3] Justice Syed Shah Mohammed Quadri, Judicial Review of Adminstrative Action, (2001) 6 SCC (Jour) 1.

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judicial control. Judicial review is 'supervisory', rather than 'corrective', in nature. Judicial review is denoted by the writ system which functions in India under Arts. 32 and 226 of the Constitution. Judicial control, on the other hand, is a broader term. It denotes a much broader concept and includes judicial review within itself. Judicial control comprises of all methods through which a person can seek relief against the Administration through the medium of the courts, such as, appeal, writs, declaration, injunction, damages statutory remedies against the Administration."[4]

II. PRINCIPLES OF NATURAL JUSTICE

Natural justice is a very crucial aspect of the Constitutional law and has been in existence since time immemorial. "This may be understood as Justice that is simple and elementary as distinct from Justice that is complex, sophisticated and technical."[5] "The concept of Natural Justice also differs from country to country and the principles applied are not uniform in nature though the fundamental concept of fair play in action maybe the same."[6] "The principles of Natural Justice are easy to proclaim but their precise extent is far less easy to define."[7] It has been opined several times that the concept of natural justice is a vague one and that it is not practicable. But this view is flawed as it seeks to compartmentalize the concept as something almost non-existent because of the fact that it cannot be weighed down and measured. In AK Kraipak v. Union of India, it was said that "The horizon of Natural Justice is constantly expanding. The question how far the principles of natural justice govern administrative enquiries came up for consideration before the Queen's Bench Division in re H.K. (An Infant), 1967-2 QB 617 at p. 630. Therein the validity of the action taken by an Immigration Officer came up for consideration."

The rules of Natural Justice are in place to see that there is no miscarriage of justice. These principles can be applied only in the case of any area not covered by the law of the land. The principle has changed over time and there have been some additions to the rules comprised within the principle. Earlier, the principle was deemed to be comprising of two rules, namely Nemo debet esse judex propria causa and audi alteram partem, which mean that no one shall be a judge in his own cause and no decision shall be given against a party without first giving the party a chance to be heard respectively. Thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in its faith without biased and not arbitrary or unreasonable but in the course of years many most subsidiary rules came to be added to the rules of Natural Justice. . Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that the limitation is not questioned. If the purpose of the rules of Natural Justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates the administrative enquiries from quasi-judicial enquiries. Enquiries

[4] M.P. Jain and S.N. Jain, Principles of Administrative Law: An Exhaustive Commentary on the Subject containing case-law reference (Indian & Foreign), 6th Ed., Wadhwa and Company Nagpur, New Delhi, 2007, p. 1779.
[5] John v. Rees, 1969 (2) All ER 274
[6] Maclean v. Workers Union, 1929 1ChD 602.
[7] Abdul v. Sulivon, 1952 (1) All ER 226

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which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching affect than a decision in a quasi-judicial enquiry.

III. REMEDIES OF JUDICIAL REVIEW

The Supreme Court and the High Court have been give the power to issue writs through Habeas Corpus, mandamus, certiorari, prohibition and quo warranto. The Supreme court can make use of these writs in order to enforce the Fundamental rights while the High Courts can use the rits for the enforcement of the fundamental as well as any other rights or purposes. "The Supreme Court held that 'for any other purpose' meant for enforcement of any statutory as well as Common Law Right."[8] These remedies have been explained below:

Writ of Certiorari:

The writ of Certiorari is used by the High Courts to direct the inferior courts to transfer to them, the record of the pending proceedings so that they can assess them and if needed, to quash them. Atkin L.J observed that the writ of certiorari may be issued "whenever anybody of individuals having legal authority to find out questions which affects the rights of subjects, and encompasses the duty to act judicially, act beyond of their legal authority."

In the case of Radheshyam Khare v. State of Madhya Pradesh.[9]it was observed by the Supreme Court that the writ consists of four components, namely, (a) a body of persons (b) having legal authority (c) to ascertain questions which affects the rights of subjects and (d) having the duty to act judicially.

Prohibition:

This writ is also issued to an inferior court by a higher court. Through this writ, the higher court prevents the lower court from acting out of the jurisdiction or exceeding the jurisdiction that it has been granted.

The writ is only available against a public authority or an authority set up by a statute exercising judicial or quasi-judicial functions. Only a person aggrieved by a decision or action shall apply for the writ. The writ has certain conditions such as:

- Like writ of certiorari, prohibition can be issued only against authorities exercising judicial or quasi-judicial functions.

- The writ can be issued only where such judicial or quasi-judicial authority assumes jurisdiction which does not have or exceeds the jurisdiction which it has or where proceedings are in contravention of law or principles of natural justice.

[8]Article 32 and 226, Right to Constitutional Remedies, Constitution of India, 1950
[9] AIR 1959 SC 107

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- At the time of the issue of the writ, proceedings must be pending.

- Where proceedings are partly within the jurisdiction of such authority and partly in excess of its jurisdiction, the writ will lie only against that part of the proceedings which is in excess of its jurisdiction.

- The authority should also continue to function. If before the issue of the writ the authority becomes functus, officio, prohibition will not be appropriate remedy.

- There should not be deliberate concealment or misstatement of material facts which may mislead the court.

Mandamus:

It is issued to anybody or individual divested with public duty to perform a function which is his duty to perform. It is issued in the form of an order by the Supreme Court or a High Court to any Court, public authority, government or corporation or individual devoted with public duty commanding such Court, public authority, government or corporation or individual.

"It is in the nature of command demanding any particular act to be done or not to be done by any individual holding public office, temporary or permanent or by a corporation or inferior court."[10]

This writ safeguards legal rights, applies constitutional limitations, correct error of law and infringement of principles of natural justice and to force any person or authority to carry out a public duty cast upon him by law. It cannot be issued to implement departmental instruction not having statutory force.

Habeas Corpus:

This writ is in consonance with the right to freedom of movement. This writ commands any person restricted without any reasonable justification to be set free of his confinement. It is in the form of an order given by the High Court of a state if a person has been imprisoned for no apparent reason. Habeas Corpus demands the court to be known as to why the person has been kept in captivity.

"The writ of habeas corpus has taken great relevance in the administrative procedure as wide powers of detainment are given on the administrative authorities in the current times. The bases of habeas corpus are the same basis of judicial review based on ultra vires doctrine. So if the detention powers are utilized mala fide or based on extraneous or irrelevant contemplations or are utilized in infringement of statutory provisions, the writ of habeas corpus will issue to nullify such a detainment. There is no need for a separate certiorari."[11]

Quo Warranto:

By the writ of Quo Warranto, the holder of a public office is questioned about the validity of his seat in the office. The officer is called upon to show cause as to what is the authority by which he holds the office. This writ grants upon the judiciary, the power to manage the executive action.

[10] Article 32, Right to Constitutional Remedies, Constitution of India, 1950
[11] Poonam Rawat, Mode of Judicial Review of Administrative Actions, *Journal of law College Dehradun***.**

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The writ cannot be used against a private office. The writ may enable the acts of the wrongful office bearer to become null and void ab initio. It will depend upon the nature of disqualification. If the disqualification is of technical nature, the acts will not be null and void and the principle of de facto office will be applied to save such actions.

IV. CONCLUSION

The Greek philosopher Aristotle was of the view that people who exercise power that is unchecked are often found to be favouring themselves and others who are like them. This observation stands valid for democracy as well. It is this unfettered power that the judicial review protects the citizens from. This is not because of the reason that the judiciary is more capable of making laws, but because of the fact that it takes away the concentration of law making power from one single entity. Judicial review does not take away the law making power from the hands of the legislature but it gives a share of the same to the judiciary. This exercise prevents the acts of the legislature from going unbridled.

It must always be remembered that a step taken in a new direction is fraught with the danger of being a likely step in a wrong direction. In order to be a path-breaking trend it must be a sure step in the right direction. Any step satisfying these requirements and setting a new trend to achieve justice can alone be a New Dimension of Justice and a true contribution to the growth and development of law meant to achieve the ideal of justice.

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