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Constitutional Rights, Judicial Review and Parliamentary Democracy

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(This editorial is based on the article 'Constitutional Rights, Judicial Review and Parliamentary Democracy' which appeared in 'The EPW' on 13th April, 2019. The article talks about constitutionality of judicial review, its underlying philosophy and issues related to judicial overreach.)

While the contribution of the Supreme Court towards asserting the supremacy of constitutional rights is undeniable, the rightful limits of judicial intervention in the executive and legislative domains has been questioned in recent times.

The heightened debate surrounding the morality and legality of court's intervention in public policies every now and then often challenges the constitutionally mandated jurisdictional equilibrium between the legislative, executive and judicial branches of the Indian state.

Therefore, to further the cause of parliamentary democracy that we have in our nation, it becomes relevant to analyse and understand the issue of judicial overreach.

Judicial Review

Judicial Review in its most widely accepted meaning is the power of the courts to consider the constitutionality of acts of organs of Government (the executive and legislature) and declare it unconstitutional if it violates or is inconsistent with the basic principles of **Grundnorm* i.e. Constitution.**

*[*Grundnorm is a German word meaning "fundamental norm." The jurist and legal philosopher Hans Kelsen coined the term to refer to the fundamental norm, order, or rule that forms an underlying basis for a legal system.]*

In post-independence India, the inclusion of explicit provisions for 'judicial review' were considered necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution.

Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.

While **judicial review over administrative action** has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the **constitutionality of legislative as well as administrative actions** to protect and enforce the fundamental rights guaranteed in Part III of the Constitution.

The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since **Article 246** of the Constitution read with the **VIIth schedule**, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures.

Hence, the **scope of judicial review** before Indian courts has evolved in three dimensions – firstly, to **ensure fairness in administrative action**, secondly, to **protect the constitutionally guaranteed fundamental rights of citizens**, and thirdly, to **rule on questions of legislative competence between the centre and the states**.

The power of the Supreme Court of India to enforce these fundamental rights is derived from **Article 32** of the Constitution. It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights.

This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of writs evolved in common law –

- **Habeas Corpus** - to direct the release of a person detained unlawfully.
- **Mandamus** - to direct a public authority to do its duty.
- **Quo Warranto** - to direct a person to vacate an office assumed wrongfully.
- **Prohibition** - to prohibit a lower court from proceeding on a case.
- **Certiorari** - power of the higher court to remove a proceeding from a lower court and bring it before itself.

With the advent of **Public Interest Litigation (PIL)** and dilution of the concept of **locus standi** [*the right or capacity to bring an action or to appear in a court*] in recent decades, Article 32 has been creatively interpreted to shape innovative remedies such as a '**continuing mandamus**' for ensuring that executive agencies comply with judicial directions.

Expanding Judicial Review

It was through the expansive interpretation of Article 21 of the Constitution in Maneka Gandhi v Union of India (1978), the Court held that the “procedure established by law” envisaged in the said article had to be just, reasonable and fair to pass the test of constitutionality.

In M Nagaraj v Union of India, the Court declared that fundamental right in Articles 14, 19 and 21 “stands atop in constitutional value” in a fulsome recognition that “human dignity, equality and freedom were conjoined, reciprocal and similar values”.

Instances of the Court’s intervention to expand the frontiers of these rights to include redressal for the killing of innocent people in false encounters and relief to the victims of custodial violence etc, has multiplied in recent times.

The Court therefore has established the foundational principles for the exercise of its judicial review jurisdiction traceable to Articles 13, 32, 136, 142 and 147 of the Constitution. (The high court’s judicial review jurisdiction is anchored in **Article 226** of the Constitution.)

Challenges of Judicial overreach

The court however in recent times has moved beyond from ensuring basic rights for citizens and has extended its review jurisdiction to what are clearly functions assigned originally and exclusively to the executive branch under the constitutional scheme.

Petitions to the Court have invoked **judicial review in “public interest”** to question major policy decisions of the government concerning policy choices, for example, in what are now known as the **2G spectrum and coal mines allocation cases**.

Challenge to proceedings of legislative assemblies and decisions of the speaker have also been entertained by the Court. Decisions of the Court voiding a constitutional amendment approved by Parliament to alter the procedure for appointment of judges, exercising review powers in what is popularly known as the **Armed Forces (Special Powers) Act (AFSPA) case** following the constitution bench decision in the **Naga People’s Movement of Human Rights v Union of India (1982)** etc has extended the Courts’ review jurisdiction to cover not only administrative decisions but to domains hitherto regarded as the exclusive preserve of legislatures.

Judicial Review or Judicial Overreach

Supporters

Those supporters of wider judicial review often consider that it furthers the rule of law. They don't see it as being anti-democratic by emphasising that it rises from the Constitution itself—the social contract that reflects the will of the people.

Another justification for an expansive judicial review jurisdiction is that it advances the cause of justice, human rights, reasonableness, tolerance and the basic principles of morality and good faith, all of which constitute the real meaning of democracy and rules out only those choices that are ex-facie* unreasonable and inconsistent with democracy.

[*Ex facie**, Latin for "on the face (of it)," is a legal term typically used to note that a document's explicit terms are defective without further investigation.]

Human rights are seen as an ethical force to provide "inspiration for legislation" and are strong ethical guidelines as to what should be done. Hence, the rise of the judiciary and overseeing the right and just implementations of such rights can best be called the need of the hour.

Those Against

Those who favour judicial restraint, argue that in a democracy, people exercise their sovereignty through elected representatives and not through the unelected judges who must defer to the wisdom of parliamentary majorities.

Questions are raised not so much about the advisability of review jurisdiction itself but with its perceived overreach to encompass areas of governance considered outside its purview and about the finality of judicial wisdom.

It is argued that the failings of democracy and inadequacies of the democratic process cannot be invoked to negate the core of the democratic principle, namely that ultimate sovereignty vests in the people.

Thus, arrangements of governance embodied in the Constitution resulting from the exercise of their free will cannot be used to deprive the political masters of the right of final decision over policy making.

Conclusions

While the Court's jurisdiction as a soldier to protect and advance fundamental rights merits loud affirmation, the Court however should not to be seen as dismissive or disdainful of the processes of democratic governance.

The presumption that the legislature understands the needs of its people and that even its discrimination and classifications are based on adequate grounds has also been acknowledged by the Supreme Court itself.

The challenge, therefore, is to find the delicate balance between the three organs which nurtures and invigorates institutions designed to serve the ideals of a true republic.

The Court can thus serve as a guiding light unto the nations even if it cannot become a sheriff unto the nations.