Implications of Judicial Review

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INTRODUCTION

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision. This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way. If you want to argue that a decision was incorrect, judicial review may not be best for you. There are alternative remedies, such as appealing against the decision to a higher court.

Examples of the types of decision which may fall within the range of judicial review include:

- Decisions of local authorities in the exercise of their duties to provide various welfare benefits and special education for children in need of such education;
- Certain decisions of the immigration authorities and Immigration Appellate Authority;
- Decisions of regulatory bodies;
- Decisions relating to prisoner's rights.

IMPLICATIONS OF JUDICIAL REVIEW

The power of judicial review has three important implications:

- Nullification
THE FIRST IMPLICATION OF JUDICIAL REVIEW IS NULLIFICATION

Since the power of judicial review results in the nullification or annihilation of legislative and executive actions of not only the central government but also the state government, it has attracted two fold challenges from both the governments.

The challenge to judicial review coming from the center is based on the principle of separation of power, and

The challenge coming from the states is based on the nature of the federal structure, which allows coordinating and independent sets of government to function in relation to the same people, in the same territory.

The claim of the federal judiciary to exercise the power of review is contested by the coordinate departments of the federal government itself- by invoking the principles of separation of powers and democratic accountability. It has been argued that there is no reason why judiciary should have a better claim than any other department of government to judge the constitutional vires of governmental actions. Some constitutional jurists argue that doctrine of separation of power strongly militates against the judiciary’s power of judicial review.[1] It is also argued that since all the powers of the organs of government are derived from the people and have been distributed by the constitution amongst them, each department should be allowed to decide itself the extent of power granted to it by the constitution. And it is further argued that if the department exceeds its limits imposed by the constitution, it is accountable to the people themselves for this. It goes without saying that if the above argument is accepted, there would be divergent interpretations of the constitution, which is bound to create confusion. For the sake of uniformity and clarity, it is essential that the task of constitutional interpretation should be entrusted to only one organ of the national government and the organ cannot be anyone other than the judiciary.[2]

The reason for entrusting the task of constitutional interpretation to one body i.e. judiciary, are obvious

The interpretation of the laws is the proper and peculiar province of the courts;[3] and

From the very nature of its functions, judiciary will always be safer than the other two branches of the government.

It is the least dangerous branch because it has neither the purse, which the legislature has nor the sword of the community, which the executive has; it merely has judgment[4]. Similarly, based on democratic principles, it is argued that to allow the non-democratic (neither elected not responsible to the people) branch of the government to undo the decision of the democratic branches of the government would amount to distrusting democracy. The argument fails as the government of limited power faces a special problem of legitimacy of the governmental actions.[5] In addition, judicial review itself has been “legitimized by popular acquiescence” and therefore, can be said to have received “popular approval”[6].
The argument of state rightist, against nullification of the state action by judicial branch of the national government, puts emphasis on the rights of the states. In the context of the US, where the constitution came into force after ratification by the states, it has been argued that the states themselves must be judges of “any infractions of the document.”[7] It has also been said that if the jurisdiction and the power of the states were made subject to the decision of the judicial branch of the national government, the residuary and inviolable sovereignty” of the states, “both legislative and judicial”, would be annihilated .[8] However, the considerations which work are not allowing different government departments from having their own final interpretation of constitution and militate against several states enjoying the power. That was perhaps the reason behind the emphasis of Hamilton on having the US Supreme Court as the final arbiter between the national and state government and final interpreter of the constitution, when he said:

The mere necessity of uniformity in the interpretation of national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed [9]

The argument of the state against the national judiciary, exercising review power in relation to the states, is based on the apprehensions of the states that national judiciary may favor the national government against the states in a dispute. Some of the state rightist argue that Supreme Court might be a perfectly impartial tribunal to decide between two states; but it could never be considered impartial when the contest lies between the US and one of its members.[10] It is argued that the states cannot be have assumed to have agreed to the final resolution of a federal dispute by an agency which is appointed and paid by one of the parties to the dispute.[11]

**SUCH ARGUMENTS INVOLVE THE SECOND IMPLICATION OF JUDICIAL REVIEW I.E ITS CREDIBILITY**

The aspect of the problem is taken care by a two-fold process

In every democratic country, the constitutional system ensures independence of judiciary.

In some countries like US, there is further provision for ratification of the appointment of the federal court judges by upper chamber of the national legislature which is constituted on federal principle and represents the state.

There are several ways in which judicial independence is ensured. The judges are given secured tenure and they hold their offices during good behavior.[12] They are given either the life tenure [13] or fairly a long tenure[14] from which they can be removed only ny a proves of impeachment. They can , of course, be persuaded to retire early and, in order to tempt the judges to do so, they are given excellent post-retirement benefits. Their salary and other conditions of service are also made secure because they cannot be changed to their disadvantage during their term of office.[15]

In the appointment itself, there is ample scope for appointing authority to favor a person who holds political views akin to him. There is no guarantee that there shall be impartiality in the appointment and selection of judges of the federal courts, or that the persons to be ultimate arbiters of diverse issues shall not be apathetic to the legitimate claims of states or of certain community. That these things shall not happen is left to be ensured by the possibility of the assertion
of a mature and vigilant public opinion. The fact that the appointments are to be made by democratically elected
government, which is accountable to the people, is perhaps considered to be, in itself, a good enough guarantee against
nepotism and abuse of power. The confidence of the states is also ensured, as noted earlier, by the requirement of the
approval of appointments by upper chamber of the national legislature which consists of the state representatives.[16]

In addition, Convention has developed which ensure that judges of the federal courts are so chosen that different
regions and communities get their representation.[17]

Above all, traditions of an independent judiciary have got so entrenched in democratic countries that, at times, some of
the appointing authorities have been shocked by the decision of the judges that they had chosen. For instance, Abraham
Lincoln's own secretary of the treasury, Salmon Chase, who was expected to uphold the constitutionality of the wartime
issue of the paper money, in Hepburn v. Griswold[18], as Supreme Courts Chief Justice, wrote for the majority in a 4:3
decision declaring the legislation unconstitutional; Similarly, President Roosevelt was bewildered by the performance of
Holmes J.[19] President Eisenhower is similarly said to have been unhappy with the performance of Warren CJ.[20]

THE LAST IMPLICATION OF JUDICIAL REVIEW IS JUDICIAL CREATIVITY

To what extent should courts be allowed to play a creative role in federal system, is a perennial problem. The idea is now
obsolete that judges are mere discoverer or appliers of law and that judicial decision-making is merely a mechanical
process of applying the law to particular facts of a case. By now, it is conceded that judges make both the ordinary and
constitutional law. Judiciary, of course, has the last word in matters of interpretation of laws and the constitution, and it is
judicial enforcement of the provisions of constitution which makes them more significant than a mere maxim of political
morality. Some creativity is inherent in the very process of interpretation, and since constitutions are expected to endure
for ages, there is scope for conscious judicial creativity in the field of constitutional law.[21]

Thus, in a federal set up, the impact the judicial decisions is not only that they preserve the sanctity of the constitution by
enforcing constitutional limitations; but rather, a close examination of the role of courts as constitutional interpreters
shows that they play the vital role of maintain the proper equilibrium between the claims of national powers and states’
rights. The read the constitution in a manner so as to produce results which accord with the prevailing needs and notions of the day. [22] It is to the credit of the creative role of the US Supreme court that a Constitution framed for an agrarian society of 1780's continues today to serve as the Constitution of a highly industrialized society, the powerful American nations. [23]

The creative role of the judiciary had dragged the courts into political controversies. For example, in Canada, experts on constitutional law have questioned the Privy Council wisdom in deliberately diluting the centralized force of the provisions of the British North American act, 1867. Similarly in US the centralizing theme if the Marshall court's decision and favoring the states' rights by the tancy court have never been above political controversy. The critics have gone to the extent of calling American system of government- government by the judiciary .even those who don't doubt the achievement of the court, question its credentials for playing an activist role to mould the destinies of the people . The active role played by the democratically non-accountable court in political matters has always been a matter of debate: how does one reconcile judicial review with the democratic ideal of the constitution. On the other hand, the defenders of the review power argue that the democratic process can always assert itself and supersede the judicial decision by the exercise of amending power. This power, having been rarely exercised, shows that there is acquiescence of the people in the innovations brought by the court.


[4] Bas Blackwell, the federalist no. 78 (oxford, 1948) 396(Hamilton)


[6] Ibid, 31


[8] Taylor, New Views of the Constitution 114 cited from Bennett, ibid, 120

[9] Federalist No. 78, 406


[11] The above thesis was developed by Spencer Roane who published a series of papers which appeared in The John P. branch historical papers on Randolph- Macon college(1905) See , Walter Hartwell Bennett, American Theories of
Federalism (University of Alabama Press, 1964)113.

[12] The US Constitution, Art III, S.I; B.N.A Act, 1857. 98(i); the commonwealth of Australia Act, S 72(ii)

[13] For example in the US and Australia

[14] In Canada retirement age is at 75 years, B.N.A. Act, 1857 S.98(iii).


Recommended Read

- GST Implications of Plotted Development
- Everything You Must Know About Tax Exemptions & Implications Under ULIPs