

Conceptual Framework of Judicial Review with Reference to Nepal

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Abstract: The power of the Judicial Review is considered as the touchstone to test constitutionality of the state action including legislation. It brings life and dynamism to the constitutional system. It brings about constitutional clarity and fulfills any gaps that may arise in the constitution. Judicial review controls the arbitrariness of government and protects civil liberties by maintaining the rule of law. The judicial review is exercised to make state organs and bodies as well as government and public officials disciplined and accountable. It is the foundation of constitutional government. The scope of judicial review can be categorized as judicial review of legislation, judicial review of executive action, and judicial review of judicial action. There are several grounds the judiciary can exercise its power. Compliance with the constitution and protection of civilian rights are the fundamental basis of judicial review. The grounds upon which state organs are subject to control by the judicial review have been classified as illegality, irrationality, and procedural impropriety. Its concern is whether a decision-making authority has exceeded its power, committed an error of law, committed a breach of rules of natural justice, and reached a decision without reasonable ground or by abusing its power. The concept of judicial review is not away from criticism. It is often said that judicial review is intolerably uncertain and amounts to little more than a license for judges to interfere arbitrarily with the machinery of government and administration. The power of judicial review has been criticized for being against democratic legitimacy. The question arises that is justifiable for the court to question the validity of the actions of the elected members of the parliament. This question makes the concept of judicial review as the most controversial feature of the Constitution. But this right is not an authority to make the court higher and more powerful than other organs, but it is a means to establish constitutional supremacy and rule of law.

Keywords: Judicial Review, Constitutionalism, Rule of Law, Civil Liberties, Supremacy of Constitution

1. Introduction

Judicial review is the power of the court vested upon it by the constitution itself to test the constitutionality of the legislative and executive actions. Judicial review is one of the strong weapons that belong to the judiciary. But it does not mean that power of judicial review makes the judiciary superior to other organs of the government. However, it is sure that it protects the constitutional norms and values. All constitutional mechanism becomes null in the absence of judicial review. [1] The power of the Judicial Review is necessary for the effective functioning of the State machinery. Therefore, it is considered as the touchstone to test constitutional supremacy. The judiciary is considered as the least dangerous branch of the government. However, the

judiciary requires the power of judicial review to safeguard civil liberties and to uphold the supremacy of the constitution. The doctrine of judicial review is the case in truth, *sine quo none* of the modern constitutionalism. In practice, there can be no constitution without judicial review. [2] The values of constitutionalism must be followed to keep democracy alive. The power of judicial review must be ensured to activate the values of constitutionalism. It is impossible to control the unauthorized use of State authority without the power of judicial review.

2. Concept of Judicial Review

Judicial Review is the most effective measure to limit the State's authority within the constitutional limits. It is through

judicial review; the court receives the responsibility of being the custodian of the Constitution. Brain Thompson rightly says;

Judicial review is one of the instruments to check and balance the power of government through the judiciary. Judiciary is considered as a custodian of the constitution. Judiciary checks the other state organs and controls any act(s) which is beyond the constitutional limits. Through the power of judicial review, the judiciary controls the executive and legislative wings of government for their arbitrary use of power and protects civil liberties. [3]

Judicial review aims to protect citizens from abuse or misuse of power by any branch of the State. [4] The law requires that the Government should be subjected to the law rather than the law subject to the Government. [1] The principle of judicial review gives the court the right to invalidate the actions beyond the limitation of the Constitution. The Court interprets the Constitution with the help of the judicial review. It brings life and dynamism to the constitutional system. It brings about constitutional clarity and fulfills any gaps that may arise in the constitution. The summary of Dr. Bhimarjun Acharya's dissertation on Judicial Review is as follows:

The provision of judicial review is considered as an authority vested in an independent judiciary to protect constitutional supremacy. There exists no constitution without fundamental rights, no fundamental rights without judicial review, and none of these without an independent, competent, impartial judicial system. Judicial review, as a system, is an essential endeavor to judge the law and government action in the light of ultimate values. It is a means by which citizens' aspirations, as expressed in constitutional absolutes are concretized into a living constitution. [5]

The judiciary is called the guardian and protector of the Constitution. Judicial review is regarded as an integral part of a written Constitution. [2] It is a judicial instrument, which

gives the Judiciary, to scrutinize the legality and the constitutionality of government action especially those acts and decisions of the political branch of the government namely the legislature and the executive. Here, we should keep in mind that judicial action also is not completely out of the purview of judicial review. It is an important tool for establishing the rule of law and constitutional supremacy in the country.

3. Objectives of Judicial Review

The main purpose of judicial review is to establish the supremacy of the constitution and the law. Judicial review controls the arbitrariness of government and protects civil liberties by maintaining the rule of law. The judicial review is exercised to make state organs and bodies as well as government and public officials disciplined and accountable. In the writ petition of the *Ganesh Panjiyar*, the Supreme Court observed that the right of judicial review is deemed indispensable mainly for the following purposes: [6]

1. To protect the rights and freedom of citizens and to ensure their enforcement,
2. For the meaningful adherence to the concept of rule of law,
3. To implement the concept of limited government,
4. For effective use and adherence to the principles of Separation of Power and Checks and Balances,
5. To limit the actions and decisions of the government within the statutory scope,
6. To ensure judicial independence and competence,
7. To control the arbitrary and autocratic actions of the state executive,
8. To protect the constitution by maintaining constitutional supremacy.

There are four core objectives of judicial review which are as follows;

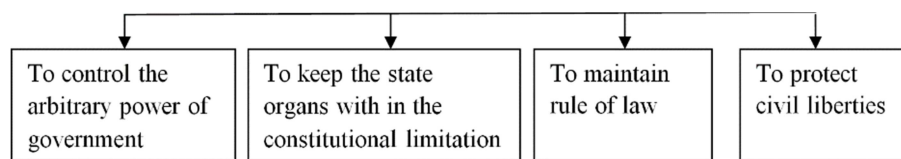


Figure 1. Objectives of Judicial Review.

3.1. To Control Arbitrary Power of Government

The purpose of judicial review is to establish the rule of law by preventing the state apparatus from operating arbitrarily. The principle of judicial review is developed to enable the general public to receive services effectively and to maintain high respect for law and order so that public officials will not misuse their power.

3.2. To Keep the State Organ Within the Constitutional Limitation

The principle of judicial review is required to bring the principles of separation of powers and checks and balances

into practice and to keep them within the limits prescribed by the constitution and the law.

3.3. To Maintain Rule of Law

"Where there is discretion, there is a greater possibility of arbitrariness," said AV Dicey, a proponent of the rule of law. [7] Judicial review is an instrument provided to the court for the establishment of rule of law that examines whether other organs of the state are within the limits prescribed by law or not. Therefore, this right is called the touchstone of the Constitution. In the case of *R. K. Jain v. Union of India*, the Supreme Court of India states that "Judicial review is thus the touchstone and essence of the Rule of Law." [8]

3.4 To Protect Civil Liberties

The court exercises the power of judicial review for protecting civil liberties. In particular, it has the authority to regulate and control the exercise of executive and legislative powers. A limited government is a prerequisite for the protection of the fundamental rights of the people. This principle holds the government accountable and ensures civil liberties.

4. Scope of Judicial Review

Judicial review is affected by various things. So that, no strict scope can be demarked. It is affected by the constitutional structure and judicial independence of the country. The legal validity/legitimacy of any decision or action is examined through judicial review. While exercising

this right, collection and evaluation of evidence and witness examination are generally not followed. It emphasizes the procedural aspect of the disputed decision. Fairness and impartiality in decision-making are expected. Judicial review examines the constitutionality of the law and other government action, declares it void if it is unconstitutional.

Nature of political regime, stability, the competitiveness of political parties, separation of powers, tradition of judicial independence, and degree of political freedom are the major elements that affect the scope of judicial review. Public awareness and attitude towards the judiciary may serve to determine its scope. [1] Sometimes personal thoughts, attitude, consciousness, and surroundings may be the determinants to the scope of judicial review. [9] The scope of judicial review can be categorized as judicial review of legislation, judicial review of executive action, and judicial review of judicial action.

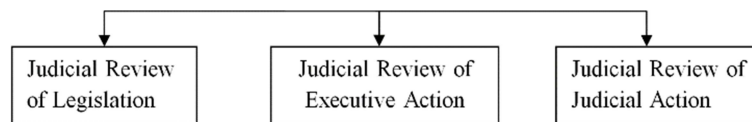


Figure 2. Scope of Judicial Review.

4.1. Judicial Review of Legislation

It incorporates the matter for the judiciary to examine whether the law made by the legislature is within the limits of the constitution or not. It includes the judicial review of constitutional amendments, judicial review of any Act or ordinance. The delegated legislation and executive notice published by the authority of any Act are reviewed from such scope if it conflicts with the constitution and parent Act. In *Nabaraj Silwal's* case, the Supreme Court interprets:

“As our constitution and legal system have incorporated the concept of constitutionalism, rule of law, judicial review of the legislation is included in addition to the actions of the government. The constitution grants extraordinary jurisdiction to the Supreme Court to provide all kinds of remedies for full justice. Therefore, the legislature should formulate fair, just, and reasonable legislation. If a dispute arises before the court that law has not been enacted accordingly, its validity can be examined and if the law is deemed inappropriate, such law may be declared unconstitutional, invalid, or void.” [10]

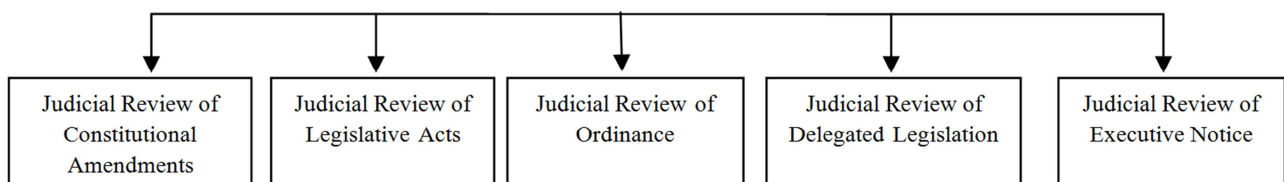


Figure 3. Kinds of Judicial Review of Legislation.

4.2. Judicial Review of Executive Action or Administrative Decision

This scope of judicial review comprises the examination of whether the executive decisions and actions are within the constitution, law, and judicial values and accepted principles. [11] Basically, violation of jurisdiction, procedural errors, and lack of reason-based decisions are often declared void in the process of judicial review. In some cases, the intention of the executive decision is also considered in judicial review. In *Nabaraj Silwal's* case, The Court invalidated the decision of the government for the appointment of the Inspector-General of Police. [12] This

issue can be taken as an example of judicial review of administrative actions. Since there is more exercise of state power, the judiciary seems to be strict in judicial review of the executive functions.

4.3. Judicial Review of Judicial Action

Generally, there is no judicial review of judicial actions. Judicial functions are concluded within the ordinary jurisdiction of the court. But in some cases, judicial review of judicial functions may also be done. This is an exceptional situation. The order issued by the Supreme Court for the protection of the right to privacy in the writ of *Annapurna Rana's* case can be termed as judicial review of judicial

action, reversing the order in the case under consideration in the Kathmandu District Court under ordinary jurisdiction. [13]

5. Constitutionalism and Judicial Review

Constitutional Supremacy is one of the basic characteristics of rule of law and limited government. Constitutional Supremacy expects that all the organs of the State machinery should play their respective role within the framework of constitutional limitation. No other organ of the State can use excessive power without the clear mandate of the constitution and law. The court can control and void the excessive action of the State government through judicial review. Judicial review is not possible without independent judiciary. Naturally, an independent judiciary is an indispensable prerequisite of a free society under the rule of law. Such independence implies freedom from executive/legislative interference in the exercise of judicial functions. [14] Thus, the concept of judicial review ensures limited government.

Limited government is the rule of law not of men. In order to keep the government in a certain limit particularly in a democratic state, the law has been divided into two basic types. [15] The first is the fundamental and constitutional law and the other is ordinary law comprising of statutory and customary law. The legal effect of such division is that if any law is enacted contrary to the constitutional limitation and directions such laws are tested on the basis of the basic norms of the constitution. That's why the constitution is called fundamental law of the land.

The concept of constitutionalism established a belief that the actions of state organs should be within the scope prescribed by the constitution and the actions against the constitution cannot be valid under any circumstances. As Charles H. McIlwain said:

Constitutionalism recognizes the necessity for the government but insists upon limitations being placed upon its powers. It connotes in essence, therefore, a limitation on the government; it is the antithesis of arbitrary rule. Its opposite is despotic government, the government of will, instead of the government of law. [16]

Constitutionalism emphasizes that public authorities should not be arbitrary, authoritarian, or extremist. Constitutionalism refers to the concept of limited government. Limited government does not mean a weak government. It is a government that has defined objectives and powers, along with the defined limitation on the exercise of such powers. In essence, this is a good government. [17] Judicial review is the authority of the court to examine the act of executive or legislative and to invalidate that act if it is contrary to constitutional principle. [18] It is associated with many modern constitutional principles like separation of powers, checks, and balances, rule of law, constitutionalism, and supremacy of the constitution.

6. Limitations of Judicial Review

Judicial review is not an unlimited or absolute right

granted to the court. There are certain limitations under the constitution and the law. Such limitations are mainly imposed in the implementation of the principle of separation of powers, and checks and balances. The limitation to the power of judicial review is imposed in order to institutionalize democratic practices and implement the concept of accountable government. Mainly there are two types of limitations for judicial review:

- 1) Expressed or Constitutional Limitation.
- 2) Implied or Self-Regulated Limitation.

The constitution itself imposed some limitations for judicial review. The rationality of such limitation is that the legislative and executive branches of government are the people's representative bodies. They are publicly elected and directly accountable to the people. They are elected on certain policies and programs which can be decided by political fora or "ballot box". [19]

Article 55 of the Constitution of Nepal (2072) can be considered to be the expressed limitation on judicial review. The article states that no question can be raised in any court regarding the implementation of the Directive Principle of State Policy (DPSP). Similarly, provision to suspend the fundamental rights in times of emergency (Article 273), not to question the privileges of the Parliament in court (Article 103), not to file a case in any court regarding the views expressed in the Parliament (Article 103), not to question the delimitation of constituencies by the Constituency Delimitation Commission (Article 286). They are the expressed limitations. But the court has explained that only the constitutional provision can impose a limitation. Judicial review cannot be a matter of contradiction between the provisions of the constitution.

In addition to the expressed limitations/restrictions imposed by the constitution and the law, the judiciary itself or in other ways also imposes a limitation on judicial review. The concept of judicial restraint developed with the belief that the courts should present themselves in a restrained manner as they are not directly elected by the people and should not be directly accountable to the people. Question of justiciability, issue of public policy, political questions, subject of legislative wisdom and competency, hypothetical issues, diplomatic relations, national security, state of emergency, alternative remedy, mala fide intention, and locus standi are the basic foundations for self-restraint during judicial review.

7. Grounds for Judicial Review

There are several grounds the judiciary can exercise its power. Compliance with the constitution and protection of civilian rights are the fundamental basis of judicial review. Lord Diplock has classified the ground of judicial review using the three broad classes of illegality, irrationality, and procedural irregularities. [20] Generally, grounds of judicial review are illegality or error of law, irrationality, procedural impropriety or violation of natural justice, unreasonableness, *ultra vires*, abuse of power (arbitrary rule), jurisdictional

error, misuse of discretionary power, failure to comply with the mandatory procedural requirement and apparent error of law on the face of the record.

The grounds upon which state organs are subject to control by the judicial review have been classified as illegality, irrationality, and procedural impropriety. Its concern is whether a decision-making authority has exceeded its power, committed an error of law, committed a breach of rules of natural justice, and reached a decision without reasonable ground or by abusing its power. It is an established fundamental fact that on an application for judicial review, the court will not review the merits of the decision but will confine themselves to ensuring, in brief, that the authority did not act illegally, unreasonably, or unfairly. [21] It also defines the role and responsibility of the legal and political branches of the state organ. The great argument of judicial review is that state organs along with the legislature and executive have not a right to violate the constitution, if they do so, the only remedy is judicial review. Generally, grounds of judicial review are as follows:

Constitutional supremacy: Constitutional supremacy can be taken as the undisputed basis of judicial review. Violations of fundamental rights and constitutional provisions are major grounds for judicial review.

Abuse of power or non-compliance with prescribed procedures: Judicial review is also conducted on the basis of

abuse of power or non-compliance with prescribed procedures. According to Wade and Forsyth,

Compliance with the Constitution and protection of civilian rights are the fundamental basis of judicial review. It also governs abuse of power, as where something is done unjustifiably, for the wrong reasons, or by the wrong procedure. [22]

Illegality, irrationality, and procedural irregularities: “Illegality, irrationality and procedural irregularities as the three main reasons for judicial review” as illustrated by Lord Diplock in the case of Council of Civil Service Union v. Minister of State of Civil Service. [20]

Principle of natural justice: Principle of natural justice, fair trial standard, and the principle against prejudice are the fundamental basis for judicial review.

Other grounds: Other grounds for judicial review include issues of jurisdiction, legal errors, and abuse of power or arbitrary use. [22]

8. Kinds of Decisions in Judicial Review of Legislation

The decisions in the cases of Judicial Review of Legislation can be broadly categorized into four categories.

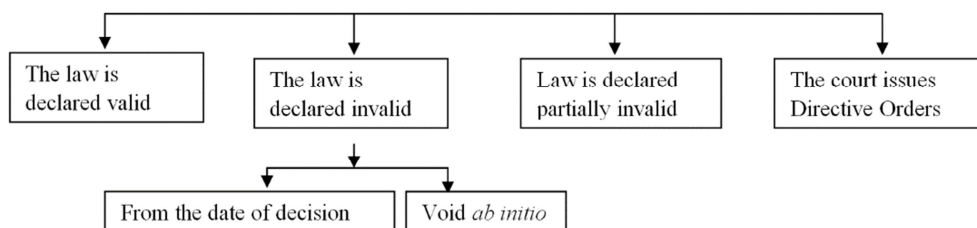


Figure 4. Categories of the Decision in Judicial Review of Legislation.

9. Criticism of Judicial Review

The concept of judicial review is not away from criticism. It is often said that judicial review is intolerably uncertain and amounts to little more than a license for judges to interfere arbitrarily with the machinery of government and administration.

Also, it is said that 'to that extent any clear principles of judicial intervention do appear, they are constitutionally unacceptable because they represent either too wide or too narrow an encroachment into the field of government and administration.' [23] The decisions and actions of the legislature are representative of the people's mandate. However, through judicial review, the judiciary can declare such actions invalid. This shows the anti-majoritarian nature of judicial review that goes against the actions of the majority government. In the course of judicial review, the judges present their interpretation of the executive and legislative actions which has a completely non-participatory nature. The discretionary power of the judiciary does not allow any kind

of interference in the process of judicial review. The court is often criticized for arbitrarily using its discretionary power. It is also a costly and time-consuming process. The long process of judicial review often leads to increased costs. The power of judicial review has been criticized for being against democratic legitimacy. The question arises that is justifiable for the court to question the validity of the actions of the elected members of the parliament. This question makes the concept of judicial review as the most controversial feature of the Constitution.

10. Conclusion

The growth of judicial review is the inevitable response to the judicial process in the exercise of judicial power. In the course of the administration of justice, the judiciary paves the way for a new dimension of justice to meet the need of the time. [24] As Brain Thompson notes, “Judicial review is an instrument to transform the concept of liberal democracy and the rule of law into practice.” [3] Judicial review is considered as a basic element of constitutionalism. The constitution

empowers the Supreme Court to examine whether the organs created by the law are within the limitation and scope determined by law or not. Judicial review is exercised under extraordinary jurisdiction. This right is not an authority to make the court higher and more powerful than other organs, but it is a means to establish constitutional supremacy and rule of law.

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