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Marbury V. Madison to Present Day: Tracing the Evolution and Significance of Judicial Review

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Abstract

The concept of judicial review signifies power vested in the superior judiciary by the judiciary itself where it can revisit the legislation. The ambit of the doctrine of judicial review stretches its boundary line to the decisions of administrative authorities as well. Marbury v. Madison was essentially seen as a vital case when it was decided since it laid down the foundation of the very power. It dynamically acquired quality and prominence, nonetheless, and is currently valued by people. It is considered to be a landmark case because it established the judicial organ as the co-equal part of the government. Many people consider judicial review as an essential part of the separation of powers. Its job as a foundation of judicial power holds a practically matchless spot of significance in judicial history. The judicial review was previously implicated in Bonham's case. It was criticized by legal advisers, judges, and laymen as, according to them, allowing unelected judges to fix the legislation drawn up by the representative institution in a democratic country is hardly justified. The current study attempted to dig out Bonham's case rationale alongside the arguments put forward in Marbury's case where it emerged to be the powerful tool possessed by the judicial organ of the state.

Keywords: administrative action, administrative discretion, democratic country, judicial review

Introduction

The word review means to revisit something. However, the word judicial review signifies the revisiting of any law, act, or action of a public body, by the judicial organ of any state. Judicial review can be defined as; "the process under which the actions of executive authority, laws passed by legislative authority, and acts of administrative authorities are subject to be reviewed by the judicial organ" (Ryan, [2014](#)). It is a basic watchdog on the state's power, providing a powerful mechanism to challenge the decisions

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of public bodies to guarantee that they are legitimate. Government workplaces, state associations, local authorities, state organizations, and workplaces practicing administrative powers should legitimately practice their powers. (Barnett, [2013](#)) The following four essential heads are guaranteed concerning looking for judicial review by the Court.

- The Parliamentary Acts have been accurately interpreted;
- Discretion if any has been legally worked out;
- The act of the authority is reasonable; and
- Activity of force by a public body doesn't abuse basic liberties (Loveland, [2012](#)).

It should be noticed that this is an intrinsic remedy that the actual Courts have grown as opposed to parliament. Judicial review is an active adjudicator-driven process since it originates from the common law. Inevitably, the actual Courts have created, extended, and advanced the standards, grounds, and available remedies that are accessible in judicial review procedures. In actuality, the Courts figure out who can look for judicial review remedy, on what grounds, and against whom.

Birth of Judicial Review

The concept of judicial review originated in the United Kingdom (UK) from one of the most important cases, that is, Dr. Bonham's case. However, it is seen that its origin is associated with the landmark case, that is, *Marbury v Madison* which was decided by the Supreme Court of the United States (Barnett, [2013](#)). Having originated in the UK, however, due to the system of government and doctrine of parliamentary supremacy, it didn't find a favorable environment to grow and develop. This study probes into the basis of Dr. Bonham's case which is presumably the originator of the judicial review.

Dr. Bonham's Case

Dr. Bonham's case emerged from a conflict concerning the practice of medicine without having a license. The University of Cambridge awarded a degree to Dr. Thomas Bonham in physical medication. Thus, in the city of London, he started practicing without having a license for which he was summoned to show up before the Royal College of Physicians (to be known as RCP hereinafter), who had jurisdiction over the act of medication. He

was analyzed in various regions pertaining to his expertise and was announced as ill-suited to train in the specialty of physics. Resultantly, Bonham was requested to cease such practice which he declined and was detained.

The case preceded the Court of Common Pleas where he made his assertion that his detainment by the college amounts to false imprisonment. Being an alumni of Cambridge, he stated that the RCP had no jurisdiction over him and subsequently had no power to capture or fine him. The RCP in their defense relied on a statute, which approved it to control all doctors in London and to put down specialists not authorized by the college (Otter, [2009](#)). The law likewise qualified the RCP for one-half of the moiety it imposed. The Honorable Justice Coke contended that since the RCP was qualified for getting the fine they imposed on Bonham, the law made it examiner, the offended party, and judge in the question: "The college cannot be judge, prosecutor, and a party simultaneously". Coke proposed that the impartial nature of a nominated authority is compromised if the arbitrator is also the offended party who is to receive a monetary benefit from the litigant as a result of the fine imposed on him. Even though, the rules that parliament drafted held that the college can hold each of three limits. Coke noticed,

"When an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

Global Recognition

Globally, the judicial review got recognition after being employed in the following two most important landmarks of the Supreme Court of the United States.

Marbury V Madison

This case was based on a question between two presidents of the United States, that is, John Adams and Thomas Jefferson. It is also considered as one of the landmark decisions by the Supreme Court of the United States. It is due to the fact that it solved the question of judicial review. The Court favored Jefferson in the choice of Supreme Court, however, it made a move to boost the strength of the Supreme Court in doing so (Street, [2013](#)). Since, it is such a case which empowered the supreme Court to keep a check on the legislative authority. Although, the Court announced that it does not

possess the power to take a certain step, on the other hand derived an amazing authority for itself.

Marbury was about to hold the position of justice of the peace, however, the commission was not delivered to him in time. Meanwhile, the new president stopped the delivery of commission to Marbury for which he knocked at the door of the Court (Langer, [2002](#)). Marshall sketched the decision by addressing the following inquiries:

1. Was Marbury entitled to the commission?
2. Was the legitimate remedy a writ of mandamus?
3. Does the Supreme Court possess the authority to issue the writ of mandamus? (Corwin, [1910](#)).

The Court established that Marbury was indeed entitled to the commission. He added that not giving him the letter directly violates his right. The response as a result of the first two queries was, therefore affirmative. The Court reached a judgment in deciding the matter in favor of Jefferson and Madison (Venzke, [2015](#)). The Court concluded that it did not have the right or powers or discretion to confer the writ of mandamus. The reason was that the law under which Marbury approached the Court and wanted the Court to receive the mandamus, that is, the Judiciary Act of 1789, contradicts Article III, Section 2 of the United States Constitution. The original jurisdiction provided under the constitutional provisions to the Supreme Court has been transgressed by the aforementioned law, the Court concluded (Corwin, [1910](#)). This judgment by Marshall certainly enabled the Court to proclaim the legislation of Congress invalid. As per his famous saying, "It is emphatically the province and duty of the judicial department to say what the law is... If two laws conflict with each other, the Courts must decide on the operation of each."

Principles Established

Two foundations of the modern judiciary and constitutional law were laid out which are as follows:

1. All those federal laws will be invalid that contend with the U.S. Constitution, and
2. Judges decide if government regulations are illegal (Cappellet, [1970](#))

The significance of the Marbury v Madison case does not lie in the specific decision reached by the Court through judicial analysis. Rather, it is notable for the method by which Chief Justice Marshall arrived at his conclusion (Davis, [1966](#)). Marshall expressed his opinion as follows:

According to Marshall, the Constitution takes precedence over any legislative act that contradicts it and an act of legislature that conflicts with the Constitution is invalid. Marshall suggested that Congress cannot be entrusted with the immense power of determining the constitutionality and legality of laws passed by the House and Senate, just as the College (presumably referring to an academic institution) cannot be allowed to judge its objective (Wolfe, [2019](#)). He concluded that only the judiciary can be granted such extensive authority, stating that

The judicial department emphatically must say what the law is. Those who apply the rule to particular cases must necessarily interpret and explain the rule as well. If two laws conflict with each other, the court must decide on the effect of each law.

In summary, the importance of the Marbury v Madison case lies in Chief Justice Marshall's assertion that the judiciary holds the responsibility to interpret the law and determine its constitutionality (Albertsworth, [1921](#)). This landmark case established the principle of judicial review, empowering the courts to invalidate laws that are incompatible with the Constitution.

McCulloch V Maryland (1819)

This case is related to the creation of banks and the imposition of tax by the state government. A bank branch was opened in Maryland that came up with the legislation to impose tax on the bank. One of the cashiers of the bank was McCulloch who disagreed with the legislation and refused to pay the tax. Maryland believed that it can impose tax on any business in its state. This gave rise to the following questions.

1. Was the creation of the bank Constitutional?
2. Can the state of Maryland impose tax on the federal bank?

The Court ruled that the bank's establishment was based on the provisions of the Constitution. It was due to the fact that the Necessary and Proper Clause, found in Article I, Section 8, grants Congress the authority to exercise powers not explicitly mentioned in the U.S. Constitution. The Court observed that this clause encompasses all the necessary measures to

promote the welfare of the general public. Additionally, the Court determined that the federal bank was created for the benefit of all U.S. citizens and could not be subjected to taxation imposed by a single state, such as Maryland. Consequently, the state of Maryland lacked the authority to impose tax on the bank. In light of this, the Court stated that as long as the objectives are lawful and fall within the scope of the Constitution, any means suitable to achieve those objectives, not prohibited by the Constitution, and consistent with its principles, are Constitutional.

Therefore, the Court concluded that Congress possesses the authority to establish a bank, impose taxes, and regulate interstate commerce. This case granted numerous powers to Congress and reinforced the concept of federalism.

Judicial Review of Administrative Action

The residuary action which is neither judicial nor legislative is known as an administrative action. There is a need to check on administrative authorities that whether these are working within the sphere of powers allocated to them or not (Smith, [2021](#)). The exercise of power may be linked with discretion where the authority is a free hand to choose between different actions. The discretion must be exercised in a structured way and if it exceeds the limits it would be termed arbitrary (Barnett, [2013](#)). The theory of judicial review, though came in Constitutional matters, yet the ambit of its applicability is not restricted only to such issues. It serves as a scale to measure the transparency of all the decisions of administrative authorities as well. It ensures the effective functioning of public bodies and if any decision is beyond what the law confers, it declares such decisions as ultra vires (Moloney, [1999](#)).

The standards of judicial review put forth legitimate limits for the activity of discretionary powers. At a point where parliament delegates power upon a public body via an Act, it will, in the drafting and passing it, ordinarily have restricted the power given (Chen, [2003](#)). An individual would anticipate that the Courts should participate in characterizing the constraints of power as communicated by the parliament. This is something like complying with their job of legal translation (Seefeld, [1940](#)). Nonetheless, the Courts have likewise fostered their guidelines to exercise power declaring that the parliament, in giving the power, probably expected

that it be worked out (or not be worked out) with a specific goal in mind, for instance, fairly, sensibly, and reasonably.

Case Laws on Administrative Discretion

In *Chairman Regional Transport Authority, Rawalpindi versus Pakistan Mutual Insurance Company Limited, Rawalpindi, 1991*, an applicant applied for registration of Pakistan Mutual Insurance Company Limited as guarantor under Sections 49 and 67 of the West Pakistan Motor Vehicle Ordinance, 1965. Pertaining to the facts of the case, the Regional Transport Authority had two cases to look into. It examined both, applied wrong standards, and gave relief to the one while denying the other. The Supreme Court of Pakistan, while rejecting the appeal, held that discretionary power should always be structured and affirmed. This means that the discretion must be structured in a way to regularize it, organize it, and produce order in it for the sole reason that the judgment reaches the next level of justice. It was established that when the legislator delegated discretionary powers without significant standards, directors should develop standards as soon as possible and should further limit their discretion through principles and rules.

In *Rana's case*, the basic principle that has been initiated by the court is that when the law gives discretion for issuing an order on all alike matters then the discretion must be exercised on the application or applicability of the judicial mind (*Col (Ret) Ayub Ali Rana v. Dr. Carlites Pune and another, 2002*). It should be based on clear considerations, fairly and correctly, to modify the justice mechanism and to ensure that the discretion conferred by law must not be used whimsically or arbitrarily.

In *Bora's case*, it was an established principle that whatever decision has been conferred by the law, the administrative discretion can no way override that. It simply means that any policy cannot go against the provisions of the law nor does any executive order possess the authority to cancel the law (*University of the Punjab v. Muhammad Aslam Bora, Advocate, 1988*). In the collector's case, (*Collector of Customs v Pakistan Petroleum Ltd, 2002*) the Court ordered the principle that the usage of discretion, by any authority, should be judiciously in a reasonable and fair way.

Judicial Review V Suo Motu

Judicial review and suo motu are legal terms as of their nature. It means that exercising power under both concepts is not illegal. Both terms vary when it comes to the use of power under their shadow (Redish, [1980](#)). Judicial review as discussed earlier is the authority of the Court to have a check on the authorities. For exercising the judicial review power, there must be a complainant and, a formal petition is a requirement that must be filed. It is only then the Courts would be able to judicially review the act or action against which the complaint is filed (Habib, [2020b](#)). On the other hand, suo moto power means initiating the proceedings without any formal complaint or petition (Fallon Jr. et al., [2021](#)). It does not require any formal petition for exercising the power of suo moto. However, it must be backed up by a reasonable and valid justification (Ryan, [2014](#)).

Among both the concepts, suo moto is considered not good to redress the grievances since it may lead to excessive use of it which, in turn, destabilizes the system. Various jurists across the globe prefer judicial review over suo moto power (Friedman, [2009](#)). However, to exercise judicial review power, following conditions must be fulfilled;

- The matter must relate to national importance.
- Failure of the concerned institution is there.
- No relief is provided to an aggrieved person.

Outcome of Judicial Review

The nature of judicial review concept is that the remedy it carries is solely discretionary. The matter is contentious. The Court may in some cases, consider declining to grant a remedy (Rosenberg, [2008](#)). For instance, the Court may hold, that, while the decision-making process was defective, nevertheless, no injustice has been suffered by the applicant, or that, even if a remedy was allowed, the decision-maker would reach the same end on the merits, or that the impression on administration would be too excessive if a remedy were granted (Street, [2013](#)).

Judicial Review in Pakistan

Under the 1973 Constitution, no clear word of judicial review is mentioned in the text. However, the power is exercised under Articles 199 and 184 of the Constitution. Article 8 clarifies that any law, conflicting with

fundamental rights, shall be considered as null and void. The wording of this Article makes it obvious that the legislature does not possess the unbound authority of law-making. The written Constitution has restricted and limited the legislative powers of the parliament by Articles 8, 199, and 184, enabling the High Courts and the Supreme Court to declare the legitimacy of Acts of Parliament. The amendments made to the Constitution are protected from the currents of waves of judicial review as per Article 239 of the Constitution which elucidates that amendments made cannot be called into question in any court on any grounds. However, it is not as simple as it seems, since there are several cases where it has been held by the judges that they do have the power to review the Constitutional amendments (Habib, [2020a](#)).

The 8th amendment to the Constitution was challenged in Mahmood Achakzai's case, where the Court by upholding the amendment held that it possesses inherent power to judicial review amendments. It further added that, although parliament is vested with the power of amending the organic law, yet it doesn't have absolute power in this regard and cannot violate the basic structure of the Constitution. Furthermore, *Sindh High Court Bar Association v Federation of Pakistan* also requires special mention here. In this case, the emergency declared by then-President Musharraf was challenged along with all amendments he made to the Constitution during such a period. The Court exercises the power of judicial review and held all such steps and declarations invalid.

District Bar Association, Rawalpindi v Federation of Pakistan, is the most recent judgment where again the 18th and 21st amendments were in question. The Court in this case has contemplated that judicial review power is vested in Courts and is the salient feature of the Constitution. It added that any Constitutional provision is to be interpreted not in isolation, however, in the context of the whole Constitution which is an established principle of Constitutional interpretation that must be kept in consideration.

Conclusion

To encapsulate, the interpretation of a statute is the core job of a judicial organ of the state. It interprets the laws passed by parliament to keep a check on the legislative power possessed by parliament. The doctrine of judicial review originated in the United Kingdom and developed in the United States. This is a device to check the validity of laws and nullify any law

ultra vires. It has been termed as the most powerful axe possessed by the judicial arm of the Constitution to cut down the roots of laws that are inconsistent with the Constitution.

From the United States to different countries of the world, judicial review has been seen to gain energy and currently is the powerhouse of any democratic state. The state powers are critically checked based on the judicial review doctrine that leads to the effective functioning of the state organs. On one side of the bridge, it is a microscope keeping an eye on the legislature, on the other side, it is argued that it somehow violates the principle of separation of power. The law-making power is vested in the legislature and by invoking the judicial review, judiciary is interfering in their jurisdiction. Whatever the case may be, it is an undeniable fact that it serves as the screen for the transparency of laws.

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