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Articles

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বাংলাদেশের সংবিধানে নির্দেশিত ভাষা এবং উচ্চতর আদালতে এর ব্যবহার : একটি আইনগত পর্যালোচনা

বাংলাদেশ সংবিধানের ৫ম সংশোধনী বাতিলের রায় ও প্রভাব : সংবাদপত্রের আলোকে একটি বিশ্লেষণ

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Authors' Name	Article	Page
M Abdul Alim	The Role of Election Commission in Strengthening Democracy: Reforms and Constitutional Obligation	1-12
M Abdul Awal Khan	Justice under Judicial Review Power of the Court: A Comparative Study on Selected Countries	13-24
Dr. M Ahsan Kabir	Different Provisions Relating to Aboriginal People's of the Sub-Continental Constitutional Laws: A Study	25-40
Dr. M Anisur Rahman	Parliamentary Election 1991 under First Caretaker Government: An Evaluation	41-58
M Sahal Uddin	The Unholy Delay of the Last Caretaker Government: Bangladesh is on the Verge of a Constitutional Crisis	59-68
Dr. Mohammad Abdul Hannan	Jurisdiction of the Supreme Court of Bangladesh in Terms of Writ: An Appraisal	69-108
Dr. Sayeeda Anju	Right against Trafficking of Women under the Constitution of Bangladesh	109-126
নাহিদ ফেরদৌসী	বাংলাদেশের সংবিধানে নির্দেশিত ভাষা এবং উচ্চতর আদালতে এর ব্যবহার: একটি আইনগত পর্যালোচনা	127-144
মোঃ আব্দুর রহিম মিয়া	বাংলাদেশ সংবিধানের ৫ম সংশোধনী বাতিলের রায় ও প্রভাব : সংবাদপত্রের আলোকে একটি বিশ্লেষণ	145-178

Justice under Judicial Review Power of the Court: A Comparative Study on Selected Countries

M Abdul Awal Khan*

1. Introduction

Judiciary is called the place of justice, hope and expectation of the people. Sometimes people may be deprived of or may not get fair and impartial decision from any court tribunal or authority. In that case judicial review ensures justice. Judicial review creates a right for individuals to approach the court for relief over a breach of legal rights and legitimate expectation through legal mechanism. It is the wide power of the court to justify the legal validity of the decision of any authority, court, tribunal or any body. This article aims at the aspects of judicial review in the legal system of UK, USA and Bangladesh and it points on the proper application of judicial review for ensuring justice and fairness in the judiciary.

Judicial review is the power of the courts to examine the acts of the executives and the scope of the legislative power and to nullify the same where it finds them incompatible. Judicial review is an example of the functioning of separation of powers in a modern governmental system where the judiciary is one of several organs of the state.¹ The procedure and scope of judicial review differ from country to country and state to state.

1.1 Concept of Judicial Review

Judicial review includes that jurisdiction of the court by which the court can declare any law made by the legislative inconsistent with the constitution or with the provisions of fundamental rights and therefore unconstitutional and void having no force. Judicial review is a protection and not a weapon.² Judicial review is the ultimate power of any court to declare any law, any

* Assistant Professor & Head (Acting), Department of Law, Manarat International University, Dhaka.

¹ *Mastafa Kamal vs. Commissioner of Customs*, 51 DLR (AD) 1

² *Chief Constable of the North Wales Police vs. Evans* (1982) 3 All ER 141

official action, and other actions done by a public official unconstitutional and hence unenforceable that it deems to be in conflict with the constitution.³ The scope of judicial control through judicial review is expanding in various countries where the machinery of justice is based on the common law.⁴ 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.

1.2 Judicial Review and *Marbury versus Madison Case*⁵

In *Marbury v. Madison* case the Supreme Court of USA declared first time a provision of congress statute as "unconstitutional," and established the concept of judicial review in the US. The landmark decision helped define the "checks and balances" of the American form of government.⁶

2. Purposes and Objects of Judicial Review

The purpose of judicial review is to ensure fair treatment by individual and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.⁷ The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law.⁸

³ Abraham, Henry, *The judiciary: The Supreme Court in the Governmental Process*, 5th edition (London: Allyn and Bacon) p-175

⁴ Gazi Omar Faruque, Dr. *Method of Judicial Control of Administrative Action*, Md. Shajahan, New Warsi Book Corporation, 1st edition. Aug 2005, p-175

⁵ 5 U.S. (Cranch 1) 137 (1803)

⁶ For details see Md. Abdur Rouf, *The Origins of Judicial Review in Journal of the Faculty of Law*, Vol. 15, Number 1, June, 2004, pp. 171-182

⁷ *Chief Constable of the North Wales Police vs. Evans* (1982) 3 All ER 141

⁸ *Ibid*

3. Scope of Judicial Review

Court can apply judicial review not only to examine the constitutionality of not only laws made by the legislature but also to examine any decision of any authority. It deals with three aspects: (i) judicial review of legislative action (ii) judicial review of judicial decision and (iii) judicial review of administrative action.⁹ Judicial enforcement of fundamental rights enumerated in the constitution is one of the applications of judicial review and in that case, most of the time the review is done against inaction or non-performance of constitutional and legal obligations.

4. Constitutional Supremacy and Judicial Review

Judicial review ensures constitutional supremacy. Constitutional supremacy declares in the constitution implicitly the existence of an independent authority to examine the constitutionality of action done by the executive, legislative or any authority and this independent authority is judiciary. Judiciary under written constitution is called the guardian of the constitution. The judiciary maintains the constitutional supremacy by its power of judicial review.¹⁰ In most cases the Supreme Court exercises this power but this is not the case everywhere. Somewhere a provision for separate constitutional court is maintained in the constitution for exercising judicial review power such as in Germany,¹¹ France¹² and Italy. Where parliamentary supremacy is present, there is no judicial review in true sense as the court cannot question the constitutionality of law passed by the parliament. There we find judicial review of administrative action under statutory law and judicial review of delegated law. The constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation.

⁹ *Chandra Kumar vs. Union of India* (1997) 3SCC 261 (292)

¹⁰ Halim, Md. Abdul, *Constitution. Constitutional Law and Politics: Bangladesh Perspective*, 1st ed., 1993, p-61

¹¹ Article 93, *Basic Law for the Federal Republic of Germany*

¹² Article 56, *Constitution of France*

5. Judicial Review and Justiciability

Judicial review is not similar to justifiability. Moreover, justifiability is neither a legal concept nor a disposed of scientific verification. It is merely observation of the court based on proper evidence. The power of judicial review goes to the authority of the court and can be exercised by the court in appropriate cases.¹³ There is not and there cannot be a uniform rule regarding scope and reach of judicial review applicable to all cases. It varies from case to case depending on subject matter, nature of right and other relevant factors.¹⁴ The power of judicial review relates to the jurisdiction of the court whereas justiciability is hedged by self-imposed judicial restraint. A court exercising judicial review may refrain from exercising its power if it finds that the controversy raised before it is not based on judicially discoverable and manageable standards.¹⁵ Moreover, the area of justiciability can be reduced or curtailed.¹⁶ Even, when exercise of power is bad, the court, in its discretion, declines to grant relief considering the facts and circumstances of the case.¹⁷

6. Judicial Review and Discretionary Power of the Court

“Discretion means when it is said that something is to be done according to the rules of reason and justice, not according to private opinion,....according to law and not humor. It is not to be arbitrary, vague, and fanciful, but legal and regular.”¹⁸ So in exercising discretion generally court has to depend on reason, justice and law accordingly but in case of judicial review court generally depends on law.

¹³ *R. Bommai vs. Union of India* (1994) 3 SCC 1 (paras 201, 256-258)

¹⁴ *Ibid*

¹⁵ Takwani, C.K. *Lectures on Administrative Law*, Eastern Book company, 3rd edition, 2005, p-239

¹⁶ *S. R. Bommai vs. Union of India*, id. At para 211 (SCC)

¹⁷ *State of Rajasthan vs. Laxmi* (1996) (6 SCC) 445

¹⁸ *Sharp vs. Wakefield* (1891) AC 173 (179): (1886-90) ALL ER 651: 39WR 561

7. Judicial Review in the USA Legal System

The concept of constitutional supremacy was first used in the US Constitution and the doctrine of judicial review was also first introduced in USA.¹⁹ Judicial review in the United States refers to the power of a court to review the actions of public sector bodies in terms of their lawfulness, or to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the Constitution itself. At the federal level, there is no power of judicial review explicitly established in the United States Constitution, but the doctrine has been inferred from the structure of that document.²⁰ In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original Jurisdiction. In all the other cases mentioned before within the judicial power of the United States, the Supreme Court shall have Appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.²¹ At the time of the 1787 Constitutional Convention, five of the thirteen States included some form of judicial review or judicial veto in their state Constitutions. Delegates at 1787's Constitutional Convention, including South Carolina's Charles Pinckney, spoke out against the doctrine of judicial review. The Constitution of USA describes "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish....The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases mentioned before, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such

¹⁹ De Smith; *Constitutional and Administrative Law*, 1989, p. 547-48.

²⁰ <http://supreme.lp.findlaw.com/constitution/article03/13.html>

²¹ *The Constitution of USA*. Article III, Section 2, Clause 2

Regulations as the Congress shall make."²² The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have power to issue writs of prohibition to the district courts and writs of mandamus to any courts appointed, or persons holding office, under the authority of the United States.²³

Since the 1803 legal case *Marbury v. Madison*, the Supreme Court has understood that it has a power of judicial review, in order to apply the Constitution to particular cases.²⁴ In that case, the Chief Justice Marshall rightly stated, "It is emphatically the province and duty of the judicial department to say what the law is.... If two laws conflict each other, the court ... must decide on the operation of each If, then, the courts are to regard the constitution and the constitution is superior to an ordinary Act of Legislature, the constitution and not such ordinary act must govern the case to which they both apply. To decide otherwise would be subversive to the very foundation of all written constitution, would force the judges to close their eyes to institution ... all laws repugnant to the constitution are void and courts as well as other departments are bound by that instrument or constitution." ²⁵

Now the doctrine of judicial review is a settled and firmly established principle in US constitutional jurisprudence. It is the most awesome and potentially the most effective weapon in the hands of the US Supreme Court by which it plays the role of a guardian of the Constitution.²⁶

²² Article III, The Constitution of USA

²³ Section 13, Judiciary Act 1789

²⁴ 5 US 137 (1803)

²⁵ Sharifuddin Pirzada: *Fundamental Rights and Constitutional Remedies in Pakistan*, All Pakistan Legal Decisions, Lahore, 1966, pp-40-42

²⁶ Gazi Omar Faruque, *op.cit.*, p-180

8. Judicial Review in England

Although England has no written constitution, it has constitutional system with parliamentary sovereignty. Parliament is both a legislative body and constitutional assembly; hence what parliament enacts is a part of the constitution. There is no touchstone to justify the validity of an act of parliament, for no law exists in UK higher than that made by the British Parliament. This is why there is no judicial review in strict sense in England. In this regard Cockburn C.J. said "No court or judicial body in the country can set aside an act of parliament on the ground that it is illegal, immoral or unconstitutional as can, easily be made by the US Supreme Court."²⁷

Judicial review in English administrative law by which English courts supervise the exercise of public power. A person who feels that an exercise of such power by say, a government minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the Administrative Court a Division of the High Court, for judicial review of the decision. If the application for judicial review is successful, the Court may set aside quash the unlawful act. In certain limited circumstances, the claimant may be able to obtain damages. A court may also make a mandatory or prohibitory order or an injunction to compel the authority to act lawfully or to stop it from acting unlawfully.

Unlike the United States, the English law does not recognize judicial review of primary legislation that is laws passed by parliament, save in limited circumstances where primary legislation is contrary to European Union law. Although the Courts can review primary legislation to determine its compatibility with the Human Rights Act 1998, they have no power to quash or suspend the operation of an enactment which is found to be incompatible with the European Convention of Human Rights - they can merely declare that they have found the enactment to be incompatible.

²⁷ Halim, Md. Abdul, *op.cit.*, p-67

The British Courts are not in a position to examine the validity of law, passed by the parliament. But the British system applies principles of judicial review in two narrower senses: (a) judicial review of administrative action and (b) judicial review of delegated law.

9. Judicial Review in Bangladesh

Judicial review in Bangladesh legal system can be exercised in various cases, particularly both from the viewpoint of constitutional law and administrative law. The substantive meaning of judicial review has been ensured in article 7, 26 and 102(2) of the Constitution of Bangladesh. Constitution of Bangladesh is the "solemn expression of the will of the people; the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to that inconsistency, be void."²⁸ Bangladesh Constitution also describes, "all existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this constitution."²⁹ "The state shall not make any law inconsistent with any provisions of this, part, and any law so made, shall to the extent of such inconsistency, be void."³⁰ This article describes about theoretical application of judicial review and article 102(2) gives the implementation. It provides the procedure as to how a law which is inconsistent with the provisions of the constitution can be declared unconstitutional by issuing prohibition, mandamus, and certiorari writs.³¹ For the enforcement of fundamental rights, specific provisions have been inserted in the constitution. The Constitution provides 18 fundamental rights and under Article 102(1), the High Court Division of the Supreme Court can issue direction and orders for the enforcement of these rights. It is pertinent to mention that in UK there is nothing as fundamental rights because it has no written constitution. All rights

²⁸ Article-7, Constitution of Bangladesh

²⁹ Article-26(1), Constitution of Bangladesh

³⁰ Article-26(2), Constitution of Bangladesh

³¹ *Kudrat-e-Elahi vs. Bangladesh*, 44 DLR(AD) 319

are ordinary which are protected under statutory law and common law and not by any constitutional guarantee like Bangladesh.

The power of judicial review conferred by article 102 is a basic feature of the constitution³² and it cannot be taken away or curtailed even by the amendment of the constitution. If the constitution makes any provision ousting the jurisdiction of the Supreme Court in certain matters, it is for the Supreme Court to interpret the ouster clause and notwithstanding the ouster clause, the Supreme Court has the power to declare an action unlawful vitiated by *mala fide* intention or bad faith. Article 102(1) of the Constitution of Bangladesh confers power on the High Court Division of the Supreme Court to enforce fundamental rights and article 102(2) confers power of judicial review on non-fundamental rights.

10. Principles followed in the Judicial Review

In deciding the constitutionality of any law passed by the legislature, the court follows certain principles in keeping with the necessity of smooth working of different organs of the State. The Supreme Court bears the constitutional responsibility to adjudicate upon the validity of the laws.³³ Some principles based on judicial decisions are discussed as follows:

10.1 Judicial Review of Legislative Actions

The person challenging the validity of the law must show that the law is clearly unconstitutional³⁴ and when constitutionality of a law is challenged, the court is to begin with a presumption of constitutionality of the law.³⁵ If an Act of Parliament would be valid only in the event of the existence of certain circumstances, it will be presumed that all such circumstances do exist. Thus all circumstances which may lead to the finding of the validity of the law must be presumed by the court and must be shown not to exist by the person

³² *Anwar Hossain Chowdhury vs. Bangladesh* 1989 BLD (spl) 1

³³ *Ibid*

³⁴ *Home Tel & Tel Co. vs Los Angels*, 211 US 265

³⁵ *Davis Warehouse Co. vs. Bowles*, 321 US 144

challenging the validity of the law.³⁶ In case of reasonable doubt as to whether the law is unconstitutional, the court will resolve the doubt in favor of constitutionality of the law,³⁷ or in other words, in no doubtful case the court will pronounce a legislation to be unconstitutional.³⁸ Where the constitutionality of a law is assailed and there are two possible interpretations, one of which would render the law constitutional, while the other unconstitutional, the former interpretation is to be preferred and the constitutionality of the law upheld.³⁹ The court gives its opinion in concrete cases and does not answer academic questions.⁴⁰ The court will not pass on constitutional question and pronounce a statute invalid unless a decision on that very point becomes necessary to the determination of the cause.⁴¹ The court will not decide a larger constitutional question than is required by the case which means that the court will decide a constitutional question only when, and to the extent, necessary for the disposal of a case.⁴² The court will not hear an objection regarding the constitutionality of a law by a person who has not been affected by it.⁴³ A law cannot be held unconstitutional on the ground that it violates one or more of the principles of liberty, or the spirit of the constitution unless such principles or the spirit are found in terms of the constitution.⁴⁴ In the same way a law cannot be declared void on the ground that it is harsh.⁴⁵

³⁶ *Rameshlal vs. Union of India*, AIR 1970 Cal 520

³⁷ Coole, *Constitutional Limitations*, 1927, p-372

³⁸ *Toombs vs. Citizens Board of Wynesboro* 281 US 643

³⁹ *U. S. vs. Harriss*, 347 US 612

⁴⁰ *Kudrat-e-Elahi vs. Bangladesh*, 44 DLR (AD) 319

⁴¹ Coole, *Op.cit.*, 1927, p-339

⁴² *U. S. Raines*, 362 US 17

⁴³ Coole, *Op.cit.*, 1927, p-339

⁴⁴ *Ibid*, p-351

⁴⁵ *Bangladesh Krishi Bank vs. Meghna Enterprise*, 50DLR (AD) 194

10.2 Judicial Review of Administrative Actions

In judicial review of administrative actions, the court has to start with the presumption of regularity of the act and the burden of proof is on the person who alleges the contrary.⁴⁶ Whenever a power is given by a statute to an authority, whatever may be fairly regarded as incidental to or consequential upon things authorized by the legislature should not be declared *ultra vires*.⁴⁷

11. Case Study on Judicial Review

Judicial review ensures proper justice in the society from preventing public functionaries to exercise excess power. Judicial review is applied when an authority acts without jurisdiction, in excess of jurisdiction or commits an error of law apparent on the face of the record. In *U.S.A vs. Two Hundred Barrel of Whisky 1877 (95US 571)* case the parent Act provided for admitting duty-free animals especially imported for breeding purposes but the court declared the regulations *ultra vires* as the parent act included all animals while the regulations confined its operation to animals of a particular stock alone. In the English case *Chester vs. Bateson (1920) 1KB 829* a regulation issued under the parent Act prohibited a landlord from having access to courts to recover possession of a dwelling, occupied by a war-worker, except with the consent of a Minister and imposed penalty for taking such proceedings. The court held the regulation illegal as it deprived the King's subjects of their right of access to the courts of justice and rendered them liable to punishment in case they had the temerity to ask for justice in any of the King's court. In *Anisul Islam Mahmud vs. Bangladesh*⁴⁸ the petitioner was being prosecuted under section-7 of the Special Powers Act 1974 for the offence of absconding and failing to surrender pursuant to a detention order passed against him., the High Court Division issued a writ of prohibition as the detention order having been found to be without lawful authority, the special tribunal had no

⁴⁶ *Mustafa Kamal vs. Commissioner of Customs*, 51 DLR (AD) 1

⁴⁷ *A.G. vs. Great Eastern Rly. Co.* (1880) 5 App Cas 473

⁴⁸ 44 DLR 1 (1992)

lawful authority. In the famous case, *Secretary of the Ministry of Finance vs. Masder Hossain*⁴⁹ the Supreme Court of Bangladesh exercised landmark judicial review power and for this reason the Judiciary of Bangladesh became independent. In *Jamal Shah vs. Election Commissioner*⁵⁰ the Court held issued order to restart elections to resume polling and complete election in due time. The directions of the Court through Judicial Review make people more confident on the law of the land. In this way Judicial Review power of the court upholds this right to maintain justice in the society.

12. Conclusion

A sound justice delivery system is a pre condition for the efficient governance of a country. Judicial review power of the court not only creates confidence in the people on court but faith also. It is an integral part of our legal system and basic and essential feature of the Constitution. Judicial review over mechanism of the state means the powers of the court to examine the legality of the decision of any authority, court, tribunal or legislature and thereby safeguard the rights of an aggrieved citizen against a wrong or an injustice done to him. Judicial review discern between falsity and truth, between right and wrong, between dark and light and between equity and injustice. The faith of the people is the bedrock on which the edifice of judicial review and efficacy of the adjudication are founded. This writing, therefore, will increase legal awareness among researchers, academicians, lawyers and law students regarding proper application of judicial review and at the same time, establishment of justice in the society will get its institutional platform.

⁴⁹ (2000) 52BLD (AD) 104

⁵⁰ PLD 1966 SC 1