

Judicial Review in India and USA : Comparison

The scope of judicial review in India is narrower than that of what exists in USA, though the American Constitution does not explicitly mention the concept of judicial review in any of its provisions.

In USA the judges exercise judicial review in a very aggressive manner. If the judges think that a particular law and the philosophy of it is not liked by the judges then, also the judiciary may reject the law. But such a thing never happens in India. The Indian judges reject a law only on the basis of unconstitutionality.

Moreover, it has also been seen that in USA, if a law is rejected by the Supreme Court then the court will make a new law in its place. Although law making is not the responsibility of the judiciary, the judiciary makes laws. Such judge-made laws are very common in USA. But in India if a law is rejected by the Supreme Court, the Court leaves the matter of making new laws to the legislative. This has also been described as Judicial Activism by some of the constitutional experts.

The American Constitution provides for 'due process of law' against that of 'procedure established by law' which is contained in the Indian Constitution. The difference between the two is: the 'due process of law' gives wide scope to the Supreme Court to grant protection to the rights of its citizens. It can declare laws violative of these rights void not only on substantive grounds of being unlawful, but also on procedural grounds of being unreasonable. Our Supreme Court, while determining the constitutionality of a law, however examines only the substantive question i.e., whether the law is within the powers of the authority concerned or not. It is not expected to go into the question of its reasonableness, suitability or policy implications.

The American principle of judicial supremacy is also recognised in our constitutional system, but to a limited extent. Nor do we fully follow the British Principle of parliamentary supremacy. There are many limitations on the sovereignty of the Parliament in our country, like the written character of the Constitution, the federalism with division of powers, the Fundamental Rights and the Judicial Review. In effect, what exists in India is a synthesis both, that is, the American principle of judicial supremacy and the British principle of parliamentary supremacy.

The scope of judicial review in India is somewhat circumscribed as compared to that in the USA. In India the fundamental rights are not so broadly coded as in the USA and the limitations there on have been stated in the constitution itself and this task has not been left to the courts. The constitution makers adopted this strategy as they felt that the courts might find it difficult to work out the limitations on the fundamental rights and the same better be laid down in the constitution itself. The constitution makers also felt that the judiciary should not be raised at the level of 'Super Legislature', whatever the justification for the methodology adopted by the makers of the Constitution, the inevitable result of this has been to restrict the range of judicial review in India.

It must, however, be conceded that the American Supreme Court has consumed its power to interpret the constitution liberally and has made so thorough a use of the due process of law clause that it has become more than a mere interpreter of law. It has, in fact come to occupy the position of a maker of law and has been correctly described as a 'third chamber of the legislature, indeed, as a super legislature.' Of course, the US Supreme Court has assumed this position; it has not been specifically conferred upon it by the constitution.

The framers of the Indian constitution took good care not to embody the due process of law clause in the constitution. On the contrary, the Indian constitution refers it to 'procedure established by law'. It can invalidate laws if they violate provisions of the constitution but not on the ground that they are bad laws. In other words the Indian Judiciary including the Supreme Court is not a Third Chamber claiming the power to sit in judgement on the policy embodied in the legislation passed by the legislature.

The power of judicial review is exercised differently in different political systems. In countries like the United Kingdom where the constitution is largely unwritten and unitary in character and parliament is sovereign, the courts can declare an act of parliament to be incompatible with the constitution, but they cannot invalidate a law for being inconsistent with the constitution. In other words, the judiciary can only interpret the constitution.

In Germany, the Constitutional Court is empowered to shoot down not only ordinary laws but also constitutional amendments for being inconsistent with the fundamental character of the constitution. The situation is different in countries where a written and federal constitution limits the powers of parliament. For instance, in the USA, the Supreme Court can strike down legislation enacted by Congress if it finds the same to be incompatible with the constitution.

However in India, there has been a long tussle between parliament and the Supreme Court on the scope and limits of judicial review. The twenty-fourth amendment to the constitution passed in 1971 authorised parliament to amend any provision of the constitution. However, the Supreme Court subsequently declared that while parliament was competent to amend any provision of the constitution, any amendment had to conform to the

basic framework of the constitution. This led the government of Prime Minister Indra Gandhi to introduce the forty-second amendment to the constitution during the proclamation of emergency, which stripped the apex court of the power of reviewing an amendment to the constitution. However, the forty-third and forty-fourth amendments undid the provisions of the forty-second amendment regarding powers of the Supreme Court to judge the validity of constitutional amendments.

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Conclusion

Like the American Supreme Court, the Supreme Court of India enjoys the power of judicial review and this power has been specifically recognised by the constitution. However, we see that its authority in relation to 'judicial review' of legislation is more restricted than that of the American Supreme Court.

Though the courts have the power of judicial review, the same cannot be exercised in an arbitrary fashion. If the law-making power of parliament is not unlimited, the courts' power to review the laws passed by parliament is also not unlimited. Like other organs of the state, the judiciary derives its powers from the constitution and the judges are as much under the constitution as anyone else. They can interpret and invalidate laws but they cannot themselves assume the law making function; nor can they confer that function on any person or institution other than the federal or provincial legislatures. Nor can the courts make constitutional what is manifestly unconstitutional. Sovereignty is located neither in parliament nor in the judiciary but in the constitution itself.

Despite various shortcomings of judicial review, it cannot be denied that it has played an important role in ensuring constitutional government in the country by keeping the centre and the states in the respective spheres. It has also enabled the Constitution to change according to changed conditions by imparting new meaning to the constitution. Through the exercise of this power, the Supreme Court has protected the freedom of citizens and protected their Fundamental Rights against encroachment by the legislative and executive wings of the government.

There is nothing in the world which is bad or good for itself but it is its uses which make it bad or good. This review system also has same situation. If Supreme Court use it only for country then it is very good but if Supreme Court uses it and keeps their own interests in mind, it is worse for country as well as countrymen.

But we know that after principle of judicial care, Supreme Court never use it against national interests and judges keeps national interests, safety, progress and dignity in their mind instead of their own interests or conflicts.