JUDICIAL REVIEW IN INDIA AND SOUTH AFRICA: A COMPARATIVE STUDY

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ABSTRACT

The present paper seeks to do a comparative study of the process of judicial review in the two common law countries viz. India and South Africa. While the vista of judicial review in India is a common law form of judicial review, South Africa has adopted a civil law mechanism of the process. Albeit majorly dominated by the common law system, the constitutional court having monopolistic domain of judicial review of constitutional interpretation in South Africa is an illuminating feature of a civil legal system. Thus, the present study attempts to explore the two different forms of judicial system existing in India and South Africa throwing light upon the convergence of the two legal systems to produce a better version of judicial review.

INTRODUCTION: COMPARATIVE JUDICIAL REVIEW

The process of judicial review can be understood as "the enforceable constitutional review of government action by an independent judicial body."[1] "In the countries where the judiciary is regarded as the least dangerous branch to the political rights of the constitution, judicial review is a natural outcome of the system of government". Contrarily, in Europe, the courts suffered very much suspicion that led to the establishment of a separate court as an essential court "to counterbalance the problem of the legitimacy of the courts"[2]. Thus, the absence of a fail-safe measure to check and constrain exceeding actions of the government and also to curb their tyrannical attempts has led to the rise of a "preferred methodology" which is the scheme of judicial review.[3] There are two major methods of the judicial review that can be understood

[1] Allan Ides, *Comparative Judicial Review*, 41 LOY. L. A. L. REV. 477 (2008)
[2] Gustavo Femandes de Andrad, *Comparative Constitutional Law: Judicial Review*, JOURNAL OF CONSTITUTIONAL LAW, Vol 3.3, May 2001
[3] *supra* note 1

broadly: one belonging to the American common law category and the other to the European continental legal system.[4] The presence of extraordinary courts with monopolistic domain for exercising judicial review in a civil legal system is one among its distinct features that distinguishes it from the common law form where judicial review belongs to the ordinary courts.[5] Further, the determination of the compatibility of the legislation with the constitution is done in abstract and "lawfulness of legislation is considered in general, without taking into account the precise circumstances of any particular case"[6] in a civil law form of judicial review than the common form where the determination is through litigation. However, albeit both the legal systems have various distinct features, they possess similar attributes as well. The protection of fundamental rights, acting as a major check on the other branches of government and preservation of the principle of separation of powers are the commonalities in both the legal systems.[7] India, being a common law country, has adopted the common law form of judicial review. Conversely, although majorly being a common law nation, South Africa has preferred the civil law scheme of judicial review that distinguishes it from other common law countries. Whether this 'distinguished form' could be a mid-way between the judiciary and the parliament regarding the tilting of power-scale and the supremacy issue? Therefore, the present study attempts to explore the process of judicial review in India in comparison with South Africa and also to illuminate the concept of constitutional courts in the South African form of judicial review as a middle conduit and a better version of judicial review. Firstly, a glimpse of the South African form would be taken followed by the Indian vista.

JUDICIAL REVIEW IN SOUTH AFRICA

Before 1994, there was parliamentary sovereignty prevalent in South Africa. "The doctrine as defined by AV Dicey[8], means, *[n]either more nor less than this, namely that Parliament has under the English constitution the right to make or unmake any law whatever, and further that no person or body is recognized by the law of England as having a right to override or set*

[4] *supra* note *2*
[5] *supra* note 2
[6] VICKY JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*, 461 (1999)
[7] *supra* note 3
[8] AV DICEY INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10ED 1959) 70, 41957 1 SA 552 (A)

aside the Legislation of Parliament."[9] The only check that the courts made was in the procedures adopted by the government and thus, the government could validate many injustices through little procedural manipulations.[10] The power of the government was almost limitless and the judiciary had to just implement the laws that were passed by the Parliament.[11] So, the principle of *'ludicis est ius dicere sed not dare' i.e.* 'the role of the judge is to state the law and not to give it'[12] was followed. However, the tyrannical period ended after "dramatic constitutionalist turn"[13] in 1994, when the new order of constitutional supremacy replaced the parliamentary supremacy and became the root ideal of the new emerging framework of the country.[14] Thus, the Constitution encapsulating the new deep-rooted Bill of Rights became supreme and interred parliamentary supremacy.[15] With the establishment of independent courts including a constitutional court to champion the Bill of Rights, South Africa confirmed the new political system viz. constitutional supremacy almost ingrained in its system.[16]

"The hallmark of such a political system is the power of judicial review: the power of the courts, and in particular the Constitutional Court, to declare invalid and strike down legislation which is not in conformity with the requirements of the constitution."[17] Through the supremacy clause imbedded in the Constitution, the judicial review impliedly was adopted as a main check and constraint on the government actions which were inconsistent with the Constitution. Article 2 of the Constitution of South Africa reads as follows:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[18]

[9] Max du Plessls, *Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience*, 33 COMP. & INT'L L.J. S. AFR. 227 (2000)
[10] *ibid*
[11] Pius Nkonzo Langa, *The Protection of Human Rights by the Judiciary and Other Structures in South Africa*, 52 S.M.U. L. REV. 1531 (1999)
[12] OXFORD REFERENCE, http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1066 [accessed 19 April 2018]
[13] Heinz Klug, Constituting Democracy: Law, Globalism And South Africa's Political Reconstruction 55 (2000).
[14] *supra* note 8
[15] *supra* note 10
[16] HEINZ KLUG, 'HISTORICAL BACKGROUND' 2-11-19 IN CHASKALSON ET AL CONSTITUTIONAL LAW OF SOUTH AFRICA 1996
[17] *supra* note *8*
[18] Article 2, The Constitution of South Africa

The afore-mentioned supremacy clause has bestowed the judiciary with the power of judicial review against the inconsistent actions of the government and to check the same. The judiciary has the power as well as the duty to uphold the constitution.[19] Thus, judicial review could be identified as a 'core constitutional value'[20] in South Africa through this clause. The Constitutional courts[21], the Supreme Court of High Appeal[22] and the High Court of South Africa[23] have the power to "make an order concerning the constitutional validity of an Act of Parliament" or other laws and governmental actions, however, the invalidity is not into force until it is given or confirmed by the Constitutional court.[24] The courts have been empowered under the constitution to "declare any law or conduct that is inconsistent with the Constitution [to be] invalid…."[25] Interestingly, the power to check the constitutionality of a constitutional amendment lies only with the Constitutional Courts.[26] Thus, the judicial review of the amendment of the constitution belongs monopolistically to the Constitutional Courts. Hence, admittedly, the wholesome power of judicial review has been granted to the Constitutional Courts under the Constitution.[27] The composition of Constitutional Courts comprises of eleven judges[28], appointed for a period of twelve years or till 70 years of age, whichever is earlier[29]. The appointment of the judges is done by the President after consulting the Judicial Service Commission[30], which is a constitutional body comprising of 25 members. The constitution also enshrines the inherent power of the afore-stated courts manifesting a strong judiciary:

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.[31]

The inherent powers of the courts thus, manifest the independent and strong courts of the country entrusted with the responsibility to account justice and uphold constitutional

[19] Article 174(8)
[20] *i supra* note 1
[21] Article 167
[22] Article 168
[23] Article 169
[24] Article 172(2)
[25] Article 172(1)
[26] Article 167(4)(e)
[27] Article 167(5)
[28] Article 167(1)
[29] Article 176(1)
[30] Article 178(1)
[31] Article 173

supremacy through their power of judicial review. Further, the Constitutional court has also acclaimed that the check and accountability of the government is one among the grounded values of the Constitution[32] and affably, the check by the courts has been admitted remarkably as a restraint by the government on themselves which is quite apparent from the response of President Mandela after the Constitutional court had set aside his decision[33] which was that if the Constitutional Court had said he was wrong then he must have been wrong.[34] This acceptance of accountability illuminates the fact that judicial review has been expressly admitted by the government as the check upon them and they do not consider judiciary as a competitor against them for power and supremacy. Also the Constitution binds all the organs and persons to the decision of the courts.[35] Evidently, judicial review has become an essential factor for the stable legal system in South Africa. Therefore, it can also be witnessed that the South African form of judicial review consists of a unique combination of the institutional structure borrowed from the civil legal system and the procedural values inherited from the common law system.

JUDICIAL REVIEW IN INDIA

During the British period, the courts had the power of judicial review, though limited, ever since the first Act was brought by the Parliament in 1858,[36] and also the high courts acclaimed the power of judicial review in various cases.[37] Even during the framing of the Indian Constitution, the concern of judicial review "was taken up during the drafting of judicial provisions, but during the framing of the Fundamental Rights as well".[38] Thus, judicial review was viewed as a citadel of India's justice and positioned on a prestigious point, albeit the

[32] Rail Commuter Action Group v Transnet Ltd t/a Metrorail 2005 (4) BCLR, 301 (CC), paras 74-6
[33] Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)),
[34] Geoff Budlender, *Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa*, 122 S. AFRICAN L.J. 715 (2005)
[35] Article 165(5)
[36] Constitutional Review of the Acts of the Legislature in India, http://shodhganga.inflibnet.ac.in/bitstream/10603/35900/7/chapter%204.pdf [accessed 19 April 2018]
[37] Empress v. Burah and Book Singh I.L.R. 3 Cal. 63, 87-88; Sathe, *S.P. Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 2ND ED. NEW DELHI: OXFORD UNIVERSITY PRESS, 2002, P. 29.
[38] G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (31ST IMPRESSION 2018), PG 165

framers had an apprehension of uncontrolled judicial intervention in the parliamentary framework.[39] After the independence in 1947, India adopted the newly framed supreme law of the land: the Constitution of India. Judicial review has been ingrained under the Constitution. The supremacy of the Constitution is maintained by Article 245 of the Constitution, where the Parliament and the state legislatures can make laws "subject to the provisions of the constitution". Article 245(1) reads as follows:

(1) *Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.*

Thus, the provisions of the Constitution i.e. the Constitution have been positioned above the Parliament and thereby, indicating the constitutional supremacy over the parliamentary sovereignty. Explicitly, Gajendra Gadkar, C.J., in the Reference case[40], observed the Constitution to be supreme and sovereign. Further, the supremacy of the Constitution was sought to be upheld through the process of the judicial review. Article 13 reads as follows:

13. Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part [III]*, shall, to the extent of such inconsistency, be void.*

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part [III] *and any law made in contravention of this clause shall, to the extent of the contravention, be void……*

Admittedly, as Hiralal Kania, C.J., had observed in A.K.Gopalan case[41], even if Article 13(1) and (2) would not have been present, the courts would have always possessed the power to strike down any enactment that infringes any of the provisions enshrined under Part III, to an

[39] ANIRUDH PRASAD AND CHANDRASEN PRATAP SINGH, FOREWORD BY PROFESSOR (DR) M.P.SINGH, JUDICIAL POWER AND JUDICIAL REVIEW: AN ANALYSIS OF THE SUPREME COURT IN ACTION, (1ST EDITION, 2012) , PG 352
[40] *In re,* Art 143, Constitution of India, AIR 1965 SC 745 (paras, 40-42)
[41] A.K.Gopalan v. State of Madras, (1950) SCR 88 (100)

"extent it transgresses the limits". In Keshvananda Bharti v. State of Kerala[42], judicial review was regarded as a basic feature of the Constitution after a long tussle between parliamentary sovereignty and judicial supremacy. In later many cases[43], the Supreme Court considered expressly judicial review to be the grounded and essential value of the Constitution.[44] Thus, judicial review was formally ingrained to be a core constitutional value of the Constitution[45] and Marshillian doctrine of the higher, fundamental and paramount law of the land was acknowledged by the Indian Supreme Court[46].

Under the Constitution, both the Supreme Court and the High courts have the power of judicial review. The Supreme Court has the final word in the interpretation of the Constitution. It is the highest court of the land and has jurisdiction pertaining to all matters of law including criminal, civil, administrative, constitutional etc. For a substantial question of law dealing with the Constitution, a bench of at least five judges hears the matter.[47] Further, all the civil and judicial authorities within the territory of India are required to act in the aid of the Supreme Court[48], thus, manifesting how all the authorities have to comply with the orders of the Supreme Court. Admittedly, the courts in India have been firmly entrusted with the responsibility to uphold the supremacy of the Constitution and to check constitutionality of the actions of the government by employing their power of judicial review.

DISCUSSION

Do both the countries survive with the similar form of judicial review and could the difference in structure have led to the distinct forms of judicial review? At the first blush, the context within which the judicial review had evolved is a little different in the two mentioned countries. While in South Africa, after the long period of atrocities and injustices under the unchecked and unrestrained parliamentary sovereignty i.e. after 1994, the government expressly adopted

[42] A.I.R 1973 S.C 1461
[43] Minerva Mills v. Union of India, AIR 1980 SC 1789; State of Rajasthan v. Union of India AIR 1977 SC 1361(1413-14); Gupta v. Union of India AIR 1982 SC 149 (Para, 981)
[44] PROF. MANOHAR RAO, JUDICIARY IN INDIA: CONSTITUTIONAL PERSPECTIVES, (1ST IMPRESSION 2009), REVIEWING JUDICIAL REVIEW BY DR. GIRJA SHANKAR SHARMA, PG 394.
[45] DR. D.D.BASU, COMPARATIVE CONSTITUTIONAL LAW (3RD EDITION 2014), PG 410
[46] Marbury v. Madison, (1803) 1 Cr. 137, pg 149;C.J, Kania in State of Rajasthan v. Union of India AIR 1977 SC 1361, pg 107.
[47] Article 145 (3)
[48] Article 144

the constitutional supremacy as the ideal of the new political system with the ingrained process of judicial review and the courts being the final interpreter of the Constitution. Thus, the country had already faced the consequences of the unrestricted parliamentary sovereignty, a common law system feature, because of which it realized the importance of an independent judiciary with the power to check the governmental actions. However, in India, after the independence in 1947, the framers had a totally new vista of a political system, though they too considered the importance of the judicial review, they were apprehended by the unaccountable judicial interventions disturbing the parliamentary actions, which could not be observed in South Africa. Therefore, the trust in the courts, at the very inception of the Constitution, was at a higher level in South Africa, though "unlike India, a reading of South Africa's constitutional history indicates an initial outright rejection of judicial review"[49]. Indubitably, judicial review has been a tool for reforms and constraint on the Parliament in both the Countries.

Further, although distinct in institutional structure, both the common law countries regard constitutional matters to be undertaken by the higher courts. In South Africa, the matters related to the constitutional interpretation are dealt by the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa and therefore, are entrusted with the powers of the judicial review. Likewise, in India, the Supreme Court and the high courts exercise the power of judicial review. However, there is a difference in the institutional structure of the courts. The Constitutional court of South Africa has a monopolistic jurisdiction related to the checking of the constitutionality of the amendment of the Constitution i.e. the other two courts do not have the afore-said authority under the Constitution. Further, it is a body specially restricted to the constitutional interpretation and related matters of law which are of general public importance. This does not bar the other two courts viz. the Supreme Court of Appeal and the High court of South Africa to hear the constitutional matters provided that the decision given by them on constitutional matters would not have any force until confirmed by the Constitutional Court i.e. the final word regarding constitutional matters lies with the Constitutional court of the South Africa. The Supreme Court of Appeal is the highest jurisdiction in all other matters. Thus, this manifests that the Constitutional court is a specially designed courts for the

[49] Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49 (2007)

protection of the constitutional supremacy and matters related to the Constitution.[50] The Constitutional Court is a civil law feature which has been adopted by South Africa after experiencing the common law system of parliamentary sovereignty. Conversely, the constitutional matters involving the interpretation are dealt by the Supreme Court, having jurisdiction of all matters, forming a constitutional bench to act as a Constitutional court. Thus, there is no special court to deal with the constitutional issues.

Further, the South African has adopted a strong court system which binds all the organs of the government. Similarly, Indian courts too have transformed themselves through their power of judicial review into very strong courts. Thus, a very cautious approach is required in exercising the power of the judicial review. According to Cora Hoesxter[51], "[T]he danger lies, not in careful scrutiny, but in 'judicial overzealousness' in setting aside administrative decisions that do not coincide with the judges own opinions."[52] "In this way, the judicial approach in South Africa is quite nearer to the judicial outlook in India."[53] Thus, the public interest litigation has been expressly grounded under Article 38 of the Constitution in South Africa, while the Indian courts have given wide interpretation to Article 32 and 226 to assume the public litigation jurisdiction. Further, Article 39 of the South African Constitution have heralded a new era of judicial activism. A "most creative activism, which may inspire courts in……India, is activisation of non-implementation of amendments, i.e. to give effect to the statute which has not been brought into force since long time."[54] This shows that the spectrum of the powers that the courts in South Africa gain from the Constitution and have, subsequently, widened through judicial review and activism, albeit "avoiding poly-centric decision making"[55] and preventing themselves to "rubber-stamp as unreasonable a decision simply because of the complexity of the decision"[56] while concomitantly ensuring that they do "not ….usurp the functions of administrative agencies"[57], is broader and more balanced than the Indian vista of judicial

[50] Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998)
[51] CORA HOEXTER, ADMINIATRATIVE LAW IN SOUTH AFRICA (JUTA 2007)
[52] Quoting Hoexter, "*The Future of Judicial review in South African Administrative Law",* (2000) 117 SOUTH AFRICAN LAW JOURNAL 484, 512
[53] *supra* note 39
[54] *ibid*
[55] *ibid*
[56] Ministers of Environmental Affairs and Tourism v. Bato Star Fishing (Pty) Ltd., (2003) 6 SA 407 (SCA)
[57] Trinity Broadcasting (ciskei) v. Independent communications Authority of South Africa, (2004) 3 SA 346 (SCA)

review.[58] Evidently, "Indian and South African constitution-makers [have] traversed two divergent paths in arriving at the same destination of constitutional supremacy and judicial review."[59]

CONCLUSION: A BETTER VERSION

The South African version of judicial review, a mixed form of civil legal system and common law system, "has been balanced".[60] "The courts have struck an admirable balance between activism and restraint"[61] so as the limit has not crossed which could invite criticisms.[62] The establishment of the Constitutional courts having monopolistic jurisdiction pertaining to the constitutional matters throws light upon the middle-conduit that South Africa has adopted between the parliamentary sovereignty and the judicial supremacy. Arguably, the final world in the interpretation of the Constitution and the government acting in aid invariably illuminate the judicial supremacy under the rubric of the constitutional supremacy and the 'rule of law' mantra, albeit the courts have restrained themselves in intervening the jurisdictions of the other organs. Conversely, the Indian courts have been highly involved in activism and appear more to be unrestrained, unaccountable and unruly horses. Therefore, it may inspire from the South African system to tackle the criticisms as well as the uncontrolled power of the courts through the establishment of a middle-conduit of Constitutional Courts. Despite this difference both the courts have played an essential role in protecting the individual rights and liberties. Conclusively, the mixed form of judicial review apparently is a better version and reflects the positive picture of convergence of civil legal system and common law system, though "sooner or later the courts, and specifically the Constitutional Court, will be [also] confronted with the question of legitimacy"[63] Nevertheless, the Constitutional Courts have been regarded as "the most appropriate branch of government"[64], "not only to guard the society against the

[58] *supra* note 39
[59] *supra* note 49
[60] *Supra* note 39
[61] *ibid*
[62] HUGH CORDER, "JUDICIAL ACTIVISM OF A SPECIAL TYPE: SOUTH AFRICA'S TOP COURTS SINCE 1994" IN BRICE DICKSON, JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (OUP, 2007) 323, 362.
[63] *supra* note 8
[64] *supra* note 2

oppression of its rulers; but to guard one part of the society against the injustice of the other part."[65]

[65] THE FEDERALIST No. 51 (Alexander Hamilton or James Madison) (Max Beloff ed., 1987)