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JUDICIAL REVIEW OF LEGISLATION- WHETHER SRI LANKA NEEDS A CONSTITUTIONAL REFORM?

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ABSTRACT

The Constitution of Sri Lanka via Article 80(3) prohibits the judicial exercise of reviewing the constitutionality of any legislation enacted by parliament once the bill becomes law. The legislature stays un checked if the judiciary is not provided with the power to review laws. In the history of Sri Lanka, the Soulbury Constitution did not expressly provide for judicial review, however the court implied the authority to do so. The two republican Constitutions expressly prohibited post enactment judicial review which is unlikely compared to other democratic states and significantly affects the democratic practices. The express prohibition hasdisabled the judiciary even from implying such power. The Constitution of Sri Lanka provides under Article 121 for pre-enactment judicial review only subject to compliance with certain procedures. Citizens can challenge the constitutionality of law within one week of the bill being placed on the order paper of the parliament. The lack of judicial review has been considered to be an impediment for upholding constitutionality and other related values and absolute post- enactment judicial review is insisted upon. The contemporary dialogue on constitutional reform too takes into account the need to introduce judicial review. However there are oppositions to the idea of post enactment judicial review on many grounds inter alia the likelihood of judicial supremacy over other organs. In this back ground, the main objective of the research is to explore whether a constitutional reform is essential to include judicial review in light of the Sri Lankan experience. The research will also involve in a comparative study as to the constitutional arrangement for judicial review in other countries and the attitude of the judiciary towards it. The research involves a qualitative study. The constitutional arrangements under three post-independence constitutions on judicial review and the judicial interpretations of the same will be analysed. The relevant scholarly writings on judicial review will be refereed to.

Keywords- *Judicial review, legislation, Democracy, Constitution, Reform*

1.JUDICIAL REVIEW- HISTORICAL BACKGROUND

Constitution must be supreme in any state and the framework of governance must ensure that no one or institution is placed above the law or Constitution . Judicial review is the best practical tool to ascertain that no one acts in contravention to the Constitution and the liberties and rights of the people are not violated . The conventional understanding of judicial review is thatjudiciary examines the constitutionality of laws made by the legislature and the conduct of the executive body of government as to their consistency with the Constitution and declares them invalid or void if they are inconsistent with the Constitution .

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This paper focuses on judicial review of legislation alone and attempts to explore the history of judicial review of legislation across the globe. In any democratic state, protection of rights of the people is the ultimate goal of the government and toward this end the Constitution must impose certain substantive and procedural limitations on the power of parliament to legislate . Judicial review is a constitutional design to ensure that the laws of the parliament do not go beyond the limitations. Judicial review of legislation is in nutshell could be described as a mechanism to ensure that the legislature acts within the ambit of the Constitution .

Judicial review of legislation is a strange concept to British as it showed clear deference to the concept of parliamentary supremacy which means parliament can make no wrong and whatever is enacted by the parliament is final and conclusive. The judiciary could not decide on the validity of laws made by UK parliament rather it determines what is made by parliament to give effect to that . In contravention to this an observation was made by Lord Coke in Dr.Bonham case to the effect that when an act of Parliament is against common rights and reasons, the common law will control it and adjudge such act to be void . There were instances where few British judges like Lord Denning attempted to engage in judicial activism for example filling the gaps in the law however it was widely criticized even by fellow judges such as Lord Diplock . Later on with the development of Human Rights, the parliament of UK no longer enjoy the absolute supremacy, its law making authorityis bound by human rights norms and the judiciary ensures that the laws are in compliance with country's obligation to protection of human rights . However whether the judiciary ok UK could declare inconsistent laws void is an interesting question and this paper will explore itbased on the discussion on judicial review vs judicial invalidation.

Judicial review is a significant feature of American constitutional law and it is a judicial invention in the absence of an express provision on judicial review in the Constitution . In Marbury v Madisoncase it was declared that where the constitution and an act of congress are in conflict, the court must follow the constitution and declare the latter to be unconstitutional andvoid. The judicial declaration of laws as ultra vires by the court without constitutional authority to do so is critiqued as extra-constitutional, the argument based on the fact that if the framers of the Constitution considered judicial review is vital to American constitutional law, it should have been expressly stated in the Constitution . The argument that judicial review violates democratic principles as it violates the decision of the majority people is overruled by constitutional arrangements in line with principle of thin democracy which limit the rule of majority in America . The age limit for candidates who run for office, the qualification criteria, the term limit on president etc. are few example of constitutional limitation on majority based form of governance. However there are oppositions to the form of judicial review America practices. The Supremacy clause under the constitution to the effect that the constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby , has been converted to the principle of judicial supremacy which means exclusive power of constitutional interpretation to the court and it damages separation of power, departmentalism and other democratic features of America, according to PresidentLincon . However this paper does not get into detailed discussion on critiques on American judicial review.

The idea of judicial review is widely in operation in many countries in the present era according to their understanding of democracy, constitutionalism, will of the people etc. However there is consensus among the nations that the rights of the people should be upheld and the legislature must be made obliged to comply with the Constitution. There are different forms of judicial review in operation in different countries, such as pre-enactment judicial review,post-enactment judicial review, strong form judicial review, week form judicial review, judicial invalidation of laws, declaration of incompatibility, overriding by parliament and this paper will analyse them to recommend an alternative for current Sri Lankan framework on judicial review.

2. JUDICIAL REVIEW IN SRI LANKA

2.1. Judicial review under the Soulbury Constitution

The non -specific reference to judicial authority on the judiciary was interpreted by the judiciary in such a way vesting the power on it. In the case of Liyanage v Queen a holistic interpretation of constitution was adopted and the specific vesting of legislative and executive powers on the parliament and the governor respectively under the constitution was interpreted to mean that the unexpressed judicial power is impliedly vested on judiciary. The absence of express provision on judicial review did not curtail the judiciary from entertaining applications challenging the validity of laws enacted by Parliament. The court reviewed the constitutionality of Official Language Act of 1956 and the Citizenship Act and the Ceylon (Parliamentary Elections) Act of 1948 in Mudanayake and Kodeeswaran cases, however the determination of the Supreme Court and the Privy Council had failed to address the grievances of the petitioners due to the chosen way of narrower interpretation of constitutional provisions, in sensitized approach of the judges, inability to foresee the impact of law on society, more deference to intention of parliament etc. are the causes for not effectively utilizing the power of judicial review for the benefit of the vulnerable . Even though it was possible for the court to declare the Citizen ship Act and the Official language Act as unconstitutional since it violated Article 29(2) of the Constitution and upheld the rights of the minority people,Indian origin Tamils and Tamils in general, indeed it was not done so.

The researcher while recognizing the fact that judicial review authorized either expressly or impliedly may not be utilized effectively, in the background experience of judicial behavior under the Soulbury Constitution, stresses upon a constitutional space at least to challenge the validity or constitutionality of laws enacted by the legislature before court of law. The challenging was possible under the soulbury Constitution and the outcome was frustrating. This research has a limitation as to its scope, it deals with the significance of judicial review and the need for a structural revision in Sri Lanka, this piece of research does not extensively deal with the question how well the judiciary exercised judicial review in Sri Lanka.

2.2. Judicial review under 1972 Constitution

The first autochthonous and republican constitution adhered to the principle of parliamentary supremacy and the National State Assembly was declared the supreme state instrument . The drafters

of the Constitution rejected the theory of separation of power and hesitated to allow the unelected judged to overthrow the decision of the elected representatives .Even though a constitutional court was established for the first time in Sri Lanka, it was not authorized to check the constitutionality of laws enacted. In fact it was expressly prohibited to challenge before any court of law or tribunal, the validity of any law of national state assembly once it becomes law . The express prohibition of judicial review was condemned by scholars as a strategy to avoid invalidation of laws such as Official Language Act by the future judiciary .

2.2.1. Pre-enactment judicial review

The pre- enactment judicial review was permitted under the 1972 constitution that is to challenge the constitutionality of laws at the bill stage. The question of constitutionality of a bill could be challenged before the Constitutional court within one week of it being placed in the order paper of National State Assembly and the court had to determine the case within two weeks of time. Any urgent bill in the national interest in the opinion of cabinet of ministers could be referred for determination of constitutionality and the court had to pronounce its decision as soon as possible within 24 hours . The effectiveness of pre-enactment judicial review will be analysed later in this paper.

It is argued by the proponents of pre-enactment of judicial review, in respect of the weakened state of judiciary under the 1972 constitution that it was caused by improper constitutional framework more than pre-enactment judicial review .It is suggested that pre-enactment judicial review serves as a point man leading to constitutionalization of laws found to be inconsistent with the Constitution by adopting the procedures such as 2/3rd majority in the house, approval of people at a referendum as the case may be, recommended by the judiciary while reviewing the bill.

2.3. Judicial Review under 1978 Constitution

Like its predecessor, the 1978 Constitution too abolished post-enactmentjudicial review. Article 80(3) of the Constitution states that where a bill becomes law upon the certificate of President or the Speaker ,as the case may be, being endorsed thereon, no court or tribunal shall inquire into , pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. This express prohibition has handicapped the court from even implying such authority given the willingness on the part of the judges to do so as in the United States of America. The court is also unable to amend constitutional provisions impliedly as the constitution prohibits implied amendment and rather insists on express statement of amendment in the bill .

The lack of post-enactment judicial review grants validity to laws which infringe the fundamental rights guaranteed under chapter III of the Constitution. The judiciary's role toward protection of fundamental rights is very much limited due to the abolition of judicial review. The judiciary's role is only to set thresholds to validate laws which are found to be invalid at the bill stage. Article 120 of the constitution provides sole and exclusive jurisdiction to the Supreme Court to determine any such question as to whether any bill or any provision thereof is inconsistent with the Constitution, subject to the long title of and certificate of cabinet of ministers on bills amending constitutional provisions or

repealing or replacing the constitution. The time prescription for making such petition and other related matters with regard to challenging of a bill involve many practical difficulties, however this paper does not get into that question. The Supreme Court has to come out with its decision whether the bill or any part of it is unconstitutional and if so what provision and provisions, with reasons Article (123). However the court has no jurisdiction to invalidate laws which are unconstitutional rather it provides suggestion to make it valid by getting special majority in parliament (Article 84) or approval of people at referendum in addition to 2/3rd majority(Article 83).

In respect of urgent bills, the constitution does not permit an ordinary citizen to challenge urgent laws instead provides for the President to refer any bill which is in the national interest in view of the cabinet of ministers, to the Supreme Court to decide upon the constitutionality of it within 24 hours to 3 days(Article 122).The urgent bills need not to be gazetted and even the members of parliament do not aware of the contents of the bill . The review of urgent bill has a lot of chances for misuse.

3. POST-ENACTMENT JUDICIAL REVIEW

The abolition of judicial review under the two republican constitutions has attracted much criticism. The prohibition on post-enactment judicial review is a rare practice in the modern democratic discourse. Although the Constitutions of many countries do not allow the judiciary to declare laws void which are inconsistent with the Constitution, however permit the citizens to challenge the validity of laws at any time and judiciary to provide necessary remedies such as declaration of inconsistency etc.

The proponents of post-enactment judicial review relies on the fact that the impact of the given law on the society can be ascertained once it comes into operation and the challenging an act when it is on the paper is meaningless since it involves a hypothetical question without actual case and litigant to decide on . Another significant feature of post-enactment judicial review is that it serves as a check on discharge of legislative authority and not only protects the rights of the people from legislative infringement but also provides suitable guidelines for the parliament to follow in making laws.

The opponent of post-enactment judicial review heavily relies on the fact that it leads to a counter-majoritarian difficulty . The legislature takes a collective decision despite the disagreements among individuals and societies, based on its commitment to human rights, and the genuine decision taken by the representatives of the people must not be overthrown by a court. However the proponents of post-enactment judicial review counter the argument on counter-majoritarian difficulty, with the norm of majoritarian tyranny, they question the system of representation, priorities of the representatives, the likelihood of prioritizing personal rights over human rights, the state of representation of minorities etc

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The debate on thin democracy with less participation of people in governance or thick democracy with more participation of people is relevant here. The American Constitutional ideology is based on thin democracy, the Constitution has imposed limitations on the power of congress and arrangements are

made to mitigate majority influence . The principle of thin democracy with judicial review, separation of powers, check and balances, institutional protection for the rights of the minorities etc., is the desired version of democracy in the present world.

Democracy not only means majority power but also majority constraint. In order to prevent violation of rights of minorities or other vulnerable under the cover of majority rule, the judicial intervention is a must and judiciary be provided with the power of judicial review . Judicial review in fact adds value to the principle that democracy while acknowledging majority rule does not deny the right of an individual to decide for himself by himself.The judiciary when exercising review power must balance the conflict with will of the people and the limitations provided on it under the Constitution. Judicial review does not necessary mean interpretive review alone,include non-interpretive judicial review for the protection of individual liberties and rights .

There is another criticism on post-enactment judicial review that invalidation of laws and the finality attached to it does not give chance for the legislature to correct the mistakes it made in making the laws, however it is strongly believed that rights of the people cannot be compromised for trial and error of the parliament .

Post-enactment judicial review serves a significant role in a state which has constitutional arrangement for devolution of power . The judiciary must be able to check and ensure that the central parliament do not trespass into devolved subjects and vice versa.There is another argument that post-enactment judicial review does not give certainty to law so it should not be allowed however it is pointed out by scholars that asthe countries which exercise post-enactment judicial do not encounter any notable problem as to the certainty of laws, the argument on certainty is negligible .

Recommendations for constitutional reform

Given the justification for post- enactment judicial review, many scholars support the introduction of post-enactment judicial review in the Constitution. Dr.JayampathyWickramaratne demands that a constitutional reform must take place to include absolute judicial review in the Constitution . RohanEdirisinghe too supports judicial review on the ground that the judiciary is best equipped to protect individual rights as it is insulated from political responsibility unbeholden to self-absorbed and majoritarianism as stated by Jesse Choper. However there are doubts as to the capabilities of judges.

The report of the Public Representation Committee which was published after consultation with public as to their expectations about the proposed new Constitution, recommends for judicial review of legislation by Constitutional Court. It is their view that the conceptof supremacy of the Constitution can be ensured if and only when judicial review of laws passed by the legislatures is available. The Constitutional Court shall have jurisdiction to review the bills and laws passed by Parliament and other legislatures to be reviewed for their constitutionality in the country . It was the considered view of some of the committee members that the decisions of the Judicial Service Commission must also be scrutinized by the Constitutional Court . The All Party representative Committee report too supported this view.

Post-enactment judicial review- different functions

The post-enactment judicial review may operate in strong form which means final invalidation of laws by the judiciary. The judicial review in practice in USA fall under this category and it is considered to be the fundamental duty of the court under the framework of a written Constitution to declare any law which is repugnant to the Constitution as void . Indian Constitution too permits the judiciary to declare laws void if they are inconsistent with the Constitution(Article33). In Sri Lanka too the dialogue on judicial review often refers to strong form judicial review.

However the post-enactment judicial review may operate in week form too. The countries which do need to strike a balance between the concepts of sovereignty of parliament and supremacy of judiciary prefer the week form judicial review . To avoid the conflict on the issue of supremacy between the organs of the government, the modern democratic world tend to practice week form judicial review. The week form review process does not declare laws which are inconsistent with the Constitution void rather find alternatives to rectify the wrong. Different countries have explored different versions of week form judicial review.

The United Kingdom,the strongpractioner of absolute supremacy of parliament once now engages in dialogue with different authorities before making any law. Its member ship in the European Union and the human rights obligation has forced it to depart from the old notion of parliamentary supremacy and work in collaboration and coordination with executive and judiciary. The dialogic review process takes into consideration the non- absoluteness of rights or in other words restriction on rights of individuals and the proportionality of the restrictions imposed by the parliament on such rights. The dialogic model involves political review too; the ministers are powered to issue a compatibility statement over proposed bills. In UK the Joint Committee on human right, a permanent body of parliament deals with the human rights issue of a proposed right bill and inform the parliament its suggestions and recommendations . The purpose of the dialogic and political review is to keep people informed of the impact of law on them and the parliament of the judicial scrutiny .

The dialogic system precludes judicial invalidation (UK, New Zealand, Victoria). It is a practice in those countries that judiciary must interpret law as compatible with human rights whenever possible and avoid invalidation of laws. Canada is an exception to this. The Constitution of Canada permits court to invalidate law after the completion of dialogic review subject to over- riding of the parliament . The parliament of Canada can include a 'notwithstanding' clause in the law when drafting in anticipation of future invalidation by court or in remaking the law after the declaration of inconsistency at the end of judicial review. The notwithstanding clause must be subjected to renewal by the parliament and judicial scrutiny every five year and the continuation or lapse of the same depend on the reaction of people at the elections in between too .

Prohibition of invalidation of laws either expressed or implied, do not preclude the court from declaring the incompatibility. Although the compatibility statement by ministers and the declaration of

incompatibility by the court do not bind the court and the parliament respectively, they direct the court and parliament in correct direction in making and determining laws affecting rights of the people.

The week form judicial review places neither the judiciary nor the parliament supreme , rather it requires for participation and conversation to decide upon the validity of laws. The decision of neither the court nor the parliament is final, for example parliament can override the decision of the court and the court also can declare incompatibility. In contrast, the strong form judicial review places the judiciary over the parliament and the finality attached to invalidation of laws create tension among the organs of state, The Supreme power of the court over the parliament may lead it to find ways to suppress judiciary, and Sri Lanka has coped withsuch suppressive constitutional, legislative arrangements and executive actions.

The countries which abolish post-enactment judicial review places the parliament at supreme level and the decision of the parliament over a bill is final until the parliament itself reverses it subsequently. The two republican constitutions of Sri Lanka fall under this category. However in some countries which follow the strong form judicial review has provisions of compromise, for example section 172 of the South African Constitution vests power on the court to invalidate laws as to the extent of inconsistency however ready to suspend the invalidation for a certain period or on conditions paving way for the parliament to correct its wrong.

4. CONCLUSION

There is no single form of judicial review in operation, it has many versions. The Present framework of pre-enactment judicial review is ineffective to uphold the rights of the people in Sri Lanka. In addition to the process of reviewing the law at the bill stage, the court must be allowed to review the law even after it becomes an act. Sri Lanka has to definitely get rid of the cursive prohibition of post-enactment judicial review and decide on what decision the court is ought to take once it realized that the particular law under review is incompatible, whether to invalidate or, declare incompatibility or provide adequate time to correct the mistake or suggest necessary steps to make the law valid.

There is example in the world for judicial activism on the part of the judges even in the absence of express direction as to reviewing the bills of parliament and adjudication. The loops hole in the constitutional framework over the issue of review of legislation did not preclude the judges from taking the lead in the right direction. In the background of the attitude of the judges towards protection of the rights of the people in Sri Lanka, it is difficult to arrive at a conclusion as to the general behavior of the judiciary toward upholding supremacy of the Constitution. There were judges who ineffectively used judicial review, narrowly interpreted laws, negligent of impact of laws on the society, however there were remarkable judgments with the right based approach based on the individual capacity of judges.

In the context of Sri Lanka, it is recommended to introduce post-enactment judicial review in the constitution and a clear arrangement of review process and adjudication must be made within the constitution itself without leaving discretion on the part of the judges at it may lead to usurpation of

such power given the appointment, transfer and dismissal process in Sri Lanka. Whether the invalidation power would be exercised by the judiciary or any weak from review is preferred, it must be expressed in the constitution without ambiguity. The question of what form of judicial review of legislation is appropriate for Sri Lanka must also be resolved with a process of dialogue and reasonable participation of people from all segments of communities.

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