Judicial Review and Principles of Self-restraint: The South Asian Context

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What is judicial review?

- Marbury v. Madison (1803)

  “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”

What is judicial review … … …

- "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution is void. This theory... is consequently to be considered, by this court as one of the fundamental principles of our society"

What is judicial review … … …

- Fletcher v. Peck (1810)
- Martin v. Hunter's Lessee (1816)
- Cohens v. Virginia (1821)
- Dred Scott v. Standford (1857)
- The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters

What is judicial review … … …

- There were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.
- it is part of a basic principle of constitutional democracy in America, separation of powers with checks and balances among the three branches of government, which provides limited government and the rule of law (Patrick and Remy 1985, 150-156).

The uses of judicial review

- Judges use their power of judicial review *only in cases brought before them in a court of law*.
- They do not make hypothetical decisions about the constitutionality of government actions.
- And they do not offer advice to government officials about the constitutionality of their actions outside the proceedings in courts of law.

The uses of judicial review …

- As of 2010, the United States Supreme Court had held unconstitutional some 163 Acts of the U.S. Congress and more than 1000 state laws.
- The great majority of these invalidation's have involved civil liberties and rights guaranteed by the U.S. Constitution.

Principles of Judicial Self-restraint

- A definite controversy must exist -- disputes between parties must involve the protection of a meaningful, nontrivial right and/or the prevention or redress of a wrong.
- Courts do not render advisory opinions, rulings about hypothetical situations, or rulings that have not involved an authentic clash between adversaries (the exception being some state courts which can offer declaratory judgments)

Principles of Judicial Self-restraint …

- Parties to a legal action must have proper legal "standing" which essentially means that someone has suffered (or is about to suffer) a personalized injury (the exception to this being class action suits, filed on behalf of others)
- Courts do not ordinarily hear "moot" cases, although sometimes a judge is the best one to decide whether something is still "ripe" for adjudication.

Principles of Judicial Self-restraint …

- The *political question doctrine* encourages courts to decline to rule in certain categories of controversial cases. Under this theory, a court acknowledges that the Constitution might have been violated but declines to act. It is often described as a type of judicial restraint, although it can be considered a form of judicial activism against plaintiffs whose rights have been violated and find their cases dismissed.

Principles of Judicial Self-restraint …

- Detractors of judicial activism charge that it usurps the power of the elected branches of government or appointed agencies, damaging the rule of law and democracy

The following have been cited as examples of judicial activism:

- Brown v. Board of Education – 1954 Supreme Court ruling ordering the desegregation of public schools.
- Roe v. Wade – 1973 Supreme Court ruling decriminalizing abortion.
- Bush v. Gore – The US Supreme Court case between the major-party candidates in the 2000 presidential election, George Bush and Al Gore. The judges voted 5-4 to halt the recount of ballots in Florida and, as a result, George Bush was elected President.
- Citizens United v. Federal Election Commission – 2010 Supreme Court decision declaring Congressionally enacted limitations on corporate political spending and transparency as unconstitutional restrictions on free speech.
- Perry v. Schwarzenegger – 2010 decision by federal judge Vaughn R. Walker overturning California's constitutional amendment to ban same-sex marriage.

Judicial Review in South Asia [Only India, Pakistan, Bangladesh, Sri Lanka & Nepal]

- All these countries have written constitutions. Except Sri Lanka, all of them have clear constitutional provisions with the superior courts' power of judicial review.
- India remains the major centre of constitutional norms and values – which in turn built significantly on the common law and American constitutional jurisprudence in the past.

Judicial Review in South Asia …

- The Indian, Pakistani, Bangladeshi and Nepalese judiciary are free of control from either the executive or the Parliament. They act as interpreter of the constitution.
- Pakistan and India being federal, their superior courts act as intermediary in case of disputes between two States, or between a State and the federation.

Judicial Review in South Asia …

- An act passed by the Parliament or a Legislative Assembly in all these countries - India, Pakistan, Bangladesh and Nepalese - is subject to judicial review, and can be declared unconstitutional by the judiciary if it feels that the act violates the provisions of the Constitution.
- In these countries, judicial review is also a type of court proceeding in which a judge reviews the *lawfulness of a decision or action made by a public body*.

Judicial Review in South Asia …

- The system of judicial review of legislation and administrative actions shows some common features in India, Bangladesh, Nepal and Pakistan. They owe much to American jurisprudence of judicial review and principles of judicial self-restraint.
- In this connection, however, even if a South Asian country adopts the form of separation of powers, the executive still tends to be in a relatively powerful position.
- Influence of the India-developed doctrine of basic constitutional structure and its influence in Bangladesh, Nepal and Pakistan.

Judicial Review in South Asia …

- Governmental structure greatly determines the form of the judicial review system (Sri Lanka, Maldives and Bhutan as example).
- A constitutional bar on judicial review in Sri Lanka makes it practically impossible for any legislation to be challenged in court on the grounds that it violates the national constitution outside a direct conviction.7
- The 1978 Constitution's executive powers provision and the Public Security Ordinance, No. 25 of 1947 have allowed emergency powers to render the power of judicial review practically impotent. The President generally prevails over weak institutions.

Judicial Review in South Asia …

- Despite controversial rulings, the Pakistan Supreme Court has the strong support of the people and the elite and is one of the most respected institutions in the nation. Even during military rule, when the Court might have been expected to be subject to a supra-constitutional dispensation, it has used its institutional authority to maintain some influence over political events.
- The judiciary of Pakistan enjoys supremacy over the other organs of the state – but the problem of implementation of its decisions is chronic.

Judicial Review in South Asia …

- In January, 2010, the Bangladesh Supreme Court observed that parliament does not possess any authority to suspend the constitution and proclaim martial law and hence, it cannot legitimize actions of martial law regimes.
- The judgment paved way for restoring the original four fundamental principles declared in the permeable of the constitution, including secularity

Judicial Review in South Asia …

- The judiciary of India has created standard precedents of judicial activism in many areas of law and justice. It has influence in all South Asian countries in both legal profession and academia.
- Restrained judges respect political process – but socio-economic compulsions come on their way frequently.

Landmark examples – Judicial review and restraintism

- Kesavananda Bharati v. State of Kerala (1973) (India) (basic structure doctrine)
- I.R. Coelho v. State of Tamil Nadu (Judgment of 11the January, 2007) (affirming basic structure doctrine)
- Ashoka Kumara Thakur v. Union of India; where the constitutional validity of Central Educational Institutions (Reservations in Admissions) Act, 2006 was upheld, subject to the "creamy layer" criteria. Importantly, the Court refused to follow the ‘strict scrutiny’ standards of review followed by the United States Supreme Court

Landmark examples … …

- Supreme Court Decision on the fate of the Fifth Amendment (2010)(Bangladesh)
- Ehteshamuddin Vs. Bangladesh 33 DLR (AD) (1981) (rights, emergencies and judicial review)(Bangladesh)
- Prime Minister Yousuf Raza Gilani’s case (2012) (Pakistan's Supreme Court has found Gilani guilty in a contempt of court case.

Landmark examples …

- However, the court gave Gilani only a symbolic sentence and he will not have to serve any time in jail. Gilani had denied that he had been in contempt for failing to reopen corruption cases against President Asif Ali Zardari. The prime minister had argued that the president, who rejects the corruption charges, has immunity as head of state)
- How much is too much (social, economic, religious, cultural and political dimensions)?

Judicial review and restraintism in Nepal – some concerns

- A very important measure to maintain limited form of government and the concept of constitutionalism – Nepal stands generally good.
- The Supreme Court needs to review new precedents established and cases overruled to maintain consistency in its approach, or principled departure.
- Judicial review as an instrument in the hands of political activists – may be abused for political gains.
- The external environment of the judiciary is under consistent stress due to political instabilities. It has implications.

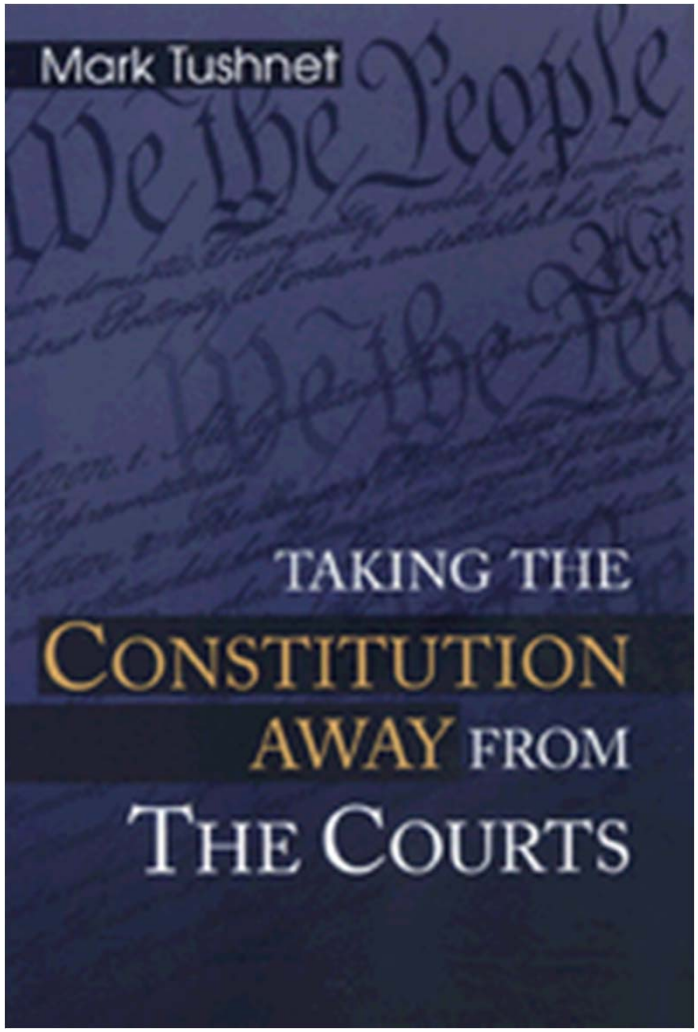
Judicial review and restraintism in in Nepal …

- Excessive use of directive orders and lack of proper research and evaluation to guide it.
- Recognition of the doctrine of necessity at times – not a healthy growth (CA extension cases)
- The use of unhelpful dictums in the judgments (the recent denial of interim order in the case of New budget to be issued by way of ordinance by the president)
- Lawyers acting as petitioners in most of the public interest litigation – not helpful to the concept of independent bar and legal profession.

Judicial review and restraintism in Nepal …

- Grouping of politicians for or against court rulings – increasing vulnerabilities on judicial decision making (Presidential stay on Katuwal's dismissal as an example)
- Increasing risk on the life and premises of judiciary – the assassination of Justice Ran Bahadur Bam and its aftermath.

Taking the Constitution Away from the Courts (2000) - Mark Tushnet



- The book challenges American traditions of judicial review and judicial supremacy, which allow U.S. judges to invalidate "unconstitutional" governmental actions.
- It not only assesses the possibility of constitutional interpretation outside the courts, but also goes on to deliver an assault on what might be termed constitutional interpretation 'inside' the judiciary.
- It urges that we create a "populist" constitutional law in which judicial declarations deserve no special consideration.