A CRITICAL APPRAISAL OF JUDICIAL REVIEW OF JUDICIAL DECISIONS IN NEPAL

A Thesis:

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2022

DECLARATION

I would like to declare that this thesis entitled " A CRITICAL APPRAISAL OF JUDICIAL REVIEW OF JUDICIAL DECISIONS IN NEPAL" is original. Mr. Shiva Prasad Acharya has conducted this study under the guidance and supervision of Asst. Prof. Kamal Raj Thapa, Nepal Law Campus, Department of Law, Tribhuvan University. I further declare that I have not submitted this thesis to any other university and it has not been published anywhere.

Shiva Prasad Acharya
LL.M 4th Semester

Date: October 14, 2022.

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NEPAL LAW CAMPUS, EXHIBITION ROAD, KATHMANDU

LETTER OF RECOMMENDATION

To,

The Head of Department of Law,

Tribhuvan University,

Exhibition Road Kathmandu, Nepal

Mr. Shiva Prasad Acharya, has completed this Thesis entitled " A CRITICAL APPRAISAL OF JUDICIAL REVIEW OF JUDICIAL DECISIONS IN NEPAL" under my supervision.

I have advised him to submit this thesis for evaluation. I wish him success in his life.

Date: October 14, 2022.

……

Asst. Prof. Kamal Raj Thapa

Thesis Supervisor

Professor of Law

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NEPAL LAW CAMPUS, EXHIBITION ROAD, KATHMANDU

LETTER OF APPROVAL

This is to certify that Mr. Shiva Prasad Acharya has completed his thesis entitled " A CRITICAL APPRAISAL OF JUDICIAL REVIEW OF JUDICIAL DECISIONS IN NEPAL" under supervision of Asst. Prof. Kamal Raj Thapa, Tribhuvan University. The researcher has fulfilled all the requirements prescribed in pursuance of the rules and regulations of Tribhuvan University and the Faculty of Law. To the best of our knowledge and belief the work is original and novel.

Members of Evaluation Committee

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Internal Examiner

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Head

Central Department of Law

Date: October 16, 2022.

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This study is substantially based on findings of my LL.M., THESIS REPORT carried out at Faculty of Law, Tribhuvan University, Nepal. It gives me great pleasure and honor to use this opportunity to express my appreciation and best wishes to the many kind people who have generously supported and assisted me in carrying out and completing this study effort. I want to thank each and every one of them.

I want to start by expressing my sincere gratitude to my renowned supervisor, Asst. Prof. Kamal Raj Thapa, whose invaluable advice was used to carry out this research. I am well aware that without his ongoing direction, inspiration, support, and excitement, my research work would never have been finished.

I must express my sincere gratitude to Dr. Krishna Prasad Bashyal, Dean of Law Faculty, Professor Dr. Nutan Chandra Subedi, Head of Central Department of Law Faculty and Associate Professor Dr. D.N. Parajuli, Campus Chief of Nepal Law, who created opportunity to carry out this study.

Last but not the least, I am sincerely thankful to my family members, without theirs continuous help this work could not be success.

Shiva Prasad Acharya
Kathmandu, Nepal.

PREFACE

In the 2nd sem of 2-years LL.M (on Nov. 27, 2020), the guest lecture was delivered by renounced person Mr. Shyam Kumar Bhattarai on Judicial Review (virtually through MS Team). During the class he has discussed about the writ filed against the judgements & orders passed by the Courts and termed it as Judicial Review of Judicial Decision which created my deep interest in the field of Judicial Review of Judicial Decisions. As a consequence I have choosen this very topic "A Critical Appraisal of Judicial Review of Judicial Decisions in Nepal" as my thesis topic for partial fulfillment of requirement of Master Degree in Law.

Judicial Review is not static concept and is continuously evolving. The Supreme Courts of Nepal is one of the key institutions in the government having the power of judicial review. The system of judicial review is different from the appeals. In appeal, the higher court has to decide the matter once again on the merits of the case. But in judicial review, the higher court has only supervisory jurisdiction where it does not go in the question of merits but only tests the validity, legality of the challenged order.

Judicial Review is a great institution for upholding and keeping harmony between the rulers and the ruled. Supreme Court eloquently has in many instances reviewed the decision and order of lower courts through writs and has corrected and controlled the gross injustices and miscarriage of justice. Ocassionaly, it has reviewed its own judgements and orders through writ petition .

I am grateful to my supervisor, Asst. Prof. Kamal Raj Thapa, who helped me stay motivated and on track to finish this thesis on time from the very beginning. He gave me complete guidance on how to approach my thesis, which led me to investigate a broader and more in-depth examination of Judicial Reviews of Judicial Decisions

I truly hope that this thesis report proves to be of great assistance to me, as well as to constitutional law students, judges, constitutional law professors, and attorneys who are interested in researching on Judicial Reviews.

Shiva Prasad Acharya
Kathmandu, Nepal.

LIST OF ABBREBATIONS

Abbreviations	Full Form
AD:	Anno Domini.
AIR:	All India Report
B.S.:	Bikram Sambat.
CA:	Constituent Assembly.
CB:	Constitutional Bench
CC:	Constitutional Court
JR:	Judicial Review
Govt.:	Government
SC:	Supreme Court
SCI	Supreme Court of India
TU:	Tribhuvan University.
UK:	United Kingdom
US:	United States
v.:	versus

LIST OF CASES

Kyam Khan Musalman v. Chitwan District Court and Others (2036)

Lhamu Tamang V. High Court, Patan et.al (2074)

Madhav Raj Ghimire V. Kathmandu District Court et.al. (2073)

Mahendra Prasad et.al V. District Judge, District Court Birgunj

MohanMaya et.al V. Central Regional Court et.al

Moona Acharya v. the Kathmandu District Court (2047)

Nani Kaji V. Bagmati Zonal Court et.al

Naredra Kumar V. Appellate Cout Rajbiraj et.al

Ncell Vs. Large TaxPayer Office

Om Prakash V. Appeallate Court Biratnagar et.al

Prachesta Rana V. Kathmandu District Court et.al (2075)

Pramod Raj Panta V. Kathmandu District Court et al (2072)

Prena Rajya Laxmi V. OPMCM et.al

Prithvi Bahadhur Pande V. Kathmandu District Court et.al. (2073)

Punya Prasad Gautam V. Kathmandu District Court et.al. (2076)

Rabindra Vs. District Court Mahottari et.al

Rajikol and Others v. Appellate Court Patan and Others (2053)

RajKumar V. Appeallate Court Janakpur et.al

Rameshraj Aryal V. High Court Patan et.al. (2076)

RamLakhan Yadav Vs. Kathmadu District Court et.al (2072)

Rupajyoti Vs. Labour Court

Saptan et.al V. Appellate Court Dhankuta

Shyam Bahadhur Jimba V. High Court Patan (2075)

Sunil Tamang V. High Court Patan Case (2075)

Sunita Aggrawal V. Kathmandu District Court et.al (2071)

Suraj V. Western Regional Court et. al.

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TikaDevi Vs. Appeallate Court Biratnagar et.al

Yagyamurti Banjade v. Durgadas Shrestha, Bagmati Special Court (2027)

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CHAPTER-I

INTRODUCTION

BACKGROUND OF THE STUDY

Judicial review is the evolution of the mature human thought. Law and Action of the government must be in conformity with the constitution. Judicial review is the cornerstone of constitutionalism which implies limited Government. It is the duty of the judiciary to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

In other words, judicial review means that the court may declare a law or piece of legislation unconstitutional if it exceeds the legislative branch's authority under the separation of powers, violates a person's fundamental rights, or fails to comply with any of the constitution's mandatory provisions. In the context of Nepal, Article 1 specifically guarantees constitutional supremacy and states that any law that is in conflict with the constitution is void to that extent. Thus, judicial review is the imposition of judicial restraint on the government's legislative and executive branches. In the long history of its use, the doctrine of judicial review has been deemed appropriate or transferred to a system or institution. It upholds the supremacy of the constitution and fundamental rights. In reality, without judicial scrutiny, there cannot be a genuine or living constitution. Simply said, judicial review is a sort of court action where the judge examines the legality of a public body's decision or action.

In the course of its development and evolution, judicial review has acquired a variety of meanings meaning’s and connotations under different democratic constitution. The principle of judicial review has became an essential feature of written Constitutions of many countries.

Judicial review can be considered as mechanism for upholding the supremacy of the constitution. Judicial review, in its most widely accepted meaning, is the power of courts to consider the constitutionality of acts of other organs of government where the issue of constitutionality is to the disposition of law-suits properly pending before the courts.

Judicial review is the power of the courts to determine the constitutionality of legislative act. It determines the ultravires or intravires of the Act challenged before it. In the words of Smith and Zurcher, "The examination or review by the courts in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect."[1]

Judicial Review is a great weapon, not only for the enforcement of the rule of Law, but also for establishing and strengthening of the Reign of Law. Judicial Review is judicial scrutiny and determination of the legal validity of instruments, acts and decisions." [2]

Bhimarjun Acharya writes the system of judicial review was guaranteed in Nepal by the Constitution of the Kingdom of Nepal, 1990, and it was an inalienable feature of the document. Through its Article 133, Nepal's freshly enacted Constitution has preserved the JR provision. Likewise, Article 144 of the Constitution grants the High Courts access to JR authority.
The independence of the judiciary is the foundational element of the JR system. According to some, the JR system preserves judicial independence, making it one of the cornerstones of constitutionalism and the rule of law. The Constitution's Article 133 grants unrestricted grounds for locus standi. Dr. Acharya writes on page 6 that "Any Nepali can file a writ petition in the Supreme Court (SC) seeking order to declare the legislative acts and administrative actions null and void to the degree of being in conflict with the constitution." On page 8, he makes the case that "there will be no constitution without basic rights, no fundamental rights without judicial review, and no judicial review without a competent, impartial, responsible, and independent judiciary" in an explanation of the significance of the JR idea. The independence of the judiciary

[1] See Edward Conard Smith & Arnold John Zurcher , Dictionary of American Politics, Barnes & Nobel, New York, 1959, p. 212.
[2] See S.A. Desmith, Judicial Review ofAdministrative Actions, 1959, p. 16.

is the foundational element of the JR system. It is said that judicial independence is maintained by the system of JR and that it becomes one of the fundamental components of constitutionalism and that of the rule of law. Dr Bhimarjun Acharya not only discusses Nepal's perspective on judicial review but also devotes a good deal of section for international precedents.

Various Concept and definition of JR:

1. Judicial review can be considered as mechanism for upholding the supremacy of the basic law in a country governed by ideal of political constitutionalism. (Gharia, 2006,pg:4)
2. Judicial review, in its narrow usage, especially since its adoption in the American constitutional system, has been used to indicate the institutional arrangements by which courts of law pronounce judgment on the constitutional validity of the disputed piece of legislation enacted by the law-making organ viz., legislature and 3 the Parliament. (Gharia, 2006, pg:3-4)
3. In Australia, judicial review is regulated by the Australian Administrative Procedures (Judicial Review) Act, 1977. (Gharia, 2006,pg:4)
4. Judicial review can be classified under three heads: (Gharia, 2006,pg:4-5)
    i. Judicial Review of Constitutional Amendments
    ii. Judicial Review of Legislation: Legislation of Parliament, State Legislation and Subordinate Legislation.
    iii. Judicial Review of Administrative Action
5. Scope of JR in three specified areas:
    i. Judicial review of legislative actions
    ii. Judicial review of administrative actions
    iii. Judicial review ofjudicial actions
6. Judicial review in a general speaking is simply defined as the process whereby the

supreme judicial body of the state examines the decisions given by their inferior judicial body in order to establish whether or not they are under the process of due law. In the context of constitutional law, the term judicial review is, however, used differently. It has a wider as well as a narrower sense. In a wider sense, it is simply used to mean a final consideration and decision by a court of law that may be of dispute between private parties or between the private party and the state or a public authority. In a narrower and a technical sense it is used to mean a Constitutional provision of the state whereby a court of law examines the [pageno:53] Constitutionality and basic legality of any law made by legislature or rules, order or decisions made by executive or executive departments (Deshpande,1977).

STATEMENT OF PROBLEM

In order to carry out the research smoothy and to provide a direction to the research, the researcher has identified three main identified three main problems whose answer would be sought through the research.

1. Is the nature and scope of Judicial review in Nepal different to that of foreign countries?
2. How has the practice of Judicial review been evolving in Nepal?
3. What are the trends of judicial review of judicial decision in Nepal?

OBJECTIVE OF THE STUDY

The salient objectives of the present research study are:

1. To expound the nature and scope of the judicial review in Nepal.
2. To understand the theoritical, practical and historical aspects of Judicial Review.
3. To evaluate the trends of Judicial review of Judicial decisions in Nepal.

SIGNIFICANCE OF THE STUDY

Constitution is the fundamental document of the land and research concerning such document also possesses its usefulness. The concept ofjudicial review is not of recent origin but always attracted bench, bar as well as academicians. Now a days due to the advent of judicial activism, study of the doctrine ofjudicial review has become the heart and soul of the present day Constitutional law.

The present research work serves several purposes and got its utility. The research submits that the content and findings in this research work are useful in multiple ways. This research work is useful for the Administrators, the Bench & bar, the Legal and non-legal academicians.

The research portrays that most important function of the judiciary under a written constitution is to keep all authorities within the constitutional limits. This function is performed by way of judicial review. Judicial review has more technical significance in public law in countries having a written Constitution. It means the Courts have the power of testing the validity of legislative as well as governmental actions on the touchstone of the Constitution. Thus, the Courts determine the legislative Acts by considering them against requirements within the parameters of a written Constitution.

The research also seeks to answer the question that whether there should be judicial review in the Constitution of a country, but to what extent it should remain and what purposes it should fulfill. Experiences indicate that Judicial Review fulfills its purposes best when it seeks to protect and preserve the individual liberties. And also highlight that this area itself involves a tremendous problem in the present era. How best to adjust the legalistic doctrines of judicial review to the needs of the day and the philosophy ofthe prevailing generations will ever remains a constant theme for constitutionalist, jurists, and politicians. . Last but not the least, this research work is useful to researchers who are burning their energies to find ways and means for justification of exercise of judicial review power in relation to Judicial Decisions.

LIMITATION OF THE STUDY

The researcher submits that this research study is having its limitations. The present research

study covers wide areas of study. The researcher utilized only limited case laws decided by the Supreme Court.

The present research study as a matter of fact also touches various social sciences, like, political science and public administration, but the researcher confined his study to the field of law alone. Though there are number of cases relating to the present research study decided by the U.S. Supreme Court & Supreme Court of India the research has covered few of them and relied mainly more upon the cases decided by the courts in Nepal.

REVIEW OF LITERATURE

The primary and secondary sources make up the two major categories that can be used to categorize the literature that was evaluated during the course of the investigation. Constitutional texts, plain Acts, regulations, and case studies are among the key materials consulted for the study. In terms of secondary sources, the pertinent academic texts, comments, legal publications, periodicals, and articles have been studied to provide a deeper understanding and appreciation of the subject. As part of the case study, the researcher put a lot of effort into reviewing the over 500 noted Supreme Court decisions on judicial review.

BHIMARJUN ACHARYA (2007)
THE SYSTEM OF JUDICIAL REVIEW IN NEPAL
DOCTORATE THESIS, BHIMARJUN ACHARYA, TRIBHUWAN UNIVERSITY, NEPAL.

According to Bhimarjun Acharya Nepal so far is concerned, adopts something new model to that of Austrian and American ones where a question is raised in the course of extra ordinary litigation to deal with it by the Supreme Court on any one of the following grounds: to have any law or any part thereof declared void on the ground of inconsistency with the constitution because it imposes an unreasonable restrictions of the enjoyment of fundamental rights conferred on by the constitution; to have the enforcement of fundamental rights or any other legal rights for which no other remedy has been provided; or have demand for the settlement of any constitutional or legal question involved in any dispute of public interest or concern. Nepalesse

Constitution contains express provisions for judicial review of legislation as well as of administrative action so as to secure its conformity with the Constitution. The framers of Nepalese Constitution have, by virtue of Art. 88 of the 1990 Constitution and Art. 107 of the Interim Constitution of 2007 vested the exclusive power of judicial review in the judiciary. The judiciary with this power can examine the constitutionality of a legislative Act and administrative action and declare null and void to the extent that the Act or action is contrary to the Constitution. This is the system of judicial review of legislation and of administrative action ensured by the Constitution.

SYLVIA SNOWISS (1990)
JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION
YALE UNIVERSITY PRESS, UNIVERSAL LAW PUBLISHING CO. PUT. LTD., DELHI

The author offers a fresh assessment of the history of judicial review in this book. She examines the evolution of judicial review from the time of American independence through John Marshall's time as Chief Justice, demonstrating that Marshall's contribution was significantly more inventive and decisive than is currently acknowledged. Before Marshall, there was, in the author's opinion, no foundation for judicial review because it was thought that the practice would be fundamentally different from what it is now. Marshall changed the essence of the constitution and the relationship between the judiciary and it in a significant way, rather than merely extending or reinforcing previously accepted notions. He achieved this in ways that appeared to be minor and were covered up.

According to Snowiss, three different periods—from Independence to Federalist 78; from Federalist 78 to Marbury; and from Marbury to the termination of Marshall's appointment to the Supreme Court—saw the development of judicial review. The legitimacy of judicial jurisdiction over unconstitutional actions was frequently disputed during the first period, despite frequent claims to the contrary. Judicial invalidation of legislation remained a highly controversial practice in this unresolved dispute. Period 1's assertion of the judiciary's power to uphold the Constitution was viewed as an unprecedented political act and judicial replacement for revolution. Judges in the first period were more influenced by outdated English precedent than

by later American doctrine.

In contrast to period 1, period 2 offered a logical defense of judicial jurisdiction over invalid legislation. James Iredell published it first in a North Carolina newspaper in 1786, and James Wilson and Alexander Hamilton later reformulated it and popularized it in Lectures on the Law and Federalist 78, respectively. First of all, period 2 judicial review did not originate from the written Constitution but rather from the existence of social contracts or fundamental law that developed in the American states following the revolutionary break with England. The period 2 judicial review upheld the period 1 idea that applying the Constitution through the courts was an unprecedented political act, a judicial equivalent of revolution.

The period started when Marshall took over as chief justice, was a revision of the period 2 position. The written Constitution was transformed under Marshall from a vehicle for explicit fundamental law in the period 2 to testimony of the Constitution's status as the supreme ordinary law.

V. S. DESHPANDE
JUDICIAL REVIEW OF LEGISLATION
EASTERN BOOK COMPANY, LUCKNOW, INDIA (1977)

Deshpande claims in his exceptional work that two of the most fundamental principles of constitutional law lead to judicial review of legislation. The first is a two-tiered legal system in which the Constitution serves as the supreme law and all other legislation is only lawful to the extent that it is in accordance with the Constitution. The second is the separation of the state's legislative, executive, and judicial powers.

He argues that under judicial review there is a two-fold limitation on the validity of the statutes. First, the legislature must have the competence to enact them, and next they must not conflict with the Constitution.

According to Deshpande, there were two developments in the development of a human rights

that had an effect on the expansion of judicial review of legislation. First, is with regard to the property right. The ability to own property was initially thought to be as as important as other human rights. In found its place in Article 17 of the Universal Declaration of Human Rights. However, with the global awakening of the masses, social improvement initiatives clashed with the property rights which privileged few individuals. When the Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights were ratified by the majority of UN member states in 1966, the right to property was consequently removed from the list of fundamental human rights.

Deshpande also highlights about two systems of judicial review. One system (that, for instance, of Columbia, South America) is that a petition of unconstitutionality is brought against the statute itself by any person, regardless of whether or not he alleges any immediate interest, directly in the supreme court, whose decision does not rule on the rights of a plaintiff against a defendant, but directly upon the validity of the statute, a ruling of unconstitutionality having the same effect as repealing the statute. The system, to which Columbia developed in 1910, enables any person, with or without a locus standi, as we understand the term, to bring an action directly against the statute itself as distinguished from an action against the government or against any other person. The second system of judicial review of legislation is the one prevailing in the United States of America. This goes to the other extreme by confining the power to raise the issue of Constitutionality only to a person who has the locus standi to do so. The issue can come before a court only in a form of litigation between two parties or between a party and the state.

JASWINDER KAUR (2013)
ANALYTICAL STUDY OF THE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN INDIA,
DOCTORATE THESIS OF PANJAB UNIVERSITY.

Kaur (2013) has concluded that Judicial review is a highly Complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic features ofthe constitution. The court in its exercise ofits power ofjudicial review would zealously guard the human rights, fundamental rights and the citizens' rights of life and liberty.Since Indian Constitution was built upon the deep foundations of rule of law, the framers

of the Constitution made sincere efforts to incorporate certain article in the Constitution to enables the courts to exercise effective control over administrative action. Pure administrative action involves both Statutory and non statutory functions which can be covered subjected to judicial review through various modes for which the proper remedy may be to issue an appropriate writ.

DR. CHAKRADHAR JHA (1974)
JUDICIAL REVIEW OF LEGISLATIVE ACTS
N. M. TRIPATHI PVT. LTD., BOMBAY

Jha analyzes judicial scrutiny of legislative actions from both a theoretical and practical standpoint, as well as within the backdrop of history. He firmly believes that the judicial review system is the only way for the Constitution to survive as a living moral and intellectual force in a state where constitutional supremacy reigns.

Jha in his great writing mentions- the process of judicial scrutiny of the legislative acts on the touchstone of Constitution is technically called judicial review'. Judicial review's main goal is to apply tremendous moral pressure to the legislature in order to keep it within the bounds of the Constitution and save the people from democratic tyranny. The individual liberty and freedom are generally eclipsed under the shadow of social needs and it is why judicial review is essential to save the personal rights of the individual.

Jha contends that the idea of popular sovereignty and constitutional supremacy is the most important factor in judicial review. There is no room for judicial review in countries like England where legislative sovereignty rules. The fundamental tenet of the English Constitution is that all authority comes from the people; as such, they seized all fundamental constitutional powers from the monarch and transferred them to parliament. Each legislative enactment in England is required to reflect the will of the entire English population at the time it is passed, and as a result, it cannot be amended or repealed without the approval of the entire English population by another parliamentary enactment. But in India, as in America, the idea of popular sovereignty is dominant, which means that the legislature is merely the agent of the sovereign people. As a

result, any legislation passed by the agent of the people is subject to judicial review to determine whether it violates the will of the people as expressed in the Constitution.

LOUIS L. JAFFE (1965)
JUDICIAL CONTROL OF ADMINISTRATIVE ACTION
LITTLE, BROWN AND COMPANY, TORONTO

Synopsis: Louis's Judicial Control of Administrative Action is a series of articles of the author, most of them published in the Harvard Law Review. Louis maintains that three goals should be pursued by a system of judicial remedies for the oversight of administrative action: comprehensiveness, simplicity, and predictability. He claims that there are two basic origins from which the systems of judicial remedies come. The first is a group of statutes which establish an agency and incorporate provisions for the review of its actions. Second, there are a variety of remedies which include certiorari, mandamus, prohibition, habeas corpus, quo warranto (the so-called prerogative writs). This work was particularly useful to the researcher to learn about the origins of prerogative writs and their functions as a system of judicial remedies.

MAURO CAPPELLETTI AND JOHN CLARKE ADAMS(1966)
JUDICIAL REVIEW OF LEGISLATION: EUROPEAN ANTECEDENT AND ADAPTATIONS
HARVARD LAW REVIEW, VOL. 79, NUMBER 6, APRIL

Speaking about the origins of judicial review of legislation, Mauro and John claim that the defeated nations borrowed the judicial review doctrine, which gives courts the authority and responsibility to declare a matter to be irrational, in order to prevent the return of the autocratic governments that were blamed for the start of both world wars and a majority of their atrocities. Thus, in the last half century. Austria, Denmark, Germany, Italy, Cyprus, Turkey and Yugoslavia instituted systems of judicial review of legislation, while Switzerland and Norway have employed such a system for almost one hundred years. Austria became the first country to adopt judicial review of legislation by the federal Constitution of October 1, 1920; similarly Yugoslavia became the first communist state to adopt judicial review, having done so in 1963.

It's true to say that the peculiar political climate that prevailed in the US at the time provided a favorable environment for the development of judicial review. It is also true that such a concept was opposed by the political foundations of both the French and English revolutions of 1789 and 1688, respectively. However, they shouldn't be taken to mean that the practice was completely absent from European tradition.

When analyzing the historical development of judicial review in Europe, Mauro and John focused on three main aspects of the phenomenon: (1) the organs that hold the judicial review authority, (2) the processes by which constitutionality disputes are settled, and (3) the implications of a finding of unconstitutionality on the law under review and the specific case (if there is one).

MUKESH MALIK (2010)
POWER OF JUDICIAL REVIEW UNDER INDIAN CONSTITUTION EMERGING TRENDS
DOCTORATE THESIS, MAHARSHI DAYANAND UNIVERSITY

Constitution is not only the basic law of the land but the living organic thing by which the other laws are to be created as per the requirement ofthe nation. The life of a nation is dynamic, living and organic and its political, social and economic conditions are always subject to change. Therefore, a constitution drafted in one era and in a particular circumstances may be found not suitable or inadequate in another era in a different context. The reality is that no Constitution can stand the brunt oftime unless it guarantees progress as well as order. As is the experience ofthe written constitutions, no amount of drafting acumen can eliminate the necessity of occasional amendments. Sometimes in-built mechanism of a written constitution fails to meet the need of unforeseen and unforeseeable events. In such situations, amendment of the Constitution not merely become inevitable but also desirable. Thus, a Constitution has to ensure stability and at the same time sufficient flexibility so that it is able to meet the challenge ofchange.

The Separation of powers under the Indian constitution is not rigid but flexible allowing as it

does in many ways, for a functional overlap of powers in the three limbs of the government. The functions ofthe different parts or branches ofthe government have been sufficiently differentiated and consequently it can very well said that our constitution does not contemplate assumption by one organ or part of the state, of functions that essentially belong to another. The powers ofjudicial review have been held to part of the basic structure ofthe constitution and cannot be abridged or excluded by amending the constitution. It is therefore acknowledge even by the diehard critics ofjudicial activism that “the power of judicial review is an exception to the principle of separation of powers”.

K. L. BHATIA (1997)
JUDICIAL REVIEW AND JUDICIAL ACTIVISM
DEEP & DEEP PUBLICATIONS, NEW DELHI

This study presented by Bhatia is designed to provide insights into the perceptions and contours of judicial review and judicial activism in India and Germany. It is a comparative study of Constitutions and administrative laws of both countries from which Bhatia has made an initiative for a progressive development of law.

This study, which Bhatia is presenting, aims to shed light on how judicial activism and judicial review are perceived in India and Germany. Bhatia's suggestion for a progressive evolution of law is based on a comparison of the administrative laws and constitutions of the two countries.

Bhatia writes that the courts whether in India or Germany have a valuable as well as indispensable role in the administrative process i.e. judicial process intends to censor or control the executive with a sole purpose that an administrative authority behaves in such a way that it must reach just ends by just means'.

Bhatia has presented judicial review as a effective and reliable system to combat the arbitrary, unreasonable, illegal, biased, non-reasoned, and incompatible.

V. G. RAMACHANDRAN
LAW OF WRITS
EASTERN BOOK COMPANY, LUCKNOW, INDIA (1993*)*

Ramchandran's Law of Writs is the book which deals very exhaustively and exclusively with the practice of prerogative writs in India. This book was quite useful for the researcher to understand general principles of writ jurisdiction which is very much essential in the study of judicial review.

Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made and it would be an error to think that the court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself. In the state where the written Constitution is adopted, the power of the judicial review is accepted as the heart and core of the Constitution.

JAI NARAIN SHARMA (2005)
JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS THROUGH WRITS RECENT TRENDS
DOCTORATE THESIS, MAHARSHI DAYANAND UNIVERSITY

The researcher found that the basic ground of judicial review is principle of jurisdiction which determine the reviewability of an administrative action oftenly expressed as ‘want or excess of jurisdiction’. The underlying principle is known as ultra-vires which refers to action which is outside or in excess of powers of decision making bodies. The jurisdictional principle gives a deceptive appearance of logical coherence and theoretical soundness but in practice, the courts always face the dilemma of deciding whether any given question is jurisdictional or not. The courts have experienced the same-difficulty in distinguishing between reviewably jurisdictional matters and unreviewable errors committed within jurisdiction. In almost every case in which action is challenged on account of jurisdictional error, the courts make a distinction between an error of law ‘affecting jurisdiction’ and an ‘error of law going to the merit of the case’.8 The former is reviewable in all cases on the ground of ultra vires as no authority can be allowed to

assume jurisdiction by taking a wrong view of the law, while the latter will be reviewable only when it is apparent on the face of the record. Thus, courts exercise broader review power in relation to a jurisdictional error of law but narrower power in relation to an error of law within jurisdiction.

HILAIRE BARNETT
CONSTITUTIONAL & ADMINISTRATIVE LAW
CAVENDISH PUBLISHING LIMITED, LONDON (2000)

The main elements of the UK Constitution are explained in Barnett's Constitutional and Administrative Law, which also takes into account any recent changes. It helped to comprehend the underlying ideas that underlie the United Kingdom's organizational structure, the Constitution's historical context. According to this book, the relationship between the citizen and the state, as well as the functions and authority of the state's institutions, are central concerns of the Constitution. It also believes that the Constitution is a dynamic, living organism that, at any given moment, will reflect the political and moral beliefs of the people it rules. As a result, it is important to understand how the Constitution operates within the sociopolitical environment in which it exists.

H. W. R. WADE AND C. F. FORSYTH
ADMINISTRATIVE LAW
CLARENDON PRESS, OXFORD (1994)

A standard text on English administrative law is Wade's Administrative Law. The book has examined many constitutional grounds for court authority, including rule of law, parliamentary sovereignty, the doctrine of ultra-vires, prerogative remedies, and the judicial review process. The book's discussion of the idea of ultra-vires asserts that it also applies to instances of power abuse, such as when something is done improperly, unjustifiably, or through the improper method. It further notes that the doctrine is not limited to examples of simple power excess. In terms of the law, the outcomes are identical: an administrative conduct is unlawful whether it

results from an obvious abuse of power or an improper purpose.

It views that the system of judicial review is radically different from the system of appeals. The appeals court is concerned with the decision's merits while hearing an appeal. The legality of an administrative act or order is a matter for the court when it is up for judicial review. The question in an appeal is: correct or wrong? On review the question is lawful or unlawful? Additionally, the right to appeal is always protected by law. On the other hand, judicial review is the use of the court's inherent authority to decide whether an action is legal or not and to grant the appropriate relief. No formal approval is required for this because the court is merely carrying out its regular duties to uphold the rule of law. Therefore, common law serves as the foundation for judicial scrutiny. There is no inherent appellate jurisdiction in the courts under modern law because rights of appeal only exist where they are granted by statute.

A fundamentally different process is judicial review. The court on review is only concerned with the issue of whether the act or order being contested should be allowed to stand or not, as opposed to substituting its own judgment for that of another body, as occurs when an appeal is accepted. Therefore, judicial control largely refers to review. It is founded on the fundamental idea that authority can only be legitimately exerted within the bounds of its proper scope, a concept shared by the entire legal system. On the other hand, rights of appeal lack this focal point. The author comes to the conclusion that the issue of where power ends and duty begins is one of the most challenging issues in judicial review. Even if an authority has unquestionable power to act, there may still be obligations on how that power should be used.

RAVI PRAKASH (2016)
RELEVENCE OF JUDICIAL REVIEW IN FREE INDIA ITS IMPACT UPON DEVELOPMENT OF THE PEOPLE: A CRITICAL STUDY
DOCTORATE THESIS, SHRI JAGDISHPRASAD JHABARMAL TIBAREWALA UNIVERSITY

The research held that the judicial review is connected with the Coke theory and the Magna Carta, it is the heritage of Aristotle and Plato. Due to missing permission of England’s Great

Council in organization of power and subsistence of certain taxes, the Great Council prohibited them.[3] The Indian judiciary has pronounced, in case of Emperor V. Burah Book Singh [4] that the injured party had the liberty to come across the legitimacy of the constitutional legislation. This was the first case of judicial review in India where the judiciary stated Imperial Parliament had the power that the Act passed by the India's Governor General Council must be approved by it. The Imperial Parliament had the power to control the India's Governor General Council. In case of Bhola Prasad v. Emperor the Federal Court of India's Chief Justice Mr. Maurice Gwyer stated that lawmakers of India have great powers within their personal range, which is similar in nature to the Parliament.[5]

The judicial review is a result of the continuous development of philosophical thoughts of legal scholars. The judicial review is not happening as sudden change but is an ongoing process. The Calcutta High Court in its milestone decision pronounced the whole CriminalAmendmentAct of Bengal, 1930 as illegitimate in the year 1950 just as soon as India's Constitution was made.

SHUBHANGI D. PANCHAL (2017)
OUSTER AND FINALITY CLAUSES AND SCOPE OF JUDICIAL REVIEW A CRITIQUE
DOCTORATE THESIS, SWAMI RAMANAND TEERTH MARATHWADA UNIVERSITY

Various exclusionary clauses came to be inserted to keep the legislations secure from invalidation by judiciary. Legislature invokes exclusionary clauses in order to enable the administration to achieve expeditiously various socio-economic objectives. The protection of exclusionary clauses is limited to intra vires action. The judicial strategy has been to evolve various conditions for the exercise of power strictly within the jurisdiction. The courts have evolved many techniques of interpretation so as to keep the authorities within their jurisdiction in spite of express or implied exclusionary clauses. The courts have evolved the concept of error of

[3] The performance of Parliament, can be declared void by the court, which is against the rights of the people and illogical for the people, such has been stated under Coke theory. This was pronounced by Chief Justice Coke, in 1610 in that case of Thomas Bonham v College of Physicians, (1610). See Ravi Prakash (2016) Relevence Of Judicial Review In Free India Its Impact Upon Development Of The People A Critical Study. Doctorate Thesis, Shri Jagdishprasad Jhabarmal Tibarewala University.

[4] See (1877),ILR3 Cal. 63 (1877)
[5] See (1942), AIR 1942 FC 17 (C),

jurisdiction which results from any error of law thus giving a ground of judicial review. Exclusion of judicial review may be total, partial, conditional or delayed. The exclusion clauses consisting of the ‘finality clause’, ‘shall not be questioned clause’, ‘no certiorari clause’, ‘conclusive evidence clause’ etc came to be inserted on various legislations to achieve their goal in full fledge.

S. P. SATHE*(2002)*
JUDICIAL ACTIVISM IN INDIA
OXFORD UNIVERSITY PRESS, NEW DELHI

This research was conducted in light of the Indian experiences looked at in the areas of judicial activism and review. It examines the problems from a different perspective and makes an appropriate analysis. The strength of Sathe's work in this book actually resides in his comparative analysis of various judicial activism and review traditions. This book identifies both reactionary and progressive judicial activism as being present in India. 'Reactionary' judicial activism is evident in a large portion of the pro-emergency, right to property, and land reform issues during the Nehruvian era. Golaknath and Kesavananda are the beginning of the "progressive" judicial activism, which leads to a completely different type of social action litigation. This book serves as an example of how fragile and fragmented progressive activism is.

Sathe is not particularly concerned with the problems of constructing the meanings of judicial activism in this book. He is still worried about the more crucial questions of its "legitimacy" and "effectiveness". His main point is that judicial activism is a manifestation of state authority that is fundamentally in conflict with itself. Or, he meant to convey the idea that justices can only operate as activists within the parameters of the traditions of the administration of justice. They might expand and strengthen the tradition, but their work will still remain traditional.

Sathe considers judicial review to be essential to democracy. According to him, judicial review entails the court supervising how other co-ordinate governmental institutions utilize their authority in order to ensure that they remain within the Constitutionally prescribed boundaries.

He thinks that judicial review can help nations become more committed to constitutional norms as they become more democratic.

Because the terms used in the bill of rights, such as "equality before the law," "equal protection of the law," "personal liberty," "the procedure established by law," or "freedom of speech and expression," are open-textured and continue to take on new meanings as society changes, judicial review under a written Constitution with a bill of rights cannot remain merely technocratic.

There are two types of judicial review, according to Sathe. One is a technocratic model in which judges merely perform the functions of technocrats and declare a statute unconstitutional if it exceeds the authority of the legislature. In the second approach, a court applies a broad interpretation to a Constitution's provisions while keeping the Constitution current through dynamic interpretation in the context of its underlying principles. An activist court is one that interprets a provision differently to reflect the shifting social or economic landscape or to broaden the scope of individual rights.

The concept of judicial review first appeared in England, where the courts scrutinized executive actions to make sure they fell within the parliamentaryly defined boundaries of the executive's authority. Although the acts of parliament were not declared unlawful by the courts in England, judicial review of legislative acts has long been popular in the colonies. Colonial legislatures were not supreme like the British Parliament, and the clauses of the constituent acts passed by the British Parliament limited their authority.

The courts in India, therefore began exercising judicial review of legislation ever since the first act of British Parliament enacted in 1885. In 'Express v. Burah and Book Singh' the Calcutta High Court enunciated the principle of judicial review as follows: the theory of every government with a written Constitution forming the fundamental and paramount law of the nation must be an Act of legislature repugnant to the Constitution is void. If void, it cannot bind the courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory and make that operative in law which was not law.[6] India has had judicial

[6] Adopted from the Acharya Bhimarjun (2007), 'The System of Judicial Review in Nepal'. DoctorateThesis, Page

review of legislation since the colonial period. The courts, however, observed maximum restraint in dealing with the acts of legislatures.

The range of options is substantially greater when a court interprets the Constitution, which is organic law. Expressions with an open texture and conceptual nature are frequently seen in constitutions. A court's interpretation of phrases like "equality before the law and equal protection of the law" and similar ones is political philosophy, but unlike a philosopher, a judge is restricted by the requirement to operationalize his philosophy in practice.

Sathe also draws attention to the fact that judicial review of legislation has grown in importance as a component of American constitutional law. Although it is not expressly stated in the Constitution, Chief Justice Marshall ruled in Marbury v. Madison that the supreme court of the United States has the authority to declare unconstitutional acts of Congress if they are in conflict with its provisions. This power play received harsh criticism. The critics said that it amounted to the court usurping its authority. The fundamental complaint was that legislation passed by an elected legislature was being censored by an unelected judiciary.

BHIMARJUN ACHARYA
THE CONCEPT OF JUDICIAL REVIEW

The Concept of Judicial Review by Dr. Bhimarjun Acharya offers a succinct introduction to the idea of judicial review, Nepal's constitutional provisions relating to judicial review, and case laws issued by sufficiently superior courts in Nepal, India, the United States (US), the United Kingdom (UK), and other countries. The book brings together a collection of six chapters that offer a critical analysis of the main concerns, guiding ideas, frameworks for comparison, court rulings, current judicial review trends, international precedents, and Nepal's constitutional and judicial position in defending the rights and interests of the populace.

The book goes deeply into the idea, theory, and practices of judicial review and seeks to understand why courts in particular circumstances judicially review laws and government

34.

actions. The conceptual foundations are novel since they are the result of important rulings that have protected peoples' rights and interests and are grounded in actual events.

RESEARCH METHODOLOGY

The present research study is mainly a doctrinal and analytical. Keeping this in view, the researcher utilized the conventional method of using libraries consisting of primary sources like Judgment of the Supreme Court published in various Law Journals. The relevant material is collected from the secondary sources. Materials and information are collected both legal and political sources like books on Constitutional law by eminent authors like D. D. Basu, H. M. Seervai, Subhash Kashayap, A. G. Noorani, Granville Austin, Rajeev Dhavan, Subhash Jain etc. Journals like Nepal Law Review, Nepal Bar Council Law Journal, NJA Law Journal, Supreme Court Bulletin, Nepal Kanoon Patrika and other law related journals available in NepJoL are consulted.
Material is also collected from print and electronic media. From the collected material and information, researcher.

ORGANIZATION OF STUDY

The entire study is divided into eight chapters with different dimensions of the problem.

The First Chapter covers the introduction of the topic, consists statement of problem, objectives, significance of the study, methodology of the study & organization of the study. It also covers the primary introduction to some basic concepts of the study
.
The Second Chapter will be dealt with literature review. Various published and unpublished literature are studied and analysed in this chapter.

The Third Chapter will explain the interconnection of the doctrine of ‘Judicial Review’, ‘Rule of Law’, ‘Separation of Power’ and ‘Judicial Activism’, etc. How these doctrines are interlinked

and supplementary-complementary to one another will be discussed in this chapter. Further, it also deals with the doctrine of applied in judicial review.

The Fourth Chapter will illuminate the historical evolution of judicial review.

The Fifth Chapter deals with the trends of Judicial Review of Judicial Decisions in Nepal and evaluation would be made upon them.

The Sixth Chapter gives the conclusions of the research study. This chapter also gives some suggestions for the effective functioning ofthe doctrine of judicial review in Nepal that may help to preserve the real zeal of Indian democracy.

CHAPTER-II

CONCEPTUAL FRAMEWORK

MEANING AND CONCEPT OF JUDICIAL REVIEW

Judicial review has achieved broader meaning then for what it has been originated. Its origin goes back to UK used to scrutinize the actiministrative action. Later US Supreme Court used as a tool to review the legislature pass by the Congress. Now, in addition to it, Judicial Review has been used by Judiciary to review its own decision against the principle of finality of judgement. The doctrine of limited government and the idea that the constitution is the fundamental law are the foundations of the judicial review philosophy. Governmental bodies are also prohibited from acting in a way that is incompatible with the constitution's provisions. The constitution becomes legalistic as a result of judicial examination.

Keeping in view the American Constitution, E.S. Corwin defined the judicial review in a narrow way as 'the power of the Court to examine the constitutionality of legislature acts which fall within their normal jurisdiction, either to enforce or to empower or to refuse to enforce if they are found to be unconstitutional and even to declare such acts as void. [7]

Dr. A.S. Anand defined judicial review as 'that which is not exclusively used in constitutional law, literally it means the reviser of the decree of an inferior Court by a superior Court.[8]

According to S.A. DeSmith, judicial review implies a comprehensive judicial enquiry into, and examination of the action of the legislative, executive and administrative branches of government, with the specific purpose of ensuring their conformity to the specified constitutional provisions. [9]

[7] See E.S. Crowin, Encyclopedia of Social Sciences, Vol. 8, p. 457.
[8]See Dr. A.S. Anand, "Judicial Review -its content its reach", AIR 2000, J&A p. 161.
[9] See S.A. Desmith, Judicial Review ofAdministrative Actions, 1959, p. 16.

According to Dowling "The study of Constitutional law… may be described in general terms as a study of the doctrine of judicial review in action."

For M.P. Jain JR is the significant derivative from "Rule of Law". [10]

IMPORTANCE OF JUDICIAL REVIEW

Importance of JR can be underlined as follows:

i. To ensure the protection of rights, prevention of their infringement, socioeconomic advancement, and to alert the legislature to be in conformity with the Constitution. (Rawls, pp.69)

ii. to establish a just and legitimate social order and invalidating the unfair, bad, and unconstitutional law (Jha, pp.135)

iii. To infuse life in the dry and abstract bones of the Articles of the Constitution enabling it to be a living organism so as to satisfy the needs of the time[11]

iv. To exert a great moral force upon the legislature to keep it within the limits of the Constitution and to save the people from the democratic tyranny.

v. JR maintains the system of check and balances.

vi. Doctrine of Judicial review is the pre-requisite for the Federal system of Government.

vii. It establishes democratic and constitutional balance between : The Federation and the Province, One State and another & The authority and the citizen.

viii. It upholds the supremacy of the Constitution.

ix. It adjusts the Constitution to new conditions and needs of the society resulting into social and economic justice.

x. It evolvesjudicial legislation

xi. It saves legislature from its legislative power being encroached upon by the executive.

[10] See MP Jain, 2018
[11] See B. Maciver, The Modern State 248, Oxford University Press, London (1960).

xii. It checks legislature from delegating its essential legislative function to the executive and from infringing fundamental rights guaranteed to the citizens.

xiii. It urges the legislatures to assess the political wisdom of each Statute and forces the legislature to follow other line of policy and in this way casts a negative influence on the policy-making ofthe government.

The doctrine of judicial review, as it is understood now, as the judicial power to strike down unconstitutional legislation, failed to strike roots in England because ofthe historic conflict between the royal prerogative on the one hand, and parliament and the people on the other. (Malik, 2010, pp. 290)

SCOPE OF JUDICIAL REVIEW

1. Judicial Review of legislature:

Judicial review of legislative enactment stands in a separate class by itself. This is a peculiar feature of Constitutions like that of the United States of America, India Nepal and so forth. There cannot be any judicial review of legislation, for instance, in a country like England where the parliament is supreme and it does not have any Constitutional fetters on the powers of legislation. (Chatterjee, 1955, pp.36) Law made by parliament can be challenged on any of the following grounds (Acharya, 2007 pp):

• law enacted in the absence of legislative competence;
• law enacted in violation of fundamental rights;
• law enacted in violation of other Constitutional restrictions; and
• law enacted in infringement of the principle of natural justice.

Judicial Review of legislature suffers from two consequences:

i. Void ab initio: The law enacted without legislative competence is still- born and void ab initio.

ii. Unenforceable: Whereas the legislature has competence to enact a law, but the law is

enacted in violation of some Constitutional restrictions, such law is not still- born and void ab initio, but is only unenforceable and if the prohibitions are removed the law becomes enforceable.

Areas of Judicial Review of Legislation:

i. JR of Constitutional Amendment

U.S. Supreme Court, which innovated the doctrine of judicial review in Marbury v. Madison703, has also restrained itself from declaring the constitutional amendments as unconstitutional, on the ground of implied and inherent limitations.[12]

ii. JR of Parliamentary Legislation

iii. JR of delegated Legislation

iv. JR of ordinance

2. Judicial Review of Administrative Action

Judicial review of administrative action is one of the important components of Administrative Law. It is inherent in our constitutional scheme which is based on rule of law and separation of power. It is the most effective remedy available against the administrative excesses. The main object is to keep the administration within the limits of law and to protect the rights and safeguards interests of citizens. It is, thus, the very heart and soul of administrative law.[13]

The core of administrative law is judicial review of administrative action. It is unquestionably the best approach for determining the legitimacy of a public power. The public authority's legal authority, the procedure's sufficiency and fairness, the evidence taken into consideration in

[12] See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.552) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.

[13] See Doctorate Thesis of Jaswinder Kaur (2013, pp.) Analytical Study Of The Judicial Review Of Administrative Action In India, Panjab University. Retrived from http://hdl.handle.net/10603/87609 on 13/11/2022

making the administrative decision and the reasons for it, as well as the nature and extent of the discretionary power, are all aspects of an official decision or administrative act that may be subject to judicial reviewThere is also the question of responsibility for damage caused by the public authority in the performance of its functions. Judicial review is less effective as a method of inquiring into the wisdom, expediency, or reasonableness of administrative acts, and courts and tribunals are unwilling to substitute their own decisions for that of the responsible authority. (Acharya , 2007, pp.54)

While exercising the power of judicial review of administrative actions it is the duty of the court to confine itself to the under mentioned questions: (Acharya , 2007, pp.55)

i. Whether a decision making authority exceeds its power?

ii. Whether the authority has committed an error of law?

iii. Whether the authority has committed a breach of the principles of natural justice?

iv. Whether the authority has reached a decision which no reasonable person would have reached?

v. Whether the authority has abused its power?

Grounds of Judicial Review of Administrative Action:

Lord Diplock observed illegality, irrationality and procedural impropriety as the grounds for Judicial Review of administrative action. However, in expansion has been made over it by the scholars. Today, the judicial review can be exercised if the administrative action suffers from the vice of following grounds:

- Illegality: that the decision maker must correctly understand the law that regulates his decision-making power and must give effect to it.
- Irrationality; that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at such a decision.

- Procedural impropriety: that the procedure for taking administrative decision and action must be fair, just and reasonable.
- Proportionality: that the end and means relationship of administrative decision and action must be rational.
- Unreasonableness: that either the facts do not warrant the conclusion reached by the authority or the decision is partial and unequal in its operation.

According to Bhatia (1997) the broader classification of the grounds of judicial control of administrative discretion may be succinctly stated as:

- Excess of discretion: Excess of discretion may signify that when the administrative authority does something which it is clearly not authorized to do under the enabling law.
- Abuse of discretion. Abuse of discretion has been used for an unlawful purpose or its exercise is based on improper motives or bad faith or in its exercise irrelevant considerations have been taken into account.

3. Judicial Review of Judicial Decision

Under the statutory and constitutional provisions, the courts have the wide range of powers of judicial review in India and Nepal. The courts must be exercised these powers with self-control and great caution. It is not expected from the courts that they phase out from the boundary of their appropriate influences of judicial assessment. The judges should keep in mind that settlement and lawmaking are separated by a thin line. The judges shouldn't go too far. case, when the court forgets this jurisdictional perception, it would encounter the legitimate commands and it will interrupt the steadiness of three.[14].

The S.C.I. assessed in J. P. Bansal v. State of Rajasthan (2003) how the public's perception of the judiciary's impartiality is at risk. Despite having flexibility to interpret the Constitution, the court. The court has correctly interpreted the Act within this freedom. When a court interprets a statute and offers their own perspective for altering it, the rule of law is a crucial part of the

[14] See Ravi Prakash (2016 pp.130-134) Relevence Of Judicial Review In Free India Its Impact Upon Development Of The People A Critical Study. Doctorate Thesis, Shri Jagdishprasad Jhabarmal Tibarewala University.

judicial evaluation. This ruling is harmful to the public interest.[15]

In State (Govt of NCT of Delhi) v. Prem Raj (2003), the Supreme Court of India noted that where the High Court altered a judgement by overstepping its bounds, the right to commute belonged only to the government. The SCI overturned the judgement of High Court.

The S.C.I. examined in the case of Syed T. A. Haqshbandi v. State of J & K (2003) whether the progression of understanding of the pronouncement had been pragmatic, correctly by court, or decision pronounced itself illogical, the judicial assessment is allowable only to the amount of court conclusion.[16]

MODELS OF JUDICIAL REVIEW:

i. The English Model

There is no explicit provision for judicial review in the English Model of Constitutional Review (the British system), which is based on court procedures despite of the existence of a written Constitution. Since parliamentary supremacy predominates and is opposed to the doctrine of constitutional supremacy, it is generally believed that no English court has the authority to contest the legality of any Act of Parliament. Instead, courts only occasionally engage in indirect judicial review of administrative actions. However, courts now play a far more active and inventive role in evaluating legislative Acts and decisions as well as administrative acts. (Jha, pp.19)

ii. The American Model

The courts cannot refuse to enforce a law under the American model, particularly in the United States of America, because they believe it to be unconstitutional. Additionally, a statute cannot be declared unconstitutional and void by a court when the only grounds for doing so are that it is unfair and oppressive and violates citizens' rights unless it can be demonstrated that such

[15] The Supreme Court stated further that where the words are clear in the legislation, in attendance is no vagueness and inconspicuousness. The purpose of lawmakers has transferred the intelligibility. There is no possibility to innovate or alter or amend the statute. The judges should not play the role of lawmaker, only exercise judicial thoughts.

[16] In case of P. V. Anvar v. P. K. Basheer (2014), the SCI overruled its earlier judgment delivered in case of State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru (2005) 11 SCC 600. But such review not through review petition but through appeal.

unfairness is prohibited or that such rights and privileges are guaranteed by the Constitution. [17] In the U.S. system of judicial review, Constitutional questions can be Fised only in connection with actual "cases and controversies. Although the requirements to litigate cases have been relaxed by the Supreme Court, the rule still is that courts will not decide a Constitutional question unless it is rooted in a controversy in which the parties have a direct, personal interest.

iii. The Continental Model

In the 1920 Austrian Constitution and, to a lesser extent, elsewhere, the idea of judicial control first surfaced in Europe after the First World War. But following the Second World War, it underwent its first significant expansion, especially in Austria, the Federal Republic of Germany, and Italy.[18] A 1969 constitutional amendment by the federal republic of Germany, which has possessed the institution since shortly after World War II, expanded its purview. Contrarily, it is quite unlikely that the 1958 French Constitution intended to establish judicial review.

iv. The Nepalese Model

Though Nepalese Model of Constitutional Review is close to that of American Model, there are some new and specific provisions for judicial review in Nepalese Constitution that has made Nepal different from America. Art 88 of the 1990 Constitution, Article 107 of the Interim Constitution and Art.133 of the Constitution of Nepal (2015) has vested the exclusive jurisdiction to the supreme court to determine all questions relating to the Constitutional validity of laws in force in the territory of Nepal, and to issue order for the settlement of any Constitutional or legal question involved in any dispute of Public interest or concern. Thus, this Constitution has explicitly mentioned the provision of public interest litigation which is very much latest to that of Indian and American Models. In India and America there is a practice of PIL, but they have not explicitly mentioned the same in the Constitution. Similarly, the fundamental rights also have been specifically guaranteed in the Constitution. The Constitution has left the unlimited ground of locus standi. Any Nepalese citizen can file a writ petition asking the court to declare the legislative act void to the extent of inconsistency with the Constitution.

Article 133 is the sole tool and the soul of judicial review of both legislation and of

[17] See, Glendon, Gordon and c. Osakwe, comparative legal traditions 70, West Publishing Company (1985).
[18] See The Fifth Constitution Of The Republic Of France (1958)

administrative action. It invests the supreme court of Nepal with the power of superintendence over legislature, administrative agencies bodies authorities\tribunals quasi-judicial bodies exercising ad judicatory powers. The nature and ambit of this power is both administrative (i.e. Superintendence jurisdiction) and judicial (i.e. judicial review). The court shall exercise this power in a very wide way, for example;

• To prevent grave miscarriage of justice;
• To prevent flagrant violation of law;
• To prevent violation of jurisdiction, namely, lack of jurisdiction, excess of jurisdiction, abuse of jurisdiction;
• To prevent violation of the principles of natural justice;
• To prevent error of law apparent on the face of record and so on.

DOCTRINE APPLIED IN JUDICIAL REVIEW

1. Basic Structure Doctrine[19]

   The doctrine of basic structure has taken birth only because the Supreme Court has presumed that the Parliament's power of amendment is limited whereas the power of judicial review is unlimited. According to the Court its power is not confined to the judicial review of legislative acts only but also extends to the constitutional amendments.[20]

2. Doctrine of Eclipse

   The doctrine of eclipse refers to the law which has not been declared void is not spread out totally from the book of statute. It is possible that in the subsequent amendment in the Constitution of the contradiction part, which is unconstitutional will be removed in the

[19] It is stated that the phrase of basic structure was former time presented by M.K. Nambiar and other counsels through the argument in the Golaknath case. While the Indian Supreme Court has make known to the basic structure perception in the case ofKeshavanand Bharati. After Kesavananda verdict, the principle of basic structure has once more originate up in IndiraNehruGandhiv.Rajnarian (1975), case which was challenged in respect to open and impartial voting, to procedure a self-governing Parliamentary arrangement of government.

[20] See See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.551) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.

future. Afterwards, such law will be free from all frailty or imperfection and may become enforceable.[21]

3. Doctrine of Severablility

   This doctrine enumerates that the court can separate the offending part unconstitutional of the impugned legislation from the rest of its legislation. Other parts of the legislation shall remain operative, if that is possible. This doctrine has been considerations of equity and prudence. It the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be void. This is known as "doctrine of severability.[22]"

4. Doctrine of Prospective Overruling

   The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs, but in such a way that it does not create a binding effect upon the parties to the original case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is laying down a new law for the future.[23]

5. Doctrine of Pith and Substance

   Pith means 'true nature' or 'essence of something' and Substance means 'the most important or essential part of something'. Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Thus, if the substance falls within Union List, thenthe incidental encroachment by the law on the

[21] The doctrine of eclipse has been pronounced in Bhikaji Narain Dhakras and others v. State of M.P. (1955), case by the S.C.I.

[22] In A. K. Gopalan vs. State of Madras, case section 14 of Prevention Detention Act was found out to be in violation of Article 14 of the constitution. It was held by the Supreme Court that it is Section 14 of the Act which is to be struck down not the act as a whole. It was also held that the omission of Section 14 of the Act will not change the object of the Act and hence it is severable. Supreme Court by applying doctrine of severability invalidate the impugned law.

[23] This doctrine was propounded in India in the case of Golak Nath vs. State of Punjab. In this case the court overruled the decisions laid down in Sajjan Singh and Shankari Prasad1cases and propounded Doctrine of Prospective Overruling.

State List does not make it invalid.[24]

6. Doctrine of Colorable Legislation

Doctrine of colourable legislation' signifies only a limitation of the law making power of the legislature. It comes to know while the legislature purporting to act within its power but in reality it has transgressed those powers. So, the doctrine becomes applicable whenever a legislation seeks to do in an indirect manner what it cannot do directly.

[24] The State of Bombay And Another v F.N. Balsara, is the first important judgment of the Supreme Court of India that took recourse to the Doctrine of Pith and Substance. The court upheld the Doctrine of Pith and Substance and said that it is important to ascertain the true nature and character of a legislation for the purpose of determining the List under which it falls.

CHAPTER III

JUDICIAL REVIEW AND ITS RELATION WITH OTHER ASPECTS

JUDICIAL REVIEW AND CONSTITUTIONALISM

The power of Judicial review has a vital significant to the concept of written Constitution. Independent Judiciary with the power of judicial review is one of the fundamental components of Constitutionalism. He further says there can in fact be no Constitution without judicial review. (Jain, 2003, pp.4). Even the Government is subject to law. Here originates the concept of constitutionalism i.e. limited Government. The Government does not have unlimited and arbitrary powers but the law places restrictions and limitations on the powers of the Government thus establishing its supremacy.[25] Judicial Review has two prime functions: that of imprinting Governmental action with the stamp of legitimacy, and that of checking the political branches of Government.

It may be observed that Judicial Review as a preserving instrument of constitutionalism extends to three principal areas : first, it preserves the constitutional balance of authority between the central and state government in a federal system; second, it maintains and preserves the balance between executive power and the legislative power on the same governmental level; and, third, it defends the fundamental human freedoms and thus acts as the 'great sentinel' of the cherished values of life. All these three aspects ofthe exercise ofJudicial Review power may be found in a single federal state, based on the principle ofseparation of powers and guaranteeing, constitutionally, certain 'basic' freedoms to the people. (Malik, 2010)

JUDICIAL REVIEW AND SEPARATION OF POWER

The question arose, however, as to who was to determine when ordinary law was inconsistent with the Constitution. The principle of separation of powers or functions of the State into

[25] See Sangeeta Mandal (2017 PP. 60) Judicial Review Under Indian Constitution: Its Reach And Contents. Doctorate Thesis, University of North Bengal

legislative, executive and judicial was invoked to find the answer. The recognition of the judicial power as a check on the legislative power would be contrary to the democratic theory by which the people vest the sovereign powers in the Legislature. One answer to this theory is that people may choose to separate the constituent legislative powers from the ordinary legislative powers by enacting written Constitutions which would stand as the fundamental law above ordinary legislation. A more satisfying answer is that the exercise of the power of judicial review of legislation should not be regarded as a legislative power.

JUDICIAL REVIEW AND PUBLIC INTEREST LITIGATION

In Nepal The Supreme Court had developed new strategy of Public Interest Litigation (PIL) for upholding and enforcing the rights of the unprivileged. It has devised new methods, forged new tools and innovated new strategies. Exercise of Judicial Activism is mostly done through Public Interest Litigation.

In India with the interpretation given by it in Menaka Gandhi case the Supreme Court brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights-jurisprudence. This was made possible in India, because of the procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation/Public Interest Litigation.

The Public Interest Litigation[26] is introduced in India courts by the judiciary , relatively than injured party or by additional third celebration. For implementation of the essential right to the person or to the group of the persons who are powerless to line of attack to the judiciary for liberation, due to their economic or social disadvantage situation or due to poverty. However, PIL has been expressedly provisioned in the Constitution for the first time in The Constitution of Kingdom of Nepal, 2047 BS. The provision has been carried by the Interim Constitution of Nepal, 2063 and the Constitution of Nepal (2072). In the Public Interest Litigation, the old fashion rules of locus standi has been relaxed. Nepalese SC is exercising Judicial Activism

[26] In the Case of Ramchandra Simkhada V. Chitwan National Park et.al. (D.No. 10204) the SC of Nepal has defined PIL as the voice of voiceless.

through PIL till date.

JUDICIAL REVIEW AND RULE OF LAW

Judicial review has at least two important functions: it gives legitimacy to governmental action and defends the Constitution from arbitrary government intrusion. The concept of the rule of law is upheld by judicial review (Jowell and Down, 1994).

For setting up principle by way of exercise of balance power, the rule of law was played good role to handles relationship between individuals and state powers in Europe. The rule of law report 2011 accepted by the Venice Commission of the Council of Europe accepted component of rule of law like legitimacy or sovereignty of legislation, legal certainty, respect for human rights, prohibition of arbitrariness, nondiscrimination and equality before law and access to justice before independent and impartial courts. According to this report if any action and decision is adverse, everyone should be able to challenge governmental action and prohibition of such challenges and violation of the rule of law, the hearing must be impartial and fair as well as within reasonable time.[27]

Judicial review is an essential part of rule of law. Judicial review involves determination not only of the constitutionality of the law but also of the validity of administrative action. The action of state public authorities and bureaucracy are all subject to judicial review, they are thus all accountable to the courts for the legality' of their actions. In India, so much importance is given to judicial review that it has been characterized as the 'basic features' ofthe constitution which cannot be done away with even by the exercise ofthe constituent power. (Malik, 2010 pp.288)

JUDICIAL REVIEW AND JUDICIAL ACTIVISM

The concept of Judicial Activism originated in the U.S. It is the process in which Judiciary uses the concept of judicial review to tell unconstitutionality of the legislature and executive orders. Inactiveness of legislature and the Executive makes or compels the Judiciary to be more active.[28]

[27] See Ravi Prakash (2016) Relevence Of Judicial Review In Free India Its Impact Upon Development Of The People A Critical Study. Doctorate Thesis, Shri Jagdishprasad Jhabarmal Tibarewala University.

[28] See Sangeeta Mandal (2017 pp. 64) Judicial Review Under Indian Constitution: Its Reach And Contents Doctorate Thesis, University of North Bengal

In his address on "Judicial Activism and PIL," Justice of the Supreme Court of India Bhagwati emphasizes that there is a wider possibility of judicial activism if the courts have the power of judicial review. Therefore, the judicial review system is always aimed against despotism, and its only goals are to safeguard the Constitution from the unwarranted interference of the government and create a just society.

According to judicial activism, judges should have a collaborative, deliberative role that demonstrates a broad range of judicial review and tends toward judicial policy making. This is a progressive approach to judicial review. A more progressive view of judicial activism favors declaring a law unconstitutional, and by making this determination, the court more closely resembles a policy-making body.[29] The court's aggressive stance is that in order to achieve democratic balance, the legislature must act precisely and authentically as their sovereign people's agent. It should be careful to avoid violating the constitution and shouldn't lead to legislative imbalance. They believe that excessive tolerance of constitutional violations would lead to disharmony.

JUDICIAL REVIEW AND JUDICIAL SELF-RESTRAINT

Constitutional limitations of the judiciary are expressly embodied in the Constitution. However, the limitations of judicial self- restraint are the inexplicit principles that are to be followed by the judiciary itself. Some of the self imposed limitations traditionally applied by the judiciary include (Acharya, 2007, pp. 108-111)

- The court does not anticipate a question of Constitutionality in advance.
- The court does not decide the question of Constitutionality unless absolute necessary is required to do so.
- The court does not declare a statute void in a doubtful case.

[29] See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.550) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.

• The court does not express Constitutional opinion suomoto.

• The court does not entertain Constitutional question at the instance of a volunteer.

• The court doesn't entertain Constitutional question at the instance of a person who has derived some benefit from the statute impugned.

• The court does not formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied.

• The court does not determine itself as a maker of the law etc.

• The right of seeking judicial review depends on the facts and merit of each individual case; there cannot be a review of an abstract proposition of law .

JUDICIAL REVIEW AND CONSTITUTIONAL REVIEW

The ability to challenge legislation that violates the Constitution is guaranteed by the Constitution, giving courts the authority to conduct judicial review of the legality of legislation. This kind of judicial review, sometimes known as "constitutional review," has the goal of ensuring that legislation complies with the Constitution. The Constitution sets forth rules governing the separation of powers between and among the various branches of the government as well as the protections provided to all citizens from tyranny. As a result, there are two ways that a legislative or parliamentary act could be unlawful. First, if the law that was passed conflicts with or overlaps with the Constitution; second, if it violates the Charter of Rights and Freedoms. against the government. Consequently, there are two ways in which an act of a legislature or of Parliament might be unconstitutional. First, when the act so enacted overlaps or contradicts with the Constitution or secondly, when the act violates the Charter of Rights and Freedoms. Thus, Constitutional Review can be regarded as the subset of Judicial Review.

JUDICIAL REVIEW AND APPEAL

The system of judicial review is different from the appeals. An appeal is statutory right which is provided under the specific statute. In appeal, the higher court has to decide the matter once again on the merits of the case. But in judicial review, the higher court has only supervisory jurisdiction where it does not go in the question of merits but only tests the validity, legality of the challenged order. The basic principle of judicial review is that it is only the decision making process and not the merits of the decision which is reviewable unless the decision or action of the

administrative authority is vitiated by arbitrariness, unfairness, illegality, irrationality or decision is such as no reasonable person on proper application of mind could take such a decision.[30]
The appellate jurisdiction is broader than the writ jurisdiction while hearing an appeal, the appellate court can re examines both the question of fact as well as of law, can appreciate evidence for it and substitute its own findings of fact for those of the lower adjudicatory body. On the other hand, the judicial review scope is very narrow. The writs are issued only for specific purposes as decided by, the court.[31] (Mandal, 2017, pp. 62)

Judicial Review is different from appeal. In appeal, the appellate authority can go into the merits of the decision of the authority appealed against, whereas, in judicial review, the court does not go into the merits of the administrative action. The reasons behind not interfering the merits of the decision is that the administrative authorities are given powers by the statutes and such powers have to be exercised within the limits drawn by such statutes.[32] As long as an authority acts within the ambit of the power given to it, no court should interfere. The basic principles of judicial review is that if an authority has power to decide, his decision ought not be interfered unless he has acted mala fide. Judicial review is a threshold enquiry regarding competence and intention[33].(Sathe, 2002, pp.314-315)

JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS

[30] See Sangeeta Mandal (2017 PP. 61-62) Judicial Review Under Indian Constitution: Its Reach And Contents Doctorate Thesis, University of North Bengal

[31] In Tata Cellular v Union of India, it is held by the court that,'Rights of appeal are always statutory where as judicial review on the other hand is the exercise of the court's inherent power determine whether the action is lawful or not and to award suitable relief. For this no statutory authority is necessary, the court is simply performing its ordinary functions in order to enforce the law. Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not

[32] . The Supreme Court of India has explained in S.R. Bommai v Union of India that in judicial review the court is not concerned with the merits of decision under review, but with the manner in which the decision has been taken or the order has been made.

[33] The Supreme Court of India in State of MP v. MV Vyavasaya (AIR 1997 SC 156.) has held that the power of judicial review of the court is not akin to appellate power. It is a supervisory power. While exercising this power, the court does not go into the merits of the decision taken by the authorities concerned but only ensure that the decision is arrived at in accordance with the procedure established by law and in accordance with the principles of natural justice. In addition to the compliance of the procedure established by law and the rules of natural justice, another ground of review may the error of jurisdiction.

Modern democratic ideals can be distinguished by their emphasis on fundamental rights. Without fundamental rights, a person is unable to develop their best selves or contribute to the advancement of social justice. Human rights are the source of today's idea of fundamental rights. (Acharya, 2002).[34] The essential foundation for judicial review is fundamental rights. In order to prevent the state from legislating to revoke the rights that were protected, the Constitution's framers thought it important to recognize the right of judicial review. As a result, the fundamental rights are made legally enforceable and justiciable for the purposes of judicial review. (Acharya, 2007).

Acharya (2007) has asserted that the guarantee of fundamental rights is the manifestations and recognition of the cravings of the people for the blessings of liberty and freedom. Inclusion of the fundamental rights in the Constitution also binds the legislature and executive.

JUDICIAL REVIEW AND INDEPENDENCE OF JUDICIARY

The role of the judiciary is becoming more and more important in the modern world. It means that independence of the judiciary is very vital for the maintenance and upkeep of the confidence reposed upon it in respect of judicial review, judicial independence would then have to be recognized as an ingredient of the basic structure.[35]

JUDICIAL REVIEW AND DIRECTIVE PRINCIPLE

The life giving provisions of the Constitution are the directive principles of state policy. These values serve as the foundation for the Constitution's social justice perspective. These principles stand in for the pledges and promises made by the Constitution, which is a living document

[34] The fundamental rights are associated with the freedoms and rights that a man is entitled to by virtue of his association with the state as one of its citizens, whereas human rights are naturally inherent in human beings by virtue of their birth. See Bhimarjun Acharya,Human Rights, Democracy and Good Governance, NYAYADOOT 76, Nepal Bar Association (2002).

[35] Dr. Ambedkar's constitutionalism was based on the recognition of the independence of judiciary and its power of judicial review. Independence of the judiciary received further consideration by a constitutional bench of the Court consisting of nine Judges in S.C. Advocates-on-Record v. Union of India. In that case the Court had to deal with important questions relating to appointment of judges to the Supreme Court, appointment and transfer of judges to High Courts and the importance and weight the opinion of the Chief Justice of India would carry in these matters. While construing the related provisions in the Constitution, the Court observed that those questions were to be dealt with in the light of the concept of independence of the judiciary. The court unanimously held that the concept of independence of the judiciary.

rather than a literary document.(Acharya, 2007 pp:48-49)

The purpose of fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all, whereas, the purpose of directive principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfill the basic needs of the common men and to change the structure of the society. (Hedge, 1972)[36].

Generally, under Fundamental Rights, state is asked not to do certain things whereas under Directive Principles, Policy and Obligation of the State the state is obliged to do certain things. In due course of time when the state capabilities is strengthened the content of the state policy can get transformed into fundamental rights. The right to employment (art.33), right to food (art.36), right to housing (art. 37), etc. were once the under state policy and obligation has been transformed to FRs in Constitution in Nepal (2072).[37]

JUDICIAL REVIEW AND REPRESENTATIVE DEMOCRACY

To ensure the fair treatment and individuals rights that provided by democracy, the courts must have the powers to adjust limits of the operation of law and fill up the legislative blanks, wherever necessary. McCormick his views that the democracy is not just the majority; it is the rights of minority and individuals and the judicial law makers did not come forward as the enemy of the democratic government. However, they were the vital features of the government. In the representative democracy, where there was independent and strong judiciary, considered

[36] This is an extract of the Lecture delivered by Justice K. S. Hegde, in the memory of B. N. Rau On The Directive Principles Of State Policy In The Constitution Of India, 17 National Publishing House, Delhi, published for The Institute of Constitutional and Parliamentary Studies (1972). He further added that Fundamental rights and directive principles are not the brain child of any particular individual or group of individuals. They are mainly the product of history. They are the outcome of clash of ideas and ideals and social power.

[37] The court in Nepal has also attempted to make the harmonious relation between fundamental Rights and Directive principles of state policy. The Godabari Marble [Surya Prasad Dhungel v. HMG, 2049 NLR at 169.]and Yogi Naraharinath case [Yogi Naraharinath v. Girija Prasad Koirala, 2053 NLR at 33.] are its examples. Nevertheless, this is not best held unless the state creates a number of administrative bodies and enacts laws in order to enforce them. In these circumstances there may be misunderstanding about the scope of powers and sometimes also a misuse of power. See, The System of Judicial Review in Nepal by Bhimarjun Acharya (2007), Doctorate Thesis, Tribhuwan University, pp.51-52.

to be other face of democracy. [38]

Tyranny by the majority poses a serious risk in democracies. The majority frequently abuses its influence. And the biggest threat to freedom and liberty is frequently produced despotism and the tyranny of the majority. Elections are the primary method of selecting legislators in the contemporary democratic system. Its greatest friend is the party system. Due to a lack of political and constitutional knowledge among the populace, many people frequently fail to vote. Another occurrence is when members of a party who were elected by their supporters become rebels or defections and join another party, betraying their supporters by engaging in such immoral behavior. A well-planned legislative program is impossible in such unrest and power-hungry situations. Additionally, even in the absence of a defection, the law typically reflects the whims and caprices of the majority in power. Such a risk to liberty is overcome by the institution of judicial review.[39]

JUDICIAL REVIEW AND CONSTITUTIONAL SUPREMACY

The idea of popular sovereignty and constitutional supremacy is the most important prerequisite for judicial review. There is no room for judicial review of legislation in countries like England where Parliamentary Sovereignty rules. The fundamental tenet of the English constitution is that all authority comes from the people, who took all fundamental constitutional powers away from the monarch and gave them to Parliament.

The doctrine of judicial review, is, sometimes described as the doctrine of judicial supremacy in the interpretation of constitutional terms and principles. (Burger, 1991). However, some jurists perceive judicial review as not the supremacy, but the judicial nationalism about all round progress of the society. (Jha, 1974, pp.161). To Bernard Schwartz a Constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes Constitutional

[38] See Ravi Prakash (2016) Relevence Of Judicial Review In Free India Its Impact Upon Development Of The People A Critical Study. Doctorate Thesis, Shri Jagdishprasad Jhabarmal Tibarewala University.
[39] See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.534) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.

provisions more than mere maxims of political morality. Judicial review provides the only adequate safeguard that has been invented against unconstitutional legislation. (Quoted in Burger, 1991).

The judiciary is sometimes called as the third chamber. The reason for such a misnomer is that a law passed by the two houses of the parliament or the Congress is declared invalid or contrary to the basic law of the land by the judiciary. The power of U.S. Supreme Court to declare the statutes of the Congress as unconstitutional is sometimes called as 'judicial supremacy' because the court has the authority to declare the actions of the other branches of the government as invalid.[40]

JUDICIAL REVIEW AND DEVELOPMENT

The purpose of welfare and development is to create equitable standard and economic equality of the people. The government has to provide needs of physical and social needs in addition to their personal needs. Hence, primary responsibility of the administration to make available complete welfare of its citizens.[41] On the matter of development and welfare of the people, the laws made by legislatures, the Supreme Court and higher judiciary of State can be struck down unconstitutional. There are several legislations in respect of social, economic and cultural development of people. The judicial review provided under the Constitution is to enforce cultural, social and economic rights in several fields specifically in health care, work, housing, education, ecology, food and other fields.[42]

[40] See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.537) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.

[41] See Ravi Prakash (2016) Relevence Of Judicial Review In Free India Its Impact Upon Development Of The People A Critical Study. Doctorate Thesis, Shri Jagdishprasad Jhabarmal Tibarewala University.

[42] The SC was successful in establishing minority rights, eliminate untouchability and other social discrimination through Judicial Review. Directive Order issued to end Haliya & Kamlari pratha, protection of animal rights (Gadimai Case), protection of Environment (Godawari Marble Case), Protection of Cultural Heritage (Yogi NariNath Case) are few examples. Through JR, the SC has successfully estbalished the minority rights.

CHAPTER IV

HISTORICAL EVOLUTION OF JUDICIAL REVIEW

The general concept of the doctrine being rooted at the time of Plato and Cicero onwards. Cicero a particularly considered to have contributed to the evolution of the doctrine of judicial review. (Jha, pp.117) Judicial review has textual, structural, and historical underpinnings that stem from the idea that courts are the ultimate defenders of the Constitution and the rights of the people. It is true that this sentiment is a legacy of the English revolutions of the seventeenth century and the laissez-faire economy that followed, at least in its explicit modern form. From 1616 through 1643, the Stuarts and the Royal attorneys, under the leadership of Bacon, argued that the King's officers were only answerable to the King's Council and not the common law courts. This was a component of what was thought to be an effort to establish an entirely non-parliamentary executive. The constraints placed on monarchy were in place when Lord Hilt ultimately established in 1700 the authority to examine official action through certiorari and mandamus. (Jaffe, 1965, pp. 322)

The opinions of the representatives to the Philadelphia Convention support the idea of judicial review in the American theory of sovereignty. During these influential years, there was no superfluous for an analysis of actual practice in the American courts. However, an evolution of idea of judicial review, the early state courts decision was especially instructive. [43]Constitutional practice, judicial review is usually considered to have begun with the assertion by John Marshall, Chief Justice of the United Court States in Marbury V. Madison in 1803, of the power of the Supreme to invalidate legislation enacted by Congress.

On the other hand the great Chief Justice of the Common Pleas of Great Britain, Sir Edward Coke, attempted to uphold the idea of the supremacy of law in the Bonham case in 1610, where

[43] See Ravi Prakash (2016) Relevence Of Judicial Review In Free India Its Impact Upon Development Of The People A Critical Study. Doctorate Thesis, Shri Jagdishprasad Jhabarmal Tibarewala University.

he ruled that an Act of Parliament was invalid because it went against reason, logic and right. For this reason, some contend that Coke, even before Marshall's ruling, first stated the notion of judicial review against legislation in the annals of adversarial court practice. The parliamentary supremacy idea, however, was introduced in England in the post-17th century, and the country was unable to sustain it for very long. While some of them do concur that Marshall was the true creator of judicial review, others contend that there were numerous instances of judicial review being used by US and UK courts even prior to the Marbury case.

THE SYSTEM OF JUDICIAL REVIEW IN OTHER COUNTRIES AND NEPAL

THE SYSTEM OF JUDICIAL REVIEW IN USA

According to Snowiss (1996) judicial review as they know it was developed over three distinct periods in the USA namely:

1. From independence to federalist 78

The legitimacy of judicial jurisdiction over unconstitutional actions was frequently disputed during the first period, despite frequent claims to the contrary. Judicial invalidation of legislation remained a hugely controversial practice in this unresolved dispute. Period 1's assertion of the judiciary's power to uphold the Constitution was viewed as an extraordinary political act and a legal stand-in for revolution. Judges in Period 1 adhered more to outdated English precedent . (Snowiss, 1996, pp.3)

2. Federalist 78 to Marbury

Period 2 provided the coherent defense of judicial authority over unconstitutional legislation that had been absent in period 1. James Iredell published it initially in a North Carolina newspaper in 1786. Alexander Hamilton revised it and made it popular in Federalist 78 and James Wilson's book "Lectures on the Law." Period 2 Judicial review, furthermore, derived its authority over legislation from equality of the government branches under explicit fundamental law.

3. From Marbury to the end of Marshall's tenure of the court.

The period 3 position, which started when Marshall took over as chief justice, was a revision of the period 2 position. The criteria for statutory interpretation were applied to the Constitution in a way that had never been done before. This application was not found in cases from period 2 .

JR before Marbury

Spence Roane, a prominent Virginia court judge, noted in Kamper v. Hawkins (1793), which was decided ten years before Marshall's ruling in Marbury v. Madison, that legislation is no longer fixed if it violates the Virginia Constitution. According to this assertion made in Kamper Sands, justice Spence was attempting to enshrine the judicial review doctrine in the Constitution. Similar to Marbury, justices of the Supreme Court sitting on circuit held that state statutes in conflict with the federal Constitution were unconstitutional, and this was upheld in Van Horne lessee v. Dorrance more than a decade later.

US Supreme Court, before Marshall, purported to exercise the power of judicial review though no laws were ever invalidated. A prime example is Hayburn's Case[44], which concerned a statute empowering federal and state courts to determine the propriety and amount of pensions for disabled veterans of the Revolutionary War. The statute provided for the Secretary of War to review the court decision and transmit his opinion to Congress, which could, if it agreed, appropriate the necessary funds. The Circuit Court for the District of Pennsylvania refused to consider William Hayburn's application for a pension under the statute, and the Attorney General sought a writ of mandamus in the Supreme Court. Prior to the decision, Congress avoided a Constitutional confrontation by amending the legislation to provide other relief for the pensioners, and the Supreme Court dismissed on grounds of moot ness.Similarly, in Hollingsworth v. Virginia[45], the supreme court refused to declare the 11th amendment

[44] Excerpted version of the opinion from "The Founders' Constitution" at University of Chicago. Ronald d rotunda, modern constitutional law: cases and notes 12. West Publishing Co. USA (1993). For full judgement see: .2 US (2 Dall.) 408, 1 L. Ed. 436 (1792).

[45] Ronald D Rotunda, Modern Constitutional Law: Cases And Notes 12. West Publishing Co. USA (1993). For full

unconstitutional on the grounds that the President had not signed the resolution proposing the amendment to the state.

The first case in which the supreme court held a state statute [46]unconstitutional was in Fletcher v. Peck[47] but the case came to the supreme court from the US circuit court for the district of Massachusetts, not from a state court. Therefore, it is clear that American political leaders understood the written Constitution's role as a check on all branches of the federal government long before Marbury, including many of the most eminent attorneys and judges in the colonies and the original thirteen states.

The doctrine of judicial review is considered as an integral part of the American judicial and Constitutional process although the Constitution does not explicitly mention the same in any provision. (Jain, 2003, pp. 831)

In United States, if Constitutional amendment is made to cure the effect of erroneous decision of the Supreme Court, nojudicial review is possible to invalidate the constitutional Amendment. The U.S. Supreme Court has power to invalidate the statute. The Congress has the power to override the erroneous decision of the Supreme Court, if it is against the basic norms of the Constitution. The Eleventh Amendment was made to nullify the effect of Supreme Court's decision in Chisholm vb. Georgia. Similarly the Sixteenth Amendment was made to reverse the Supreme Court decision in Pollock v. Farmers Loan and Trust Company.[48]

THE SYSTEM OF JUDICIAL REVIEW IN UK

The formative period for the origins of judicial review in England was the seventeenth century that in the famous Dr. Bonham's case. Coke, then Chief Justice of Common Pleas, allowed Dr. Bonham to bring an action for false imprisonment against the Royal College of Physicians and Surgeons. Significance of this case was that the court held the common-law courts did have

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judgement see: 3 US (3 Dall.) 378, 381 & n. 1 L. Ed. 644 (1798)

[46] In Marbury the statute of Congress i.e. section 13 of the Judiciary Act of 1789 was declared void.

[47] 10 US (6 Crach) 87,3 L. Ed. 162 (1810).

[48] See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.529) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.

jurisdiction to test the validity of official action. In particular, judicial review of legislative Acts was frequently used in England. It was influenced by the Cokeian doctrine of common right and reason as well as the Magna Charta of 1215. This doctrine was further accelerated by Chief Justice Coke. The law, which was against public sentiment and common morality and did not appeal to the common right and reason, was void. According to American Constitutional author Corwin, the case of Bonham, which was determined in England in 1610 by Chief Justice Coke, is the first instance of judicial review.[49]

The main reasons for the absence of Judicial Review of Legislation in England may be as follows;

• The evolution of the doctrine of parliamentary supremacy.
• Absence of fundamental rights.
• Existence of unwritten Constitution
• Growing conservatism of the Eng people and faith in the decision of the majority
• Members of parliament such as members of the House of Lords taking part in the judicial administration.
• Unitary form of government centralizing all powers.
• Ambition of the Eng. people to make the electorate more conscious and alert so as to choose good representatives.
• The broad consciousness of the Eng. people to make parliament to work in the spirit of national harmony.
• Predominating influence of the public opinion on parliamentary activities.
• Making of the Constitution and the ordinary laws by the same body. i.e. the parliament.

THE SYSTEM OF JUDICIAL REVIEW OTHER EUROPEAN COUNTRIES

The idea of making the judiciary the custodian of the Constitution was embraced considerably later than in the United States, typically only in the 20th century, across Europe and other areas

[49] See Edwards Corwin (1961)., The Constitution And What It Means Today 144, Princeton University Press.

of the world. However, some European nations introduced a variation on the American model while embracing it. They made the decision to establish a special Constitutional court that must be consulted on all issues relating to the constitutionality of legislation and that alone has the authority to declare statutes unconstitutional, as opposed to allowing any court to decide on the constitutionality of statutes with the Supreme Court having the final say, as is the case in the United States.

First to implement the centralized system was Austria (1920). It was adopted by Italy (1948) and West Germany following World War II (1949). Today, there are constitutional courts operating in Turkey, Spain, and Portugal. In centralized systems like those in Europe, matters involving constitutional questions about the legality of statutes are typically referred to the court by trial courts or by losing parties who have their constitutional rights violated by trial court rulings. But occasionally, political organizations like the national executive, regional administrations, and parliamentary minorities can also raise the issues. Without having to file a lawsuit in a regular court, these might challenge the law before the Constitutional court.

Despite not being a true court, France has had a Constitutional Council since 1958. On the petition of the president of the republic, the prime minister, the head of either of the two legislative assemblies, or a parliamentary minority, the Constitutional Council may annul unconstitutional laws before they are put into effect.

It has been decided to adopt the American system of judicial review by regular courts. Several states, both in Europe and elsewhere, including Ireland (1937), Greece (1975), Japan (1946), India (1950), Mexico (1917), Brazil (1946), and Argentina(1949), have occasionally modified the US system of Judicial Review. It has been in operation in Switzerland, with some limitations, since 1874. It was first used in Canada in 1867 and Australia in 1900, and it is still a key component of the constitution in both countries today.

With the exception of Yugoslavia, all communist nations' constitutions forbid judicial review. The legislature's interpretation of the people's sovereignty and the unity of political authorities would both be weakened by this. Constitutional councils were established in Hungary in 1984

and Poland in 1985, but in reality they simply work as advisory bodies for the legislature.

THE SYSTEM OF JUDICIAL REVIEW IN INDIA

In the context of India, the study of judicial review can be made in three different periods: the period of pre- Government of India Act, the period of the Government Act and the period of post independence.

The Period One: A few rules governing the authority of judicial review were established by the Government of India Act of 1858. On the grounds of legislative incompetence or the abuse of legislative powers, the law court had the authority to review the constitutionality of legislative acts.[50]

The Calcutta High court in Empress v. Burah and Book Sing[51] held that a particular legislative enactment of the Governor General in Council had more power than the Imperial Parliament had granted him, which rendered it unconstitutional. After hearing an appeal in this case, the Privy Council ruled that the High Court of Calcutta lacked the authority to determine whether the legislation of the Governor General was Constitutional or not.

The Second Period: On December 6, 1937, the Federal Court was established by the 1935 Government of India Act for the first time in India's history. The Federal Court was impliedly given the authority to rule on the constitutionality of acts under this Act even though it was not officially given the authority to conduct judicial reviews. The federal court and the High Courts of India assessed the constitutionality of numerous legislative Acts throughout this time as the Constitution's translator, exercising all of their judicial restraint, wisdom, and skill. The Government of India Act of 1935 did not contain a particular provision for judicial review, yet the federal court appears to have successfully adopted this power. One of its special cases is the case of Bhola Prasad.[52]

[50] See The Government of India ACT (1858).
[51] See Empress v. Burah and Book Singh, (1877), ILR, 3. Cal. 63.
[52] Bhola Prasad v. Emperor, AIR (1942) sc 17.

The Period Three: Under the present Constitution of India, the scope of judicial review is circumscribed in Art 131 A (1) and Act 226 of the Indian Constitution give the exclusive jurisdiction to the Supreme Court and the High Court to determine all questions relating the Constitutional validity of any central law and state law respectively. The provisions of the fundamental rights contained in part III of the Indian Constitution furnish the real basis for the power of judicial review. (Acharya, 2007, pp.166) The fundamental subjects of judicial review in the present Constitution of India relate to:

• Enactment of legislative Act in violation of the Constitutional mandates regarding distribution of powers.
• Delegation of essential legislative power by the legislature to the executive or any other body;
• Violation of fundamental rights;
• Violation of various other Constitutional restrictions embodied in the Constitution;
• Violation of implied limitations and restrictions, etc.

The Indian Supreme Court, for the first time asserted the doctrine of judicial review against the legislation in Gopalan , where the validity of the Preventing Detention Act, 1950 was challenged. In this case the main issue was whether Art 21 envisaged any procedure lay down by a law enacted by a legislative or whether the procedure should be fair and reasonable. The court held by majority that the word law in Act 21 could not be read as meaning rules of natural justice. The expression "procedural established by law would therefore mean the procedure as laid down in an enacted law.

In A.K. Gopalan Case[53], when the legality of the Preventing Detention Act, 1950, was challenged, the Indian Supreme Court for the first time established the idea of judicial review against the legislation. The main question in this situation was whether Art. 21 contemplated any legislatively approved procedure or if the procedure should be just and reasonable. The majority of the court decided that the word "law" in Act 21 could not be interpreted to mean the principles of natural justice. Therefore, "procedural established by law" would refer to the process outlined in an enacted law. (Acharya, 2007, pp.166)

[53] See A.K. Gopalan v. State of Madras, AIR 1950 sc. 27.

The court in Shankeri Prasad[54] , when the Constitution (first Amendment) Act 1951, curtailing the right to property was challenged, held that fundamental rights were not excluded from the process of Constitutional amendment under Art 368, they can be amended by the parliament since they were not inviolable and beyond the reach of the process of Constitutional amendment. The matter was again raised in 1965 in Sajjan Singh[55], where the validity of the Constitution (17th Amendment Act, 1964) affecting the property right was challenged. The court again held the same argument as established in Shankari Prasad. The court in Golaknath decided the way of amendment of the Constitution could be questioned as being contrary to Art. 13(2) of the Constitution. They took the view that an amendment of the Constitution made under Act. 368 was law within the meaning of Art 13 and could not therefore, take away or abridge the fundamental rights guaranteed in part of the Constitution. (Acharya, 2007, pp. 168)

The Kesavanandada Bharati case ruling serves as the starting point for an examination of the doctrine of judicial review in India. To overcome the Golaknath judgement, the parliament passed the Constitution (24th amendment) Act in 1971, which included changes to Articles 13 and 386. The validity of bothe 24th and 25th Amendments[56] was challenged in Kesavananda. First, the majority disregarded Golaknath's argument that Art. 368 did not grant the right to amend the Constitution. Second, it ruled that parliament cannot change the fundamental framework of the Constitution when exercising its power to amend it. In other words, Art. 368 cannot be used to undermine the Constitution's fundamental principles. With the case of Indira Gandhi v. Raj Narayan, the Supreme Court adopted the Keshavananda Bharati principle in regards to non-amenability of the basic structure. The court determined that a constitutional amendment cannot undermine the fundamental principles of the Constitution because it is a law or has a higher standing in this case.

The Supreme Court's ruling that clause 4 of the 39th amendment was unconstitutional in the Indira case did not sit well with the government, and it vowed to make sure that the court would

[54] See Sankari Prasad Singh v. India, AIR 1951 sc. 458,
[55] See Sajjan Singh v. Rajasthan, AIR 1965 sc. 2245.
[56] In 1971, the parliament enacted the 25th amendment, which made the substitution of the word "amount" for the word "compensation" and diluted the right to property.

never again be able to do so. As a result, the 42nd amendment in 1976 added another change to Art. 368. A constitutional amendment may not be challenged in court on any grounds whatsoever, according to this amendment. Two new clauses were introduced to Article 386 in order to accomplish this goal. But in Minerva Mills, the court once more reinterpreted the rule that, in accordance with Article 368, Parliament cannot modify the Constitution in such a way as to impair its fundamental provisions and undermine its framework.[57]

From Keshavanand the Supreme Court of India has added a long list of essential features in the ever-expanding catalogue of the basic structure. On a perusal ofthis catalogue we find that over half of the provisions of the Constitution have been covered. It is further expanding. The Supreme Court has refused to foreclose the list of essential features. It has reserved the right of expansion as and when situation demands. Supreme Court is very anxious to protect essential features of basic structure, to be evolved by it from time to time. It appears that the Constitution is not more important but the essential features of the Constitution are more important. [58]

HISTORY OF JUDICIAL REVIEW IN NEPAL

In 2008, the Pradhan Nyayalaya Act was passed. It included a number of provisions for Pradhan Nyayalaya. This Act's Section 30 gave the Pradhan Nyayalaya writ jurisdiction and judicial review authority for the first time in Nepal's legal history. The full bench of the Pradhan Nyayalaya in the Bsheshwor V. Commissioner Magistrate case[59] used this authority to declare Section 1 (a) of Commissioner Magistrate unlawful since it was in violation of Section 30 of the Pradhan Nyayalaya Act, 2008. Unfortunately, the King Tribhuvan revoked the Pradhan Nyayalaya's authority to annul an order on a writ petition and to declare administrative and legislative activities void in 2010 by the second amendment. He disregarded the Pradhan Nyayalaya Act's Section 30, which gave Nyayalaya exclusive review authority. In 2012 B.S., King Mahendra reinstated the authority of Pradhan Nyayalaya after Tribhuvan's death as a result of political pressure. However, he completely repealed the Pradhan Nyayalaya Act in 2013 and

[57]See Minerva Mills v. India, AIR 1980 sc. 1789.
[58] See Doctorate thesis of Purvi Gharia-Pokhariyal (2006, pp.536) Critical Evaluation Of The Functioning Of The Doctrine Of Judical Review In India With Special Reference To Some Constitutional Amendments, Maharaja Sayajirao University of Baroda. Retrieved from http://hdl.handle.net/10603/58165 on 10/30/2022.
[59] Bisheshowr Prasad Koirala v. Commissioner Magistrate, 2016 NLR 123.

passed a new law known as the Supreme Court Act. The Supreme Court Act, 2013 established the Supreme Court as a Court of Record of the land. (Acharya, 2007, pp. 182)

Government of Nepal Act, 1948

Government of Nepal Act, 1948 declared in 1948 by the then Rana Prime Minister, was a first written Constitution of Nepal. Though the Constitution inserted the provision of judiciary called Administration of Justice and provisioned for the institution of a Pradhan Nayalaya in Nepal under Chapter-five, it had not mentioned any provision for the system of judicial review. Because of this the mere provisions of fundamental rights inserted in the Constitution had no meaning at all. (Acharya, 2007, pp. 184-185).

Interim Government of Nepal Act 1951,

In Interim Government of Nepal Act 1951, the provision of the judiciary was incorporated in Part Ill of the Constitution. The Constitution was, however silent on the power of judicial review. the fundamental rights were incorporated under the provisions of the directives principles and policies of the state in Article II. The violation of such rights could not be questioned in the Court of Law.

The Constitution of the Kingdom of Nepal, 1959

The Constitution of the Kingdom of Nepal, 1959 was framed in 1959 on the supervision and guidance of Sir Ivor Jennigs, a renowned Constitutional Jurist of the United Kingdom. this was the first Constitution to guarantee fundamental rights and ensure power of judicial review to the judiciary. In addition to, Article! of the Constitution also ensured that Constitution was a fundamental law of Nepal and all laws inconsistent with it, to the extent of such inconsistency, would be void. Similarly, the Constitution, for the first time in the history of Nepalese Constitutional laws, guaranteed the right to remedy as a fundamental right of the people. To this provision, the Court had power to issue necessary and appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo-warranto for the enforcement

of right conferred by the Constitution. Another significant provision outlined by the Constitution was Article 54 which ensured that any person who claimed the whole or some Article of any Act or law being inconsistent with the Constitution, shall have right to move to the Supreme Court to make such laws declared void. This provision was maintained under the chapter- legislative powers[60], Thus, in this Constitution the power of judicial review is seemed to have vested in the Supreme Court though it was not explicitly mentioned in any provision. In the tenure of this Constitution a writ petition regarding the Judicial Review of legislation was filed in the Supreme Court on the ground that the Section 10 of Civil Service Act, 2013 and the Section 19 and 20 of Citizen Right Act, 2012 were inconsistent with the provision of the Constitution. But the Court discharged the petition without any reasonable grounds.[61] (Acharya, 2007, pp.192-193)

Constitution of Nepal, 1962

The late King Mahendra suspended the Kingdom of Nepal's 1959 Constitution in 1960 by dissolving the Parliament and announcing the Constitution of Nepal, 1962 which was based on a non-Party system. It was asserted that the King issued the Constitution as a result of the state's inherent rights and privileges.[62] This Constitution is the fundamental law of the land. All laws that are in conflict with this Constitution will be void[63]. However, neither Article or Clause of the Constitution specified that the Supreme Court had the authority to conduct judicial reviews. In reality, the Court had very little authority. The King was given all legislative, executive, and judicial authority, as well as any remaining authority. The Supreme Court possessed extraordinary authority to issue the orders and writs that were required and appropriate, including the writs of habeas corpus, mandamus, certiorari, prohibition, and quo warranto for the enforcement of constitutional rights[64]. Despite all of this, the Supreme Court had demonstrated the judicial review's power in this time. In the Mul Chandra Azad case[65], the Court ruled that the

[60] See Article 54 of the Constitution of Kingdom of Nepal, 2015 (1959)
[61] See Gajendra Bahadur Pradhanang v. HMG, NLR 2017 at 30.
[62] See the preamble of The Constutition Of Nepal, 1962.
[63] See article 1(1) of The Constutition Of Nepal, 1962. Although the constitution was provided with the fundamental right along with right to constitutional remedy (Art. 16), the Constitution had a blunder that was Article 17 which provisioned that the law could, for the purpose of public interest, be enacted in order to restrict or maintain the exercise of the rights conferred by the Constitution under chapter three. It was anti-thesis of Constitutional jurisprudence to make general law to be prevailed over the Constitution. This provision was also contrary to Article 1 of the Constitution. To this provision, fundamental rights guaranteed by the Constitution could be restricted, curtailed or suspended at any time by the enactment of ordinary laws.
[64] See article 71 of The Constutition Of Nepal, 1962.
[65] See Mul Chandra Azad v. Special Court, NLR 2025 at 322.

provisory note of Section 21(2) of the Manual of District Panchyat was null and void. In a same vein, Bishwonath Upadhyay dissented from the majority judgement and held that Section 20 of the Land Reform Act (first amendment), 2022, was invalid due to its conflict with Article 11(2) of the Constitution.[66] (Acharya, 2007, pp.194-195)

In the Sarvagya Ratna Tuladhar case[67], the Supreme Court's complete bench also declared a number of principles in support of the Constitution. In this instance, the court made it clear that it had the authority to declare any statute, or a portion of it, void because it was inconsistent with the Constitution. Another intriguing matter that arose during the existence of this Constitution was brought before the Supreme Court, however the Court dismissed the petition without providing any justification[68]. Jurists commented that this incident was the hostile to the development of legal history. The Court in this era also had effective exercise of the power of judicial review of legislation, in particular, the cases of Purna Chaitanya[69], Jagandas[70] &Shankar Prasad[71] etc. (Acharya, 2007, pp. 195)

The Constitution of the Kingdom of Nepal 1990

The Judicial Review power was expressedly granted by the Constitution of Kingdom of Nepal, 1990 in its article 88 which was provisioned as follows:

Jurisdiction of Supreme Court:

(1) Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes unreasonable restriction on the enjoyment of any fundamental right conferred by this Constitution or on any other ground; or to have any law or any part thereof made by a Provincial Assembly declared void because it is inconsistent with any law made by the Federal Parliament; or to have any law or any part thereof made by a Municipal Assembly or Rural Municipal Assembly declared void because it is inconsistent with a law made by the Federal Parliament or the Provincial Assembly; the Supreme Court shall have an extra-ordinary power to declare such

[66] See Raghuraj v. HMG, NLR 2034 at 54.
[67] See Sarvagyaratna Tuladhar v. Chairman, Parliament, NLR 2035 at 322.
[68] See Madindraraj Shrestha v. Administrative Chief Bagmati Zone, NLR 2023 at 49.
[69] See Purna Chaitanya Brammachari v. HMG, NLR 2044 at 1075.
[70] See Shankari Prasad Marwadi v. Janakpur Zone, NLR 2045 at 963,
[71] See Shankari Prasad Marwadi v. Janakpur Zone, NLR 2045 at 96.

law to be void either ab initio or from the date of its decision in case the law in question appears to be so inconsistent.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution or of any other legal right for which no other remedy has been provided for or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern; have the extraordinary power to issue necessary and appropriate orders, provide appropriate remedies, enforce such right or settle such dispute.

(3) Under the extra-ordinary jurisdiction referred to in clause (2), the Supreme Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.

Provided that except on the ground of absence of jurisdiction, the Supreme Court shall not under this clause interfere with any internal proceedings of the Federal Parliament or Provincial Assembly, and with any proceedings instituted by the Federal Parliament or Provincial Assembly concerning violation of its privileges and penalties imposed therefor.

The Interim Constitution of Nepal, 2007:

Judicial Review Power of SC expressed in art. 107 is as follows:

(1) Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground; and the Supreme Court shall have extra-ordinary power to declare that law to be void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with this Constitution.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution or for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such right or settle such dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and

writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.

Provided that, except on the ground of absence of jurisdiction, the Supreme Court shall not under this Clause interfere with any proceedings and decisions of the Legislature-Parliament concerning violation of its privileges and penalties imposed therefor.

Constitution of Nepal (2015)

The provision regarding the Judicial Review of Supreme has been expressed in art. 133 is as follows:

(1) Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes unreasonable restriction on the enjoyment of any fundamental right conferred by this Constitution or on any other ground; or to have any law or any part thereof made by a Provincial Assembly declared void because it is inconsistent with any law made by the Federal Parliament; or to have any law or any part thereof made by a Municipal Assembly or Rural Municipal Assembly declared void because it is inconsistent with a law made by the Federal Parliament or the Provincial Assembly; the Supreme Court shall have an extra-ordinary power to declare such law to be void either ab initio or from the date of its decision in case the law in question appears to be so inconsistent.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution or of any other legal right for which no other remedy has been provided for or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern; have the extraordinary power to issue necessary and appropriate orders, provide appropriate remedies, enforce such right or settle such dispute.

(3) Under the extra-ordinary jurisdiction referred to in clause (2), the Supreme Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.

Provided that except on the ground of absence of jurisdiction, the Supreme Court shall not under this clause interfere with any internal proceedings of the Federal Parliament or Provincial Assembly, and with any proceedings instituted by the Federal Parliament or

Provincial Assembly concerning violation of its privileges and penalties imposed therefor.

Similarly, the Judicial Review Power for the high court has been provisioned in art. 144 as follows:

(1) The High Court shall have the power to issue necessary and appropriate orders, for the enforcement of the fundamental rights conferred by this Constitution or for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any legal question involved in any dispute of public interest or concern.

(2) For the purposes of clause (1), the High Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.

Provided that except on the ground of absence of jurisdiction, the High Court shall not under this clause interfere with any internal proceedings of the Federal Parliament or Provincial Assembly, and with any proceedings instituted by the Federal Parliament or Provincial Assembly concerning violation of its privileges and penalties imposed therefor.

Although there is no direct wording of the term Judicial Review, the provision are so made in order to achieve the aim and spirit of Judicial Review.

CHAPTER V

JUDICIAL REVIEW OF JUDICIAL DECISION IN NEPAL

Nepal since the very beginning of its constitutional history has been practising Judicial Review. The Habeas Corpus issued in the Valley Arrest Order of Kathmandu Magistrate to Bishwashwor Prasad Koirala (2013) is a landmark one. This Judicial Review has not been limited only with the work of legislature and executive, but even with the decision passed by the various courts.

Yagyamurti Banjade v. Durgadas Shrestha, Bagmati Special Court, Singhdarbar and Others (2027)

In Yagya Murti Banjhade on behalf of Pasuram Banjhade V. Bagmati Special Court, the SC issued the Habeas Corupus writ and overturned the detainee order of Durgadas Shrestha of Bagmati Special Court observing the lack of Jurisdictional Error. The SC held that since the petitioner was sentenced to imprisonment and fine due to the lack of jurisdiction of the Chairman of Bagmati Special Court, Mr. Durgadas Shrestha, it has been determined that the prisoners detained by such illegal order should be released, and the petitioner has been released. In is a landmark decision of the Court. The Court overturning the decision of Bagmati Special Court held that degree of freedom in a democratic system was greater than in an autocratic regime. Compliance of both the substantive and procedural laws was compulsory to the authority while curtailing the right of personal liberty.

This judgement is a landmark in the history that it Supreme Court made a judicial review upon the decision made by Bagmati Special Court by issuing Habeas Corpus writ which resulted in huge dissatisfaction upon the government of the time against the decision.

Annapurna Rana V. Kathmandu District Court (2055)

In Annapurna Rana V. Kathmandu District Court the Supreme Court of Nepal, a woman who lives with a man and engages in physical contact with him is not necessarily his wife. The Supreme Court declared in a case involving a contentious property dispute between a mother and a daughter of a prominent Keshar Sumshere family that living together and even having a child are not enough circumstances in and of themselves to pronounce them husband and wife. The

Supreme Court's precedent-setting decision was related to a petition Annapurna Rana, the granddaughter of the late Keshar Sumshere Rana, filed with the high court, in which she argued that a Kathmandu District Court decision ordering a virginity test on her was unconstitutional and in violation of her right to privacy, which is protected as a fundamental right under Article 22 of the Constitution. The district court's decision to allow the virginity test was overruled by the Supreme Court.[72]

The judgement is milestone in the Judicial History of Nepal because SC successfully protected the fundamental rights of the citizen by making a review upon the interloculatory order passed by the Kathmandu District Court.

Kiran Vikram Rana V. Kathmandu District Court et. al (2050)

In Kiran Vikram Rana V. Kathmandu District Court et. al[73] the petition was filed in the SC claiming to block the execution of the judgement of the court as Tahasil Depart is filling from the property of petitioner illegally. The SC held that if the property of the petitioner is about to be filled illegally, the petitioner is available with the alternative legal remedy (submitting an application to the judge of the same court against the action of Tahasil Depart) as well as the remedy of canceling the judgment by showing his right. The petition was quashed by the court. SC denied to accept the extraordinary jurisdiction as there was availability of Alternative Remedy.

Hari Bahadur Dhakal V. High Court Patan (2077)

In Hari Bahadur Dhakal V. High Court Patan[74] et.al the petitioner claimed that the Charge Sheet registered against her husband on selling and distributing rhinoceros horn in Kathmandu District Court was a jurisdictional error as her husband was a Military Personnel and the hearing must be done on Military Court as per Military Act, 2063 rather than regular court. The SC held that from the point of view of fair trial and organizational structure, it seems preferable to give jurisdiction to ordinary courts rather than military courts in relation to crimes of a civilian nature other than military nature. The Writ Petition was quashed by the Court.

[72] See NLR 2055, Issue 8, Decision No. 6588

[73] See NKP 2050, D.No. 4734; Case: Prohibition.

[74] See Hari Bahadur Dhakal V. High Court Patan Case: Habeas Corpus . NKP 2077, Vol.12 Decision no. 10604 Date of Judgment :2076/05/12 . Decided from Full Bench. Retrieved and translated from https://nkp.gov.np/full_detail/9660

MohanMaya et.al V. Central Regional Court et.al
For committing a serious error of law: The No. 77, 78 of Court Proceeding of Muluki Ain and Section 54 of the Evidence Act, 2031 has seriously erred and decided by the District Court, Regional Court and Regional Court as it appears to be contrary to the principle of justice and valid procedure, recognition and tradition, and an order has been issued to cancel those decisions and make decisions in accordance with the law.

Ghaneshyam Soni named as Bandana Soni V. High Court Patan(2077)

In Ghaneshyam Soni named as Bandana Soni V. High Court Patan[75] et.al the petitioner claimed for the bail instead of pre-trial detention for the indictment made upon her. However SC refused to issue the writ of Habeas Corpus as she has been kept in custody as per the procedured established by law. Instead it issued Directive Order in the name of Kathmandu District Court to rethink about the taking bail/bond keeping in view the health of the petitioner. SC has encroached the independence and conscience of the District Court by issuing the Directive Order to thinking about bail/bond hearing.

Advocate Sushil Kumar Sharma Sapkota on behave of Krishna Bahadur Magar V. High Court Patan (2075)
In Advocate Sushil Kumar Sharma Sapkota on behave of Krishna Bahadur Magar V. High Court Patan[76] the SC denied to issue Habeas Corpus writ as it upheld the denial of Kathmandu District Court to transfer the offence committed by Millitary Personnel against National Park and Wildlife Protection Act, 2029 to Millitary Court. Quashing of writ petition has preserved the independence of the lower court.

Sunil Tamang V. High Court Patan Case (2075)
In Sunil Tamang V. High Court Patan Case[77] the petitioner was arrested for the execution of the

[75] See Ghaneshyam Soni named as Bandana Soni V. High Court Patan, Case: Habeas Corpus. NKP 2077, Vol. 5 Decision No. 10494. Retrieved and translated from https://nkp.gov.np/full_detail/9560
[76] See Advocate Sushil Kumar Sharma Sapkota on behave of Krishna Bahadur Magar V. High Court Patan Case: Habeas Corpus NKP: 2075, Vol.10 Decision no. 10115 Judgment Date :2075/03/05. Retrieved and translated from https://nkp.gov.np/full_detail/9167
[77] See Sunil Tamang V. High Court Patan Case: Habeas Corpus NKP 2075, Vol.5 Decision no. 10004 Date of Judgment : 2074/08/14. Decided from Full Bench. Retrieved and translated from https://nkp.gov.np/full_detail/9055

judgement of High Court Patan on the offence related to Narcotic Drugs. The petitioner claim that he was aquitted from the charge in the trial court . However, he didn't get opportunity of hearing in the Appeal filed in HC by the Government of Nepal against the verdict of trial court. Petitioner claimed for the Habeas Corpus Writ as he wasn't given an opportunity for hearing as the notice for attendance for appeal defence was not released in the right location of his residence. However the SC quashed the petition stating that the notice of attendance for appeal defence was released in the location stated in defendant statement. As the petitioner hasn't fulfilled the duty of informing the change of location the notice of attendance released in homeland cannot be regarded faulty. Further the court stated that it is not appropriate to grant immunity to criminals who are arrested and imprisoned during the execution of the judgment by putting forward flimsy and inconsistent arguments regarding the deadline issued according to the law. If immunity is granted in that way, there will be a serious deviation in following the principle of finality of judgment.

TikaDevi Vs. Appeallate Court Biratnagar et.al

For auctioning without understanding the registrant: Before the notification for the disputed property received from the deed of will, the legal procedure should be given and the registrant has a chance to speak his case, the work done by giving the public notice of auctioning without giving the legal procedure has been canceled by the order of action.

Lhamu Tamang V. High Court, Patan et.al (2074)

In Lhamu Tamang V. High Court, Patan et.al [78] the petitioner challenged the over imprisonment for the fine by counting the period of detention from the date of judgement instead of date of arrest. The SC issued Habeas Corpus writ to release the petitioner from the imprisoment stating that the nature of imprisonment will be the same no matter how you are imprisoned. It further stated that it is against equality to adopt a double standard in the same nature of the content, since if the sentence of imprisonment is prescribed in the judgment, it will be counted from the date of imprisonment and if imprisonment for fine is to be counted only from the date of the judgment.

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[78] See Lhamu Tamang V. High Court, Patan et.al Case: Habeas Corpus NKP:2074 Vol.8 Decision no. 9864 . Date of Judgment :2073/09/28 Retrieved & translated from https://nkp.gov.np/full_detail/8915

Krishna Bahadur Gole V. High Court, Patan, Hetauda Bench et.al (2074)

In Krishna Bahadur Gole V. High Court, Patan, Hetauda Bench et.al[79] the petitioner claim for the merging of two punishment (one done by Bara District Court & another done by Makwanpur District Court) but the SC denied it stating that the petitioner will not get such privelege as he commited the second offence during the tenure of first punishment.

Arun Shrestha V. Kathmandu District Court et al. (2077)

In Arun Shrestha V. Kathmandu District Court et al. the petitioner challenged the decision of (High Court Patan upheld the decision of Kathmandu District Court that upheld the decision of Jugement Executive Officer) addition of imprisonment for fine of two different cases which exceeded the maximum term of imprisonment for fine should not be more than four years as conceived by the law. The SC overturn the decisions through the issuance of Writ of Certiorari and henceforth issued a order of Mandamus to give Prisoner notice accordingly[80].

Punya Prasad Gautam V. Kathmandu District Court et.al. (2076)

In Punya Prasad Gautam V. Kathmandu District Court et.al.[81] the petitioner challenge to overturn the notice of attendence published in the Rajdhani Daily Newspaper claiming that the petitioner address notice was errorneous. However SC didn't entertain such claim stating that it was only the pretention of the petitioner in order to create hurdles in judicial proceedings & give trouble to the opponent party. Although the decision was reached by the court through one-sided hearing, SC denied to overturn one sided hearing.

Prachesta Rana V. Kathmandu District Court et.al (2075)

In Prachesta Rana V. Kathmandu District Court et.al[82] , the petitioner claimed to overturn the decision of Kathmandu District Court that allowed her mother withdrawl of case which was filed

[79] See Krishna Bahadur Gole V. High Court, Patan, Hetaunda Bench et.al Case: Habeas Corpus NKP: Decision no. 9846 - Realization of prisoners 2074 Issue: 7 Date of Judgment :2074/04/09 Retrived and translated from https://nkp.gov.np/full_detail/8897

[80] See Arun Shrestha V. Kathmandu District Court et al. Case: Certiorari/Mandamus NKP:2077 Vol. 3 Decision No. 10465. Retrived and translated from https://nkp.gov.np/full_detail/9531

[81] See Punya Prasad Gautam V. Kathmandu District Court et.al.[81] Case: Certiorari/Mandamus NKP: 2076 Vol.3, Decision No. 10215. Retrieved and translated from https://nkp.gov.np/full_detail/9266

[82] See Prachesta Rana V. Kathmandu District Court et.al Case: Certiorari/Mandamus NKP: 2075 Vol.4 Decision No. 9995. Retrieved and translated from https://nkp.gov.np/full_detail/9046

on her behave (petitioner being Child at the time) as this withdrawl of case has affected her partitionary right. The SC quashed the writ petition stating that the petitioner mother's act was not against the welfare of the petitioner.

Prithvi Bahadhur Pande V. Kathmandu District Court et.al. (2073)

In Prithvi Bahadhur Pande V. Kathmandu District Court et.al.[83] , the petitioner challenged that it was againsnt the sovereignty of the nation to provide the information of its citizen to the foreign nation. But the SC quashed the petition stating that the informantion was provided to the foreign nation as Legal Assistance in the criminal case and such mutual legal assistance in double criminality cases cannot be considered to against the sovereignty of the nation. (Quashed, MLA)

Madhav Raj Ghimire V. Kathmandu District Court et.al.84 (2073)

In Madhav Raj Ghimire V. Kathmandu District Court et.al.[85], the petitioner claimed the the privilege as regard of No. 194 of the court proceeding of Muluki Ain even in the case of writs filed against the finality of judgement. However Court denied to give the petitioner such privilege stating that such privilege is only for the case of appeal and similar proceedings and not for petitioner who enter the court through writ jurisdiction.

[83] See Prithvi Bahadhur Pande V. Kathmandu District Court et.al. Case: Certiorari/ Mandamus. NKP: 2073 Vol.9 Decision No. 9667. Retrieved and translated from https://nkp.gov.np/full_detail/8710

[84] See Madhav Raj Ghimire V. Kathmandu District Court et.al. The tippani was attached by the Writ Depart seeking for the uniformity of decision in of the Bench in providing the privilege of NO. 194. However, the Court found that there was no contradiction among bench in providing such privilege. The Court explained that the privilege No. 194 given to the imprisoned/fined party while accepting appeal or similar jurisdiction cannot be extended while accepting the extraordinary jurisdiction (i.e writ jurisdiction) of the Court. Case: Certiorari/Mandamus Extended Full Bench Decision NKP:2073 Vol. 6 Decision No. 9309. Retrieved and translated from https://nkp.gov.np/full_detail/8652

[85] See Madhav Raj Ghimire V. Kathmandu District Court et.al. The tippani was attached by the Writ Depart seeking for the uniformity of decision in of the Bench in providing the privilege of NO. 194. However, the Court found that there was no contradiction among bench in providing such privilege. The Court explained that the privilege No. 194 given to the imprisoned/fined party while accepting appeal or similar jurisdiction cannot be extended while accepting the extraordinary jurisdiction (i.e writ jurisdiction) of the Court. Case: Certiorari/Mandamus Extended Full Bench Decision NKP:2073 Vol. 6 Decision No. 9309. Retrieved and translated from https://nkp.gov.np/full_detail/8652

Badri Kumar Khatri V. Kathmandu District Court the SC (2072)

In Badri Kumar Khatri V. Kathmandu District Court the SC[86], the petitioner claimed that due to the release of notice of attendence in wrong address he was unable to defence the charge made upon him in kinapping and body hostage. Though the application was filed in Kathmandu to overturn the notice, Kathmadu District Court quashed it stating that the time limit of six months as provided by No. 208 of Court Proceeding has been lapsed. The petitioner pleaded to declare null and void the very section of Muluki Ain as it contradict to the Article 24 (the right to Justice of the Interim Constitution of Nepal, 2063) and also sook for the overturning of the judgement in the case of Kidnapping and taking hostage of the body which was made contrary to the principle of fair hearing. But the special bench of SC denied the petitioner to give his claim.

Bishnu Maya Muri Magar V. High Court Patan (2075)

In Bishnu Maya Muri Magar V. High Court Patan[87] the petitioner claimed for overturning of the decision of HC Patan that overturned the interloculatory order of Kathmandu District Court to make expert verification of thumb print and signature. The SC overturned the decision of High Court Patan through the issuance of writ of Certiorari stating that High Court cannot intervene and interfere in the jurisdiction of evidence collection of District Court. Warning the High court for not intervening unnecessarly and unreasonably to the jurisdiction of lower court has empowered the independence of courts within the Judiciary.

Jugal Kishor Rathi V. Income and Tax Court (2025)

In Jugal Kishor Rathi V. Income and Tax Court[88], the Judge of Income and Tax Court denied to give another date of presence tot the petitioner as the former date of presence was provided was

[86] See Badri Kumar Khatri V. Kathmandu District Court, Case: Certiorari/Mandamus. NKP: 2072 Vol.10 Decision No. 9477. Retrieved and translated from https://nkp.gov.np/full_detail/8520

[87] See Bishnu Maya Muri Magar V. High Court Patan, Case: Certiorari/Mandamus. NKP: 2075 Vol. 8 Decision No. 10072. Retrieved and translated from https://nkp.gov.np/full_detail/9124

[88] See Jugal Kishor Rathi V. Income and Tax Court Case: Mandamus Decision No. 494. Judgement Date: 2025 Jestha 17. Retrieved and translated from https://nkp.gov.np/full_detail/9531 Petitioner ought to seek the writ of Certiorari to overturn the decision of the Income and Tax Judge not to give another Date of Presence to the

on public holiday. The petitioner challenge such action in the SC through the writ of Mandamus. The SC issued Mandamus Writ in the name of Income and Tax Court to provide another date of presence to the petitioner.

Rameshraj Aryal V. High Court Patan et.al. (2076)

In Rameshraj Aryal V. High Court Patan et.al.[89], the petitioner filed the writ of certiorari in order to quash the interim order of High Court Patan.The SC quashed the petition underlying some landmark principle regarding the writ jurisdiction of High Court and Supreme Court. The Supreme Court Stated that the Writ Jurisdiction Provided to High Court through the article 144(1) & (2) is concurrrent to the Writ Jurisdiction of Supreme Court as provisioned in art. 133 (2) & (3). The Supreme Court further stated only in case of Gross violation of human rights and Misscarriage of Justice, SC being the apex court can entertain writ over the writ heard by the High Court, otherwise writ over the writ heard by the High Court or final judgement made by the high court will not be entertained. The key part of the judgement has underlined below:[90]

> "The question arises whether the principle of judicial review prevents a writ petition in the Supreme Court under Article 133(2) and (3) against the same party in the content which has been reviewed by the High Court under Article 144(1) and (2), if the writ petition registered in the High Court is issued Is there an appeal to the Supreme Court on the matter of refusal to issue an interim order or an interim order or an interim order? To determine this question, first of all, the nature of interim order or interim order should be considered. in principle The purpose of the interim order is to prevent possible inconvenience or irreparable damage by keeping the content of the dispute as it is, while the purpose of the interim order is to facilitate the final resolution of the dispute. The duration and effect of both these orders shall remain in force until the final decision of the dispute. In this case, in the case of a dispute at the level of

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Petitioner. But Petitioner failed to seek the writ of Certiorari and the Court issued the writ of Mandamus without overturning the former decision of the Income and Tax Judge.

[89] See Rameshraj Aryal V. High Court Patan et.al., Case: Certiorari. NKP: 2076 Vol. 6 Decision No. 10294. Retrieved and translated from https://nkp.gov.np/full_detail/9360

[90] If an issue is In the high court under consideration under Article 144 (1) and (2) of the Constitution of Nepal then hearing the writ petition in the supreme court under Articles 133 (2) and (3) of the Constitution of Nepal on regarding the interim and interloculatory order is against the spirit of the constitution and the Principles of Judicial Sovereignty. Such practice should not be encouraged unless there seems to be miscarriage of justice. Although there is some difference in terminology in sections 133 (2) and 144 (1), there is not much difference in essence. Principally, the jurisdiction of the writ is an extraordinary right.

the High Court, there is usually no need to look at and interven from the external level. Except for reviewing the matter within the High Court in accordance with the law.

Why a writ cannot be filed in the Supreme Court on the same subject matter on the interim or interim order given by the High Court. According to the provision made in Article 133(2), the petition for writ shall be filed in the exercise of fundamental rights or if there is no alternative remedy or if it is ineffective. As the interim order in the dispute pending in the court is of an immediate nature, it cannot be considered that there is no remedy. In this situation, the order in dispute under Article 144(1) of the Constitution fulfills the conditions of Article 133(2) and it does not seem to be generally accepted that the Court should exercise extraordinary powers easily. In view of the fact that the writ jurisdiction is generally a discretionary jurisdiction, except in the case of direct arrest, it is desirable for the Supreme Court to adopt the approach of judicial self-restraint in matters pending in the High Court. There is a deviation in justice and it is imperative to intervene.

According to the constitution, the courts are autonomous to determine the dispute by determining the appropriate procedure in the dispute before them. Judicial autonomy should be respected by the higher courts. Without doing this, if the higher court intervenes again by using extraordinary jurisdiction in small procedural or interim orders, judicial autonomy will die and all the powers will be centralized in the higher court. It becomes productive from the point of view of easy access to justice. The Supreme Court is only the guardian of the subordinate courts, Not an interventionist in matters of justice. Judicial self-restraint is also its religion. Lower courts cannot act boldly when interfering in small claims Therefore, the Supreme Court should not act in a way that is inconsistent with the principles of autonomy and division of jurisdiction of the Judiciary."

Yaksyadhoj Karki V. High Court Patan et.al (2076)

In Yaksyadhoj Karki V. High Court Patan et.al[91], the Petitioner Anak Sky J.V. Company is a "A" grade construction business company. The company entered into an agreement with the Postal Services Department to complete the construction of the Postal Services Department building

[91] See Yaksyadhoj Karki V. High Court Patan et.al , Case: Certiorari. NKP: 2076 Vol.10, Decision No. 10369. Retrieved and translated from https://nkp.gov.np/full_detail/9435

within 24 months. However, he pointed out problems such as blockades and earthquakes, saying that the work would not be completed on time, and he was given an additional 26 months. However, the construction of the building could not be completed on time. As per the terms of the agreement for unnecessary delays, the Department of Postal Services imposed Liquidated Damage (i.e, 0.05% of the contract amount will be paid daily as compensation for the delay). The petitioner company then appointed a arbitrator on its behalf to resolve the dispute through the Dispute Adjudication Board and also wrote to the Opposition Postal Service Department to appoint a arbitrator on its behalf. However, the Department of Postal Services did not appoint an arbitrator on its behalf. The petitioner company applied to the Patan High Court to appoint one arbitrator from the court for the opposition Postal Service Department as per Section 7 of the Arbitration Act, 2055 BS. But the Patan High Court refused to appoint an arbitrator. There was no provision in the law to appeal against such decision of the Patan High Court. Therefore, the petitioner company entered the Supreme Court with a writ petition of certiorari / mandamus to overturn the decision of the High Court Patan. The Supreme Court quashed the writ petition, refusing to issue a writ. The SC held two major principle in this case: If the initial disputes are to be referred to the Dispute Adjudication Board, it should be mentioned in the agreement. And Unless the agreement clearly states that disputes will be settled by arbitration, the court itself cannot add new conditions to resolve disputes through arbitration.

Sunita Aggrawal V. Kathmandu District Court et.al (2071)

In Sunita Aggrawal V. Kathmandu District Court et.al[92] the petitioner demanded to overturn the decision of High Court Patan that overturned the interloculatory order of Kathmandu District Court which has fixed the date of separation (mano chuttiyeko) as the previous day of the filing of complaint. Hearing the petition the SC overturn the decision of High Court Patan. The SC held "A higher court can order only in cases where there is a clear violation of the law when ordering a matter of such an abstract nature under 17 no. In the event of a procedural error, the SC can issue an order to correct the error."

Pramod Raj Panta V. Kathmandu District Court et al (2072)

[92] See Sunita Aggrawal V. Kathmandu District Court et.al Case: Certiorari. NKP: 2071 Vol.11 Decision No. 9295. Retrieved and translated from https://nkp.gov.np/full_detail/8294

In Pramod Raj Panta V. Kathmandu District Court et al[93], the petitioner challenged that the summon released and the notice published in the petitioner in the Gorkhapatra daily for the attendence in the court for defence in the charge of cheating was unlawful. The petitioner demanded for overturning of the judgement of Kathmandu District Court on his part as the judgement was reached against the principle of fair hearing. The SC to found the summon released and notice published to be unlawful and thus the judgement of the Kathmandu District Court was partially overturned on the part of petitioner through the issuance of writ of Certiorari. And Mandamus Order was issued to decide the case again by including the petitioner in the judicial process.

RajKumar V. Appeallate Court Janakpur et.al

If the property is auctioned without the right even if it is a joint venture: As per No. 8 and No. 9 of the transaction procedure, the court of appeals of Janakpur, which held that the auction of geo-property from the land in the father's name should be suspended without considering it, has been annulled by issuing an order to send the property.

RamLakhan Yadav Vs. Kathmadu District Court et.al (2072)

In RamLakhan Yadav Vs. Kathmadu District Court et.al[94] the petitioner challenged the judgement of Kathmandu District Court on the Transaction Case as it was reached through onesided hearing. The SC found that the notice was released in wrong address by which petitioner hasn't got an opportunity of hearing. The SC overturned the judgement of KDC through the issuance of writ of Certiorari. Further, the court issued Mandamus Order to reproceed the case hearing by giving opportunity of hearing to the petitioner.

Moona Acharya v. the Kathmandu District Court (2047)

In Moona Acharya v. the Kathmandu District Court[95], the Court stated that a concerned authority, who is confiscating the property of a citizen, is under an obligation to provide an opportunity to the petitioner to defend his/her case. The Court further expressed, though

[93] See Pramod Raj Panta V. Kathmandu District Court et al Case: Certiorari. NKP: 2072 Vol. 1 Decision No: 9331 Retrieved and translated from https://nkp.gov.np/full_detail/8375

[94] See RamLakhan Yadav Vs. Kathmadu District Court et.al Case: Certiorari NKP: 2072 Vol. 5 Decision No. 9396 Retrieved and translated from https://nkp.gov.np/full_detail/8439

[95] See NLR 2018 at 18. NLR 2047 at 326. NLR 2048 at 559

procedural fairness is the requirement of justice, it does not mean that this requirement can be fulfilled at the disposal and convenience of the petitioner. Therefore, if a reasonable opportunity is given for a hearing, that is quite sufficient to satisfy the requirement of natural justice.

Dilsobha Shakya v. Kathmandu District Court et al (2059)

In Dilsobha Shakya v. Kathmandu District Court et al[96]. The petitioner challenged the decision of Land Revenued Office which was not executed as per the spirit of Kathmandu District Court. The Division Bench of the Supreme Court expressed the immense importance of the rule of natural justice and ruled that such rule is the foundation of justice, like to provide opportunity to the other party and other principles of natural justice. The Court reasoned, if the principle of natural recognition is not contemplated during the course of producing justice, it leads to defective justice with bad result.

Rajikol and Others v. Appellate Court Patan and Others (2053)

In Rajikol and Others v. Appellate Court Patan and Others [97] the petitioner demanded to overturned the judgement of Appeallate Court Patan that quashed the appeal of the petitioner made over the decision of Labor Office. The SC held that the right to appeal was conferred on by the law, and it was a legal right rather than a fundamental one. The Court also held that it was up to the policy of government to decide to whom be given the right to appeal. Therefore the Court did not generally consider upon the policy matters of government.

Basudev Dahet Tharu v. Parsa District Court and Others (2040)

In Basudev Dahet Tharu v. Parsa District Court and Others (2040) the Court observed that the law cannot help to those who do not care their rights in time.

Rabindra Vs. District Court Mahottari et.al

[96] See Dilsobha Shakya v. Kathmandu District Court et al. Case: Certiorari. NKP: 2059 Vol.5 Decision No. 7096. Retrieved and translated from https://nkp.gov.np/full_detail/3164

[97] See Rajikol and Others v. Appellate Court Patan and Others Case: Certiorari. NKP: 2053 Vol.2 Decision 6139. Retrieved and translated from https://nkp.gov.np/full_detail/1368

If there is a difference of opinion in the division bench of the Appellate Court, if it is not submitted to the third judge: According to the Rules of the Court of Appeal, 2048, Rule 11, if there is a difference of opinion between the judges of the joint bench and the third judge should be submitted to the third judge, it seems that the detention order submitted to the bench of three judges is void.

Advocate Laudev Bhatta v. Rupandehi District Court and Others (2027)

In Advocate Laudev Bhatta v. Rupandehi District Court and Others[98](2027) the Court observed that legal practitioner has power to take tarekh and do all other necessary things with regard to the dispute for which he is.

Bikash Rout Kurmi v. Sarlahi District Court and Others (2049)

In Bikash Rout Kurmi v. Sarlahi District Court and Others (2049) pronounced that it was against the rules of judicial administration to apply the ex post laws with a retrospective effect on the substantial rights of an individual. The procedural law may affect the perspective results. In this case, the latter amended Act was applied by the District Court after the filing of a case.

Kyam Khan Musalman v. Chitwan District Court and Others (2036)

In Kyam Khan Musalman v. Chitwan District Court and Others (2036) The Court rules that the writ of habeas corpus can be issued if the imprisonment so imposed exceeds the limit prescribed by the Court. The Court observed that there must be pre-condition satisfied while keeping a person in preventive detention.

Bhola Kumar Sherchan V. Chitwan District Court and Others (2026)

In a question was consideration whether the petition was under the rule (format) as prescribed in the proviso to rule 47(a) of the Supreme Court Rule 2021. The Court held the petition was under the rule and format.

AvadRam V. Appeallate Court Nepalgunj et.al

[98] See NLR 2029 at 326.

Verdict No amendment according to No. 17: The order to amend the judgment Under section 16 of the Administration of Justice Act 2048, it cannot be revoked by taking an application as equivalent to an interloculatory order that is within the scope of No. 17 of Court Proceeding of Muluki Ain. Such decisiom made to overturn such order would be overturned.

K.I. Singh v. Kathmandu Special Court (2021)

In K.I. Singh v. Kathmandu Special Court (2021) is one of the most talked case in judicial history of Nepal. Responding to the habeas corpus issue, the Court held that person who was imprisoned under the decision of the Court could not be released from the writ of habeas corpus. The significant of the verdict is that it differentiated judicial custody from the police custody.

Mahendra Prasad et.al V. District Judge, District Court Birgunj

In Mahendra Prasad et.al V. District Judge, District Court Birgunj, the SC denied to issue Habeas Corpus writ stating that in the case of the claim of the petitioners that their constitutional rights were violated by not providing bail for the purpose of preliminary investigation can be reached as they were held in custody through the order of the authorised judicial officer for the purpose of preliminary investigation. Petition would be quashed as Habeas Corpus is related to the issue that a person who has no right to detain has been detained or detained more than he is allowed to detain.

Suraj V. Western Regional Court et. al.

For taking a decision that went beyond the plaintiff's claim even at the appellate level: It seems that the decision that went beyond the plaintiff's claim was canceled by the order of transfer.

Janardhan Vs. Appeallate Court Hetauda et.al

In the case of dismissal before the deadline for filing the reply: If the reply is filed within the time limit according to the law, it appears that the case has been dismissed in violation of No. 179 while the deadline for filing the reply is pending, and the decision must be made according to the oral evidence from the reply according to No. 185

Tek Bahadhur V. Chitwan District Court et.al

In Tek Bahadhur V. Chitwan District Court et.al the subjudice of the case is that the SC issued interim order in the name of Chitwan District Court not to handover the case related to homicide to the Millitary Court.[99]

Kaluman V. Solukhombu District Court et.al [100]

For not keeping the defendant in Rohabar while deciding not to return the case: In accordance with Section 29(1) of the State Cases Act, 2049, the Government of Nepal has decided to withdraw the case, for ordering that the court may not grant permission to withdraw the prisoner before the specified date in the case of keeping the detainee in Rohabar. When it is seen that the order to appear before the court on the date before the specified date for the decision of the party who is adversely affected by the filing of the writ petition, it seems that there is an error in the order regarding the deadline as well as the general principles and legal provisions regarding the hearing.

[99] See Tek B. Ghimire V. Chitwan District Court Case No. 078-WO-0466
[100] See NKP 2057 Decision No. 6967

Ganesh Panjiyar V. Supreme Court (2075)

In Ganesh Panjiyar V. Supreme Court, Ram Shah Path Kathmandu et.al[101], Ganesh Panjiya filed a decision review petition in the SC being unsatisfied with the judgement passed by the 3-member full bench of SC. The petition was reviewed by the bench of 3-member and permission wasn't granted for review. Ganesh Panjiyar filed the certiorari/Mandamus writ petition claiming that it is against the justice of fair hearing to hear a review petition by a equal member full bench and challenged it in the very court that the decision should be overturned. The petition was heard by the 7-member full bench that declared the judgement passed by the 3-member review committee null and void and issued Mandamus order in the name of the registar to place the revision petition in the 5-member bench for hearing whether to grant or not to grant the permission for review.

Nani Kaji V. Bagmati Zonal Court et.al

If levy is levied without law: It seems that the action of the Bagmati Regional Court has been invalidated by filing the amount without any reasonable basis in the absence of factual evidence for the photo expenses.

Om Prakash V. Appeallate Court Biratnagar et.al

In the case of refusal to accept stamp duty: In the case of refusal to accept stamp duty, even if no one, including the petitioner, did not accept stamp duty during the auction, it seems that the order made to accept the stamp duty in the name of the petitioner-plaintiff contrary to the provisions of the law cannot be said to be lawful and just.

Prena Rajya Laxmi V. OPMCM et.al

In Prena Rajya Laxmi V. OPMCM et.al, Prerna Rajya Lakshmi Shah, daughter of former King Gyanendra Shah, filed a writ again claiming the land of Nepal Trust as her dowry.[102] In this bench, along with Rana, there is a bench of judges Meera Khadka, Harikrishna Karki, Anil Kumar Sinha and Prakashman Singh Raut. Prerna's writ came to the Supreme Court when it was decided that Rana would be the Chief Justice after the Supreme Court had twice decided to

[101] See NKP 2075 Vol 9 Decision No. 10084

[102] See Prena Rajya Laxmi Shah Vs. OPMCM et.al. Case No. 075-WC-0031) Although the writ filed in CB challenged the legality of Nepal Trust, the aim was same as previous i.e. to get the property back.

'implement the decision'. The government had decided to merge the land belonging to the former King Birendra to the Nepal Trust on 1st December 2064. Under the same land, Prerna reached the Supreme Court for the first time on 25th January 2071 by claiming 15 Ropani 1 Ana in Kathmandu Chauni. The then Chief Justice Ramkumar Shah and Judge Cholendrashamsher Jabara ruled that Prerna received dowry and decided that the land should be in her name in October 2072. After not being satisfied with the decision, Nepal Trust filed a review petition. Finally, the Supreme Court decided that the land will be in the name of Nepal Trust. It was decided that the said land was in the name of former king Birendra and it would be in the name of a trust formed to look after and maintain all the properties in the name of Birendra and his family. The joint bench of the then Chief Justice Sushila Karki, Judges Deepak Karki and Sapna Malla decided that the land will belong to the trust on 21st December 2073. However, Prerna again filed a writ on 6th December 2075, claiming that the government cannot bring the land she received as dowry under the Nepal Trust. Expressing dissatisfaction with the Supreme Court's decision to give the said land to Nepal Trust, she approached the Supreme Court to review the decision. However the Constitutional Bench quashed her writ petition.

Advocate Aashish Adhikari on behalf of Pode Tamang Vs Sindupalchock District Court

In Advocate Aashish Adhikari on behalf of Pode Tamang Vs Sindupalchock District Court SC issued Habeas Corpus writ to release 15 year Pode Tamang from prison and issued writ of mandamus in the name of government to establish reform home.

Krishna Shrestha Vs. Kathmandu District Court

In Krishna Shrestha Vs. Kathmandu District Court, as the deadline notice for auction was pasted in the office which was closed the deadline has to be renewed as the party has not received the information properly.[103]

Rupajyoti Vs. Labour Court

In Rupajyoti Vs. Labour Court, the SC held that in the absence of other alternative remedies the decision of the Labor Court, a writ petition may be filed under the extraordinary jurisdiction of this Court.[104]

[103]See 2064 Writ NO. 0521 Case: Certiorari/Mandamus

Saptan et.al V. Appellate Court Dhankuta

Another decision should not be taken while the appeal is pending: It is against the principle of natural justice to decide one appeal against the judgment of the same court while keeping the appeal pending.

Ncell Vs. Large TaxPayer Office

In Ncell Vs. Large TaxPayer Office, Ncell, a private telecom giant, on Monday lodged a petition at the Supreme Court, saying the Large Taxpayers Office has wrongly determined their tax liability at Rs39.06 billion. Although the telecom company did not question the order to pay tax, it has said its outstanding tax stands at Rs14 billion. It should not be liable to pay fee and interest as determined by the Large Taxpayers' Office[105]

Naredra Kumar V. Appellate Cout Rajbiraj et.al

After the execution of the decision, 17 no. It is not possible to make an order on the application of: The case that has already been completed, it cannot be said that the case is under consideration in the court. After the verdict was announced, 17 no. An order cannot be made in the following application. The order is cancelled.

Advocate Aashish Adhikari On behalf of Bablu Godia Vs Banke District Court

In Advocate Aashish Adhikari On behalf of Bablu Godia Vs Banke District Court , Banke DC & Nepalgunj Appellate Court ordered Bablu Godia (who was below 16, Robbery case) to put in prison. But according to Children Act, 1992, Bablu Godia was entitled to be kept in Juvenile Reform Home.

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[104] See NKP 2063 Issue 4 D.No. 7675

[105] In the Initial Writ petition 074-WO-0475/ 074-WF-0015 by Ncell against the Large Taxpayer Office the SC held that it ought to pay capital gain tax. In later writ the amount determined was challenged. Although it implicity seemed that the challenged was made against SC verdict though explicitly it is seen against Large Taxpayer Office.

https://kathmandupost.com/national/2019/04/22/ncell-lodges-petition-at-supreme-court-challenging-tax-amount-set-by-large-taxpayers-office

Shyam Bahadhur Jimba V. High Court Patan (2075)

In Shyam Bahadhur Jimba V. High Court Patan, Hetauda Bench the petitioner claimed that the person who has been convicted by the Makawanpur District Court for charge of Sawari Jyan wasn't him. The petitioner claimed that his name and addrress do not match. But the High Court Patan, Hetauda Bench denied to issue the Habeas Corpus Writ. The petitioner came to Supreme Court with the Habeas Corpus Writ. The Writ was issued and petitioner was realesed. [106]

[106] See Case No. 2074-WH-0004, Decision Date: 2075-09-05

CHAPTER VI

FINDINGS, CONCLUSION AND SUGGESTIONS

FINDINGS

The Judicial Review in Nepal has been observed as follows:

1. The nature and scope of Judicial Review in Nepal is closer to that of Indian practice. SC of Nepal has made numerous Judicial Reviews of legislative acts, administrative actions and judicial decisions. The Golaknath and Keshavandan Bharati case are not only the Example of Judicial Review done by SCI, in addition they are also the Judicial Review of Decisions passed by the SC in Sankari Prasad and Sajjan Singh Case. Similarly, in Nepal, Ganesh Panjiyar Case is the bonafied example where SC has reviewed its own decision through writ jurisdiction. Similarly, Yagyamurti Banjhade Case, Annapurna Rana Case , Bablu Godia Cases are the genuine representative examples in which SC has reviewed the decision of lower courts.
2. The burden of of proof to prove the unconstitutionality of legislation lies in the petitioner.
3. Every laws and decision made by courts are presumed to be constitutional unless declared null and void.
4. Lower rate of finalization of the Judicial Review case after the establishment of Constitutional Bench.
5. Issuance of Directive Order is common in many of the laws and decision challenged.
6. Judicial Review is done by SC on Judicial Review done by lower courts. (Mostly where there is gross voilation of human rights and misscarriage of justice.)
7. Many of the delegated legislation are declared null and void.
8. Extended full bench of SC made the Judicial Review if the full bench decision challenged and full bench makes Judicial review of the decision of division bench. (Panjiyar Doctrine)
9. Many of the lower court inter loculatory order are challenged in the Supreme Court

through extraordinary jurisdiction.

10. Although the decision and order passed by the constitutional bench is final but attempts are made to challenge them in general bench of SC. (Ex: Ganesh Regmi Case which challenged the CJ decision to stay at leave in the hearing date of the case of Constitutional Council where CJ himself was one of the member.)
11. SC has occassionaly lost the self-restraint and has shown over activism in certain cases. (Ex. Rishi Kattel Case where the SC broke the NCP into two fragments).
12. Many administrative decision reviewed by SC includes abuse of power, misuse of power, irrational and illogical decision and decision made through one sided hearing.
13. SC has frequently encroached the independence and conscience of the District Court by issuing the Directive Order to thinking about bail/bond hearing.
14. At many cases the SC is found to be reluctant to overturn the Cases which were challenged for being decided one sided with releasing notice of attendance properly.

CONCLUSION

Judicial Review is not static concept. It scope is expansive and has been used in a very different way then for what it was evolved. Except the few scholars many scholars has failed to properly define and classify the concept of Judicial Review is as they have excluded that through Judicial Review even the judiciary scrutinize its own decisions. In the beginning days it has been observed that even judges were opponent in the task performed by them as their duty. Later such practice is not observed . This might be due to the principle laid down by Supreme Court in Ashna Parajuli Case.[107] The Supreme Courts of Nepal is one of the key institutions in the government having the power of judicial review. The Court's rulings have an impact on politics, society, and the economy. They exhibit statesmanship in addition to the judges' excellent artistry. After the entry of Nepal as Fedral nation the judicial review has very wide and expansive scope.

[107] See Asna Parajuli Vs. District Judge Shrikrishna Bhattarai NKP 2074 Issue: 5 Decision no. 9805 In this case Supreme Court Order to the Registrar to be sensitive towards filing a complaint or case in a court of law by making a judge as an opponent in relation to judicial work.[107]

The Constiution of Nepal (2072) has provided both expressed and implied limitation of Judicial Review.

Although our Constitution does not adhere to a precise separation of powers, it does establish an independent court with broad authority over legislative and executive actions. For judges and the general public who seek judicial redress against alleged legal wrongdoing or executive excess, the independence and integrity of the judiciary are of the utmost importance and interest in a democratic form of government. A guarantee of faith inscribed in the Constitution, independent judiciary is the fundamental component, and judicial review is the fundamental framework. The constitution mandates and the people demand an unbiased and independent judiciary.

One of the major task of judicial review is to interpret and uphold the basic law, which is the solemn will of the sovereign people, to judge constitutional infractions, and to annul legislative laws that violate the Constitution. By addressing the demands of the people on an economic and social level, it is a great institution for upholding and keeping harmony between the rulers and the ruled.

Although the GolakhNath Case and Keshavanda Bharati Case decided by Indian Supreme Court are famous as the Judicial Review of Legislation. In strict speaking they are also the Judicial review of Judical Decision as in both case Supreme Court reviewed the already decided case i.e the Shankari Prasad Case and Sajjan Singh Case.

The judicial review system is a crucial tool for defending and advancing fundamental human rights against any unwarranted intrusion by the legislative and executive branches of the government. It is crucial to the operation of a limited government. It is intended to combat legislation or other executive action that conflicts with the country's fundamental law. Legal review is necessary in a judicial system to perform a few important roles, such as legitimizing government action, defending the Constitution from government overreach, and shielding the populace from tyranny. In general, the goal of judicial review is to stop authorities from going beyond their authority. It does this by requiring them to exercise the authority that is legally theirs and by controlling how they wield it by fixing glaring flaws in their processes.

The concept of judicial Review has its foundation on the doctrine that the constitution is the supreme law. It has been so ordained by the people. It is the ultimate source of all political authority. The constitution confers only limited source powers on the legislature, executive and judiciary. If these organs consciously or unconsciously oversteps these limitations judiciary should hold it in control, to thwart its unconstitutional attempt even if it is done by the judiciary itself.

Judicial review is crucial in the area of administrative law because it is used to regulate how a variety of tribunals and other individuals who have a responsibility to act in a judicial, administrative, or quasi-judicial capacity exercise their authority. In administrative law, it is thought that judicial review offers sufficient protections against arbitrariness, and the system of judicial review serves as the cornerstone for the entire superstructure of control mechanisms. Rather than focusing on the legality of administrative action, the system of judicial review in administrative law is fundamentally concerned with the legitimacy of administrative process.

All types of judicial scrutiny are together referred to as judicial review. However, the usage could make us ignorant to the range of potential judicial duties in relation to official behavior and might even result in incorrect inferences. For instance, a statute may explicitly or implicitly state that an administrative decision is final and cannot be overturned or reevaluated by a court or other authority.

The judiciary has a responsibility to make sure that all laws are in accordance with the Constitution's requirements. The term "judicial review" not only refers to the authority to carefully examine laws and executive actions, determine whether they are in accordance with the Constitution, and, if they are, to declare them invalid but also refers to the examination of its own judgement and judgement passed by lower courts. Judicial Review of Judicial Decision is vital for controlling the gross injustice and miscarriage of the justice by the court. The judiciary must be independent, unbiased, and competent in order for this power to be used effectively. Judicial Review keeps the lower courts and Supreme Court in track of justice. Judicial Review is a puts the court in Judicial Discipline.

Judicial review is absolutely essential and not undemocratic because,the judiciary while interpreting the constitution or other statuses is expressing the will ofthe people of India as a whole who have reposed absolute faith and confidence in the Indian judiciary. If the judiciary interprets the Constitution in its true spirit and the same goes against the ideology and notions of the ruling political party, then we must not forget that the Constitution of India reflects the will of the people of India at large as against the will ofthe people who are represented for the time being by the ruling party. If we can appreciate this reality, then all arguments against the democratic nature, of the judicial review would vanish. The judicial review would be undemocratic only ifthe judiciary ignores the concepts ofseparation ofpowers and indulges in "unnecessary and undeserving judicial activism". The judiciary must not forget its role of being an interpreter and should not undertake and venture into the task of lawmaking, unless the situation demands so. The judiciary must also not ignore the self-imposed restrictions, which have now acquired a status of "prudentjudicial norm and behaviour". Ifthe Indian judiciary takes these two "precautions", then it has the privilege of being the "most democratic judicial institution of the world, representing the biggest democracy ofthe world.

The Judicial Review of Judicial Decisions has been made large extent on the Interloculatory order made by the lower courts. For eg: In Annapurna Rana Case the Virginity Test order of Kathmandu District Court was challenged. The detention made by lower court without following the procedures established by the law. For Eg: Advocate Aashish Adhikari On behalf of Bablu Godia Vs Banke District Court: Banke DC & Nepalgunj Appellate Court ordered Bablu Godia (who was below 16, Robbery case) to put in prison. But according to Children Act, 1992, Bablu Godia was entitled to be kept in Juvenile Reform Home. Many instances are seen where SC has been over active and has failed to maintain self-restraint. Reviewing of Ncell Case and Perana Rajya Laxmi Case through writs against finality of judgement are some examples.

SUGGESTIONS

Most of the scholars and writings still define Judicial Review as a tool to scrutinize the action of other branch of Judiciary. In fact, Judiciary scrutinize its own action too. Due to evolving nature

of Judicial Review it is necessary to revise the definition made on Judicial Review. In narrower sense (scrutinizing the action of legislature) and broad sense (scrutinizing the action of legislature and administrative bodies) has been frequently used but except the few writers many of them has failed to define in much broaders sense i.e. scrutinizing the legislative, administrative and judiciary action. The following things must be considered in order to raise the glory of Judicial Review.

- In a situation, the Nepalese system of judicial review also needs to be modified and reformed. We need to establish a Special Constitutional Court for judicial review of legislation. It is impractical to provide the review of all local as well as province legislation review to the Constitutional Bench of Supreme Court. This helps to minimize the delay in the hearing of regular cases.

- In the beginning (baby phase) it is better to provide High Courts to make procedural review of legislation passed by local and province legislature and later both procedural and substantive review of province and state legislation can be provided to the High Court. Large no. of Judicial Review of Judicial Decisions are related to the unlawful detention made by the lower courts, the intensive training has to be provided to the judges. Feasible alternatives must be created to hear the cases related to orders and decision made by the lower courts.

- There is an inherent defect in the process of judicial review where the courts refrain to go into the merit of the case. They examine only the legality of the action. Such Indian principle is not necessary to be followed by the Supreme Court of Nepal. Being the apex it should be brave enough to enter into the merit and finalize the case rather than issuing mandamus to the lower courts to redecide the cases. This reduces the delay in the justice and procedural hurdles to be faced by the parties.

- The Judgement passed by the court need to addrress all the relevant question raised by the parties. Ignoring or Partially addressing of such question creates dissatisfaction in the

party. So that the party will adopt writ jurisdiction challenging the lower courts order and decision. There should be caution in the exercise of Public Interest Litigation petitions. Before being admitted for hearing they should be properly scrutinized. Even the case finalized by the lower courts are challenge through PIL in order to bypass the principle of resjudicata.

- At least one district one child reform home must be established. In many cases the district court has ordered the children below 18 years to keep in jail for the execution of judgement reasoning that there is no reform home availiable. Such has been challenged through Habeas Corpus Petition and writ has been issued. Bablu Godia & Pode Tamang case are some representative examples for it. Supreme Court should keep in mind about the principle of self-restraint along with the principle of judicial activism so that it will not spoil the justice being over active.

- Cheap and Speedy justice has to be ensured by making necessary amendments in the laws. Procedural formalities and hurdles created by it has delayed the justice. For Ex: Ganesh Panjiyar has to wait for several years to terminate his case.

- Discretionary powers given to judges should not be unguided and uncontrolled. It has to be limited by certain ways or methods so that they do not become unguided. Judicial mind should be used while exercising of discretionary powers. Discretionary powers in good faith and for a proper, intended and authorized purpose. They need to act in a reasonable and impartial manner. It should be used keeping in view the justice, public interest and the welfare of the society.Supreme Court has to evolve continuously new principles, standards, guidelines and parameters so that discretionary powers conferred on the judges may not abused or over-used.
- The protection of the fundamental rights is more important. Therefore judicial review should be made more effective by including more institutions in its fold. Even a private body which performs public duty should be amenable to Part-Ill ofthe Constitution.

- The courts required not to interfere in policy matters and political questions unless it is absolutely essential to do so. Judges must be concern with justice not with popularity. Decision must not be done just to catch up the attention of media and to show stunt.
- Supreme Court should never encroach the jurisdiction of lower courts. Under the principle of independence of judiciary it must be noted that all courts are functionally independent from each other.
- The expanded role of the power of judicial review has been given the title of 'judicial activism' by those who are critical of this expanded role of the judiciary. Court even has to function as legislature and executive. For the sake of justice Supreme Court shouldn't retrace back for making judicial intervention over its own decision.

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