
SUPREME COURT AND THE POWER OF JUDICIAL REVIEW: A CRITIQUE

RAHUUL KISHNANI¹

PEER REVIEWED

ABSTRACT

India chose a parliamentary type of democracy, in which all sections of the population are involved in policy-making and decision-making, ensuring that all points of view are represented and that all sections of the population are fairly represented in all such bodies. The Judiciary has a critical function to play in this type of inclusive democracy. That is the principle of accountability in any republican democracy, and regardless of the constitution's other expositions, this core subject must be recognized by everyone wielding public power. The Supreme Court's Judicial Review Power is the consequence of a succession of cases and a long-running battle with the legislature. Because the Indian Constitution is so explicit and thorough, the Indian Supreme Court was at a disadvantage from the start. Given this disadvantage, it has fought tooth and nail to keep as much Judicial Review as possible. This paper critically reviews the role and powers of Supreme Court towards Judicial Review in India.

Key Words: Supreme Court, Power, Judicial Review, India, Constitution.

¹ ADVOCATE

REGAINING POWER BY SUPREME COURT

The Ninth Schedule that was added in year 1951 by the parliament by way of amendment to the constitution, its importance was that laws included in it were kept outside the purview of Court's Jurisdiction, i.e. the Court was barred from exercising its power of Judicial Review over any legislation included in this Schedule, irrespective of whether it violates Fundamental Rights or not. This amendment granted the government the power and freedom to enact any law they wanted, thereby placing a blanket ban on its judicial scrutiny, even if it went against Fundamental Rights. The Schedule was designed to protect the Land Reform and Nationalization Laws, as well as laws meant for concentration of economic powers and was intended be used sparingly, but the number of laws increased from 13 to 284 before the courts could intervene.

Then, this scenario change in the well known Supreme Court ruling. In the I.R. Kohelo case² primarily, it is laudable for being a unanimous judgment of the Supreme Court's Constitution Bench of nine judges, and secondly, and most importantly, because the Supreme Court's decision in this case restored the Power of Judicial Review that was taken away by the First Amendment of the Constitution.

In this judgment, the court invoking the Basic Structure Theory to the Ninth Schedule, stated that the laws listed in the Ninth Schedule are also subject to Judicial Review if they violate Fundamental Rights enshrined in the Constitution. However, the court in the same breath added that the standard of Judicial Review is different in this case than will be different than the ordinary statutes. As the criteria for Judicial Review of ordinary legislation is whether the laws are in violation of Fundamental Rights or the Constitution.

By this, a severe test of qualifying for Judicial Review was established for laws in the Ninth Schedule and it brought them under the Jurisdiction of the Court thereby ending the long-standing blanket protection of the Ninth Schedule. With the Supreme Court's decision in this case, not only Judicial Review, but also the Doctrine of Basic Structure, has achieved its ultimate aim. The date of the Keshavananda Bharati judgment i.e. on April 24, 1973 was set as the cutoff

² SCC 2 2007 p1

date for evaluating legislations prospectively on the touchstone of Basic Structure. That any law enacted after this date was open to challenge on the ground of violation of Fundamental Rights forming part of the basic structure. It was affirmed that *Article 14* (Right to Equality), *Article 19* (Right to Life), and *Article 21* (Right to Die), are the rights that according to the Supreme Court, even if they are removed from the Constitution, they retain their existence and meaning in the spirit of the Constitution. Thus, the same was held to be inseparable part of the Constitution.

These Supreme Court judgments in relation to the Constitution's amending power as well as the criteria for Laws in the Ninth Schedule brought new life to the Supreme Court's power of Judicial Review Power in India. Consequentially, the present established legal status is that there is no longer an area of legislation where a Court cannot consider its legality as enacted by the Legislature or executive acts. In light of this, it is necessary to examine the Constitutional provisions grating power of judicial review to the courts under the Indian Constitution.

CONSTITUTIONAL PROVISIONS IN INDIA

The India Constitution provides this system of judicial review inspired from US Constitution wherein the powers of the parliament are supreme but the courts also have powers of reviewing the enactments of both the parliament and state legislatures. This makes the courts more powerful and grants an instrument of the judicial review. The various provisions of the Constitution which provides for power of judicial review are part of our Constitution in various articles. These articles are Article 13, 32, 131-136, 143, 226, 145, 246, 254, 251 and 372. Wherein, Article 13 grants powers to the courts to declare any law as void which contravenes any fundamental. Article 32 provides the right to constitutional remedies to enforce fundamental rights. Similarly, Article 226 empowers the high court to issue directions, orders or writs in the form of Mandamus, Habeas Corpus, Quo-Warranto and Certiorari for enforcement of fundamental rights. In addition to above, Article 143 confers advisory jurisdiction upon the Supreme Court. Further, Article 372(1) provides that all the law in force in the territory of India immediately before the commencement of the constitution shall be in force therein until altered, repealed or amended by a competent legislature or an authority.

Article 131-136 empowers the courts to adjudicate disputes between individuals, and the state, between the states and the union; and while doing so the court may also be required to interpret the provisions of the constitution and the interpretation so given by Supreme Court becomes the law binding on all courts of the land.

Article 245 provides that the powers of both parliament and states legislature are subject to the provisions of the constitutions and the legitimacy of any such legislation can be challenged before any court of law on that particular subject matter or if such law infringes any of the fundamental right. Article 246(3) states that the powers of both parliament and state legislatures are subject to provisions of the Constitution of India. Thus, these are some of the provisions exercised by the courts in India to judicially review any law. The courts have often by way of their judicial pronouncements have expanded the scope and application of the above provisions of the Constitution.

EXPANSION OF THE SCOPE OF JUDICIAL REVIEW

The judges breathe life into the dry skeleton provided by the legislature, resulting in a living organism that is appropriate and adequate to meet the society's demands (P.N. Bhagwati). Chief Justice P.N Bhagwati's statements are noteworthy since judges' roles include not only rigidly interpreting the constitution but also giving actual meaning to legislation.

Judicial review in India is based on the Constitution and its scope is well defined by the Supreme Court of India and the same is also reaffirmed by way of judicial pronouncements on a regular basis. To precisely define the term *Judicial Review*, it is the checks and balance of Acts or Laws by the Judiciary as enacted by the Legislature if they are in violation of the provisions of Constitution. This is power of judicial Courts to check the conduct of the legislature; however, it is not only confined to Laws enacted by the Legislature. This reach has now greatly expanded and a new Doctrine is evolved known as *Judicial Activism*, which is step ahead of the *Judicial review*. According to Justice *P.N Bhagwati*, the Court's ruling in the Golakh Nath and Keshvanad Bharti case is an example of Judicial Activism.

“Judicial activism, on the other hand, touches the Judicial Review's border threads. The scope of Judicial Review has been expanded to include maximum limitations. And Judicial Activism can readily cross these lines, leading to accusations of Populism or Excessism (S.P

Sathe p.43). Activism is populism when doctrinal effervescence transcends the institutional ability of the Judiciary to transform theory into reality, and excessivism when a Court assumes obligations ordinarily done by other government co-ordinate organs” (S.P sathe2, p43).³

After the period of emergency, i.e. after 1976, judicial activism by the courts became more positive and more social oriented, as the courts by now realized that the citizen’s liberty cannot be left at the mercy of the State. After 32 years of republic, Professor Baxi optimized, *the Supreme Court of India has become the supreme court of Indians* (Upender Baxi in P.K Gandhi p61). The court became much more approachable and user-friendly. For this Court, two strategies were used: (1) it reinterpreted the fundamental provision in a more liberal manner in order to maximize the rights of the people, particularly the disadvantaged ones; and (2) it made the courts work easier by relaxing its technical rules of locus standi, accepting letter petitions, and acting sue moto.⁴

The distinction between review and activism can be further understood from the established principles by Courts, wherein the Judicial Activism has an impact on social welfare and even if a person lacks locus standi, they can file a (Public Interest Litigation) PIL before the Supreme Court. The purpose of PIL is obvious from the name. PIL’s history may be separated into two distinct periods. The first phase focused primarily on improving the lives of the poor, depressed, and disadvantaged members of society. During this time, the courts heard and decided a number of PILs concerning a variety of important and well-known issues in modern society. We can better understand this with the help of few Case Laws made during that era.

First and foremost, it will be apt to examine the landmark court ruling in the case of ***D.S. Nakara and Ors. vs. Union of India (UOI)***.⁵ where the court granted an additional payment of Rs. 300 crore in pension, benefiting millions of people in our country. The court made this judgment after considering the societal conditions, such as rising prices, declining rupee value, and the plight of the elderly. The *Guinness Book of Records* recognized this historic ruling because no previous Court decision has directly benefited as many people in the world.

³ S.P Sathe, “Judicial Activism: The Indian Experience”, “Washington University Journal Of Law & Policy”, Vol6, 2001, http://Heinonline.Org/Hol/Page?Handle=Hein.Journals/Wajlp6&Div=5&G_Sent=1&Collection=Journals

⁴ Upender Baxi, “Taking Suffering Seriously: Social Action Litigation In The Supreme Court Of India” In P.K. Gandhi Ed. “Social Action Through Law Partnership For Social Justice”, “Naurang Rai, Concept Publishing Company, New Delhi, India

⁵ SCR 2 1983 p165

Another case to consider is that of *Hussainara Khatoon and Others vs. Bihar Home Secretary and Others*.⁶ In this case, a large number of criminal writ petitions were grouped together as petitions by under-trial prisoners, many of which were based on letters sent by the under trials wherein certain orders were passed for release of certain prisoners on bail on their executing personal bonds for appearance without any monetary obligations. The Court issued a comprehensive order on a habeas corpus petition filed in reference to the situation of circumstances in Bihar on February 12, 1979. This was followed by *Re: Hussainara Khatoon and Ors* instructions, which were issued from time to time. These directives contain guidelines for the release of under-trials who are languishing in jails due to a lack of timely disposition of outstanding cases. The Supreme Court ruled that a citizen's Right to a Quick Trial is protected under *Article 21* of the Constitution.

The Courts then became the advocate for environmental cases in the second phase. Many PILs on environmental issues were filed with the court which transpired into good and valuable decisions during this area. Several NGOs have found that addressing public issues through PILs has proven to be the most fruitful undertaking whereas even courts have taken a supporting and encouraging role. The Judiciary has also not let down such groups, and have passed notable orders in the petitions filed by these groups. For example, the common cause and the Bombay environmental action group have filed over 100 PILs apiece.

*Tirupur Dyeing Factory Owners Association Vs. Noyyal River Ayacutdars Protection Association and Ors*⁷ The court ruled in this case that polluting industries must take all necessary steps to prevent environmental degradation and to remove sludge and other pollutants from the affected area. The polluter's liability for environmental harm is absolute and it is not limited to the victims of pollution, but also includes costs of restoring a pollution-free environment for the society at large. The "*Polluter Pays*" principle and the "*Precautionary Principle*" have now been accepted as law of the land and also as part and parcel of the country's environmental law. The philosophy of "*Sustainable Development*" must be read with the principles of "*Polluters-Pay*" and "*Precautionary Principle*."

⁶ CriLJ 4020 1995

⁷ SCC 9 2009 p737

M.C. Mehta vs. Union of India (UOI) and Ors⁸ In this case, the Court held that as long as mining operations may be carried out in accordance with the principle of sustainable development, the Court should not impose a complete ban on mining because it creates revenue for the State. However, pursuant to Paragraph 89, the possibility of implementing a ban in the future was left open. The macro consequence of widespread land and environmental degradation caused by a lack of corrective actions has been overlooked by authorities (including rehabilitation plan). Mining within the Principles of Sustainable Development is referred to as “balancing,” while mining outside of the Principle of Sustainable Development is referred to as “banning.”

SUPREME COURT JUDGMENTS INVOLVING SOCIAL JUSTICE

There are numerous instances where the Supreme Court has ruled on numerous cases involving social welfare. However, the court’s pleasant and upbeat attitude, as well as the progress of the PIL, resulted in a slew of issues. All of these decisions are correct in their contexts, but it does not mean that judicial activism is always viewed favorably. The following two decisions will demonstrate the potential for judicial activism to inflict harm.

Ashok Hurra vs Rupa Bipin Zaveri⁹ After a few rough years of marriage, the plaintiff and defendant filed for divorce by mutual consent in this case. However, before the divorce was finalized, the wife withdrew her consent. Keeping this in mind, the lower court denied the husband’s divorce. The High Court, however, granted divorce, citing the fact that permission was withdrawn after the 18-month term prescribed by the Hindu Marriage Act. The wife took her case all the way to the Supreme Court. Meanwhile, the spouse married and had a son with another woman. The Supreme Court ruled that, notwithstanding the fact that the husband should not have married before the appeal was decided, the marriage had irreversibly broken down. The parties had been in excruciating pain for the past 12 years, and it would be unjust to add to their misery. Despite the fact that the court made harsh judgments regarding the husband’s behavior, the Court decided that divorce had been granted and the second marriage was legitimate.

The objective of an appeal to the Supreme Court is effectively defeated by this shocking and amazing decision. The Supreme Court agreed that the husband should not have remarried

⁸ SCC 6 p142 2009

⁹ AIR 1266 1997

before the appeal was decided, but it upheld the validity of the second marriage. Although there was no chance of reconciliation in the marriage, the manner in which the divorce was granted invited considerable criticism. It cannot be argued that the divorce was granted with finality because the appeal was still ongoing in the Supreme Court. Despite the fact that the husband remarried, the Supreme Court upheld the marriage as legal. This could become a weapon in the hands of persons who wish to remarry before the outcome of their appeals in higher courts.¹⁰

Arnit Das vs. State of Bihar¹¹ At Patna, a murder case was filed in which one Abhishek was shot and killed. The petitioner was detained in connection with the crime on September 13, 1998. The petitioner was brought before the Additional Chief Judicial Magistrate in Patna the next day, who remanded him to a juvenile facility in Patna after recording his statement. The petitioner claimed to have been born on September 18, 1982, making him a minor who was entitled to protection under the Juvenile Justice Act of 1986. On behalf of the prosecution, the petitioner's claim was refuted. An inquiry was ordered by the A.C.J.M. under Section 32 of the Act. A Medical Board recommended that the petitioner be examined. The A.C.J.M. found that the petitioner was above 16 years of age on the date of the incident and so did not need to be tried by a Juvenile Court after receiving the Medical Board's findings and any other evidence presented on behalf of the petitioner. The Sessions Court upheld the decision in an appeal, and the High Court upheld it in a revision. On appeal to the Supreme Court, it was decided that the relevant date is the day the offender is brought before a competent body, not the day the offence is committed.

It was never a point of contention whether the criminal was a minor at the time the crime was committed. As a result, the Supreme Court never had to decide whether the date of the crime or the date on which the offender is brought before a competent body is the date on which the offender should be considered a juvenile. The Juvenile Justice Act was designed to defend the interests of juveniles, taking into account the age of the offender at the time of the offence. The fact that the criminal may not have been fully aware of the consequences of his actions adds to the legislation's sanctity. What happens, though, if an offender is apprehended 30 years after the crime was committed? Is it appropriate to place him in a remand home alongside other juveniles

¹⁰ Gurram Ramchandra Rao, "Judicial Review In India", "[Http://Vlex.In/Vid/Judicial-Review-India-29344398](http://Vlex.In/Vid/Judicial-Review-India-29344398)", September 23, 2010.

¹¹ AIR 2001 3575

despite the fact that he is not their age? Is he tried as a regular offender notwithstanding the fact that the crime was committed when he was under the age of majority?¹²

The offence itself remains an offence committed by a juvenile, regardless of how much time has passed since the incident and the person should be evaluated according to his age and intent at the time of the offence. The Supreme Court, on the other hand, offers no guidance on the aforementioned issue or how this specific instance should be handled.

Professor Sir William Wade, Q.C., who praised the monograph “Judicial Activism and Constitutional Democracy in India” as a “small book devoted to a big subject,” cautions that, while praising Judicial Activism, “it is simple that the judiciary is the least competent to function as a legislative or administrative agency.” For one reason, Courts lack the resources to collect precise information or conduct in-depth investigations. If they rely on advocates who appear in front of them for data, they are likely to receive politicized or incomplete information. If courts must rely on their own knowledge or study, however, it will always be selective and subjective. Courts also lack the ability to effectively supervise and implement the consequences of their orders, schemes, and mandates, because they mandate for isolated cases, and their decrees do not account for the different and varying situations that administrators will face when implementing the mandates in other cases. In addition, if a Court’s order is discovered to be unworkable or requires revision, there is no way for the court to overturn it.” The learned author advises that “the Supreme Court could have well left the decision-making to the other branches of the Government after directing their attention to the problems, rather than itself entering the remedial field,” highlighting the difficulties that courts are likely to face if they enter the fields of legislation or administration.

Another issue that the Supreme Court is dealing with is the overflow of cases brought by PILs. Some NGOs have made it a sport to file writ petitions on important issues, and don’t even mind if they are frivolous and unworthy. One of the most common misunderstandings in judicial review of legislative and executive action is that courts believe that they are superior to the

¹² Gurram Ramchandra Rao, “Judicial Review In India”, “<http://Vlex.In/Vid/Judicial-Review-India-29344398>”, July 23 2021.

legislature and administration. If such is the case, a third chamber of legislation will be created, which is contrary to the notion of constitutionalism.¹³

CONCLUSION

As we saw in this chapter through several cases, the Supreme Court of India is without a doubt the final interpreter of the Constitution. It works as a protector at its highest level. Our Supreme Court has accomplished a lot more than just being a rigid law translator created by legislation, thanks to its unconditional commitment towards securing constitutional principles. This Court is now doing a lot for social welfare thanks to its Judicial Review and ever evolving Judicial Activism powers. It has become the last recourse for society's weaker members. On the other hand, putting lawmaking power in the hands of the Court puts the state's Constitutionalism in jeopardy. India follows its constitution, which was written with the goal of establishing a strong nation. However, the Supreme Court's power may lead to a country in which the judiciary is in charge. It is equivalent with the creation of a third chamber of legislation, which is contrary to the notion of constitutionalism, which is the idea of limited government in which a government organ can be checked on the basis of being arbitrary.

The rule of law is incomplete without accountability. It's also necessary for another reason, as it was in previous Dicey editions:¹⁴ of course modified in later editions, referring to John Wilkes's case,¹⁵ "Any discretion conferred tends to arbitrariness, and hence there is something contradictory with the rule of law," she says. But, as time went on, it became clear that granting some discretion for the purpose of applying it to the facts of a particular case is something that cannot be done away with. The amount of discretion should be kept to a minimal, and it should be governed by specified norms, rules, or principles so that it does not become arbitrary. As a result, the rule of non-arbitrariness must be put to the test by the courts whenever the need arises.¹⁶

¹³ Madhav Godbole, "The Judiciary And Governance In India", "Rupa.Co.", New Delhi, India, 2009.

¹⁴ Dicey: Law of the Constitution, 8th ed., p. 198 as cited in M.P. Jain and S.N. Jain, Principles of Administrative Law, 4th ed., Wadhwa and Company, Nagpur, 1986, p. 14

¹⁵ Wilkes v. Wood, (1763) 19 St Tr 1153; cited by C.K. Takwani, Lectures on Administrative Law, 3rd ed., Eastern Book Company, Lucknow, 1998, p. 19.

¹⁶ Registrar, Trade Marks v. Ashok Chandra Rakhil, AIR 1955 SC 558; Narasimha v. District Magistrate, AIR 1953 Mad. 476; Rikabdoss Bhavarlal v. Collector of Customs, (1961) 2 M.L.J. 443; I.S.T. Comm. V. P. Manjunath, AIR 1972 SC 2250; Ajantha Transport v. T.V.K. Transport, AIR 1975 SC 123.

The expansion of Judicial Review is the obvious response of the Judiciary to ensure that the exercise of Governmental Power is properly checked. People's growing awareness of their rights; the trend of Judicial Review of every major government action; and the executive's willingness to seek judicial determination of debatable or controversial issues, sometimes to avoid accountability for its decision, have all contributed to the judiciary's growing importance. The prevalent notion in this country is that the judiciary has been active in expanding the sphere of Judicial Review into non-traditional areas that were previously thought to be beyond judicial purview.

The judiciary's response to ensure that the exercise of governmental power is properly checked is to expand judicial review. The judiciary's importance has grown as a result of people's growing awareness of their rights, the trend of Judicial Review of every major government action, and the executive's willingness to seek judicial determination of debatable or controversial issues, sometimes to avoid accountability for its decision. The popular belief in this country is that the judiciary has been active in expanding the scope of judicial review into previously thought-to-be-outside-of-judicial-purview sectors.¹⁷ It must always be recalled that taking a step in a new direction carries the risk of taking a step in the incorrect direction. It must be a sure stride in the correct direction to be a ground-breaking trend. Any action that meets these criteria and establishes a new trend toward justice can be considered a New Dimension of Justice and a genuine contribution to the evolution and development of law aimed at realizing the ideal of justice. Finally, I'd like to point out that wielding this power necessitates a sense of causation. The court should not act in an arbitrary manner. *Great Powers, Great Responsibilities*, is a quote from a scholar that can guide the court when it is exerting its power.

This concept of judicial review is one of the powerful systems of our Indian Constitution to keep a check on the legislative and executive actions. The doctrine of judicial review is firmly rooted in India and has exclusive sanctions of the Indian constitution. All the provisions in Indian constitution clearly mention the importance of judiciary exercising judicial review and helps in keeping a check over the legislative and executive at Centre as well as states. The system of judicial review acts as guardian of our constitution and guarantees protection of individual fundamental rights and further divides power between the union and the states. That, the very

¹⁷ Dr. Tilok Nath Arora, *Judicial Strictures*, Universal Law Publishing Co. Pvt. Ltd., 2001 ed., pp. 3-4.

purpose of a written Constitution is to contain the basic structure of the government with well defined powers and limitations, without that Constitution will not serve any purpose. Thus, an attempt should be made to limit the interpretation of the laws by way of judicial review to the scheme of the constitution and not beyond that, thus, the power of judicial review should be exercised for legitimizing the actions of the legislature and protecting the constitution against any undue encroachment by the government.