

MIND YOUR LAW

JUDICIAL REVIEW

Foreword by

Justice Hemant Gupta

Edited by

SK Bose

SCOPE
LIMITATION &
OVERREACH

ISBN 978-93-342-6760-0

JUDICIAL REVIEW
SCOPE LIMITATION AND OVERREACH

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MIND YOUR LAW

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Judicial Review: Scope Limitation and Overreach

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The subject of judicial review holds a renewed and urgent relevance in an era of democratic complexity and increased demand in constitutional issues adjudication. This book arrives at a pivotal moment, offering a thoughtful, nuanced, and deeply contextual examination of judicial review—not merely as a legal doctrine, but as an organic judicial process. The institutions are intricately woven into the fabric of constitutional democracy.

From its roots in basic legality—striking down laws that conflict with the constitution—to its emergence as a more robust vehicle for enforcing fundamental rights and steering policy reform, judicial review has evolved remarkably. This transformation has been neither linear nor uniform across jurisdictions, but it shares a common trajectory: the pursuit of justice through constitutional fidelity.

The author draws on Mauro Cappelletti’s seminal work to chart this global arc, showing how post-World War II constitutionalism infused judicial review with a deeper democratic ethos. The transition from a "thin" legality-focused model to a "thicker" human rights centric review reflects not only changes in legal philosophy but also the public expectations from the judiciary.

What distinguishes this volume is its socio-legal perspective—a reminder that law does not exist in a vacuum. Courts today work in a landscape where legal texts intersect with societal needs, political pressures, and moral claims. The rise of the “activist constitutional judge” is one response to this complex milieu. Yet, as the book rightly cautions; such judicial assertiveness required to be balanced

by humility and an awareness of institutional limits. Courts must be guardians, not roadblocks.

The challenge before the judiciary is profound: to safeguard constitutional values without encroaching upon domains that belong to the legislature or executive. As this book compellingly argues, judicial legitimacy rests not only on legal reasoning but also on public trust, which must be continuously earned through judicious restraint and principled engagement.

I commend the efforts of Prof. (Dr) SK Bose for contributing meaningfully to the discourse on judicial review. This work is essential reading for judges, scholars, and all those who care about the evolving relationship between law, courts, and democracy. It reminds us that the strength of a constitutional democracy lies as much in its institutions as in the careful calibration of power among them.



Justice Hemant Gupta (Retd.)

Former Judge, Supreme Court of India

Date: 30/05/2025

PREFACE

The doctrine of judicial review remains one of the most consequential features of modern constitutional democracies. As a principle, it empowers the judiciary to act as a sentinel of the Constitution—checking arbitrariness, safeguarding rights, and ensuring that all branches of government remain within their prescribed boundaries. Yet, it is precisely this power—so vital to constitutional governance—that also invites intense scrutiny when it appears to exceed its limits.

This volume, *Judicial Review: Scope, Limitation and Overreach*, is a timely and incisive contribution to the ongoing global discourse on the role of the judiciary in a constitutional framework. It does mention a lot on Indian context. Subsequently, it brings together a collection of scholarly essays that interrogate, interpret, and illuminate the multiple dimensions of judicial review—its theoretical foundations, its practical evolution, its virtues, and its vulnerabilities. This is an edited book, and the book seeks not merely to describe the state of judicial review, but to question its trajectories, test its assumptions, and assess its boundaries.

The uniqueness and the strength of this volume lie in the depth and diversity of its contributors. Among them, the doctoral scholars have particularly distinguished themselves through the originality of their insights, the analytical rigour of their research, and their capacity to engage with complex jurisprudential questions. Their work demonstrates a remarkable maturity of thought and a commitment to scholarly integrity that deserves special recognition. My special appreciation is for all the Ph.D scholars and young law professors for their vibrant insights.

I, as the editor of this book open the volume with a chapter Introduction to Judicial Review: A conceptual Contour. It would be difficult to mention every author and their contribution in this preface, as you move to read chapter after chapter ,you will discover how authors have given a comprehensive exploration of the historical roots, theoretical justifications of judicial review in common law jurisdictions. Their analysis, grounded in comparative constitutionalism, sets the stage for deeper discussions on how the doctrine has been adapted and reinterpreted across jurisdictions. Some authors astutely trace the gradual expansion of judicial review from its classical origins to its contemporary manifestations, reminding readers that context often shapes constitutional interpretation. Some authors in their contribution bring a comparative public law perspective to the subject by critically evaluating the limits of judicial intervention in matters of policy, drawing from decisions in the United Kingdom, India, and Canada, they articulate a nuanced argument for judicial self-restraint and the need to respect the democratic space of the legislature and executive.

What distinguishes this volume is the boldness and clarity with which the PhD scholars confront foundational questions: Where does judicial review end and judicial legislation begin? How much discretion should courts exercise when the text is silent but justice is at stake? What

constitutes overreach, and how do we distinguish it from necessary innovation? These are not easy questions, and yet the contributors have engaged with them with rare depth and conviction.

The present collection is not a defence of the judiciary, nor is it an indictment. Rather, it is a scholarly effort to understand the scope and limits of judicial review in a principled and balanced manner. This book should find its readership not only among legal academics and practitioners, but also among judges, policymakers, and serious students of constitutional law. It is our hope that the discussions it initiates will contribute meaningfully to the evolution of judicial review in a way that strengthens constitutional democracy rather than distorting it.

I extend my sincere appreciation to each contributor for their rigorous work and intellectual generosity. In particular, I commend the doctoral scholars whose contributions have enriched this volume with substance, clarity, and vision. They represent the promising future of constitutional scholarship, and their voices will undoubtedly shape the debates of the years to come.

Judicial Review: Scope, Limitation and Overreach, preserving the gravitas of the subject while emphasizing the scholarly value of the contributions.

I place on record my sincere gratitude to Justice Hemant Gupta, Former Judge, Supreme Court of India and Chair Person, IIAC, Delhi for authoring Foreword to the book. I also take this opportunity to express my heartfelt thanks to Prof.(Dr) Deependra Kumar Jha, Vice Chancellor, Manav Rachna University for his continued encouragement and support. My special thanks to all my colleagues at School of Law, Manav Rachna University for their support and cooperation.

Prof.(Dr) SK Bose, Editor

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INTRODUCTION TO JUDICIAL REVIEW:A CONCEPTUAL CONTOUR

-Prof.(Dr) SK Bose

Foundation of Judicial Review

For a vibrant, working constitutional democracy, judicial review is the very life breath of the constitution. It has its roots in Common Law. The very foundation of the judicial review was in a sense laid by Chief Justice Sir Edward Coke who gave a landmark judgment in *Dr. Bonham's* case in 1610. Since then it has been understood that the common law would control Acts of the legislative and it is the Court which could declare an enactment void if it was against common right and reason. This also meant that the doctrine of the supremacy of Parliament was established in England. Superior courts exercise their powers through judicial review to test the legality of a governmental or State action. Judicial review, in the opinion of Prof. Wade, is a fundamental mechanism for keeping the public within the limit for upholding the rule of law. Through this mechanism, the Court can exert its inherent power to find out whether an action is lawful and to grant relief. In 1798, Justice Samuel Chase, in *Calder v. Bull* garnered support from the principles of a higher law and judicial review to enforce limitations outside the written constitution on legislative power.

Chief Justice Marshall in *Marbury v. Madison*, 1803 explained the Court's duty in case of conflict between an ordinary law and the Constitution in which the Constitution would prevail. Nations with a written Constitution and a deep-rooted Bill of Rights, the Executive and the Legislative have restricted powers. The Constitution creates three branches of Government- legislative, executive and judiciary- each supreme in its own sphere. The judiciary is constituted the guardian of the Constitution and the arbiter of the functions of all organs and their powers as grantees under the Constitution.

A democracy without some form of judicial review is considered deficient. In Europe this has been a prevailing practice with almost no exception. Despite the dissemination of judicial review of administrative law predates and doesn't entail the same history of judicial review of legislation, one cannot deny the close connection of the two which has become evident. In 1969, in his classic study, *Judicial Review in the Contemporary World*, Mauro Cappelletti mapped the spread of judicial review-centered constitutionalism across the world showing the beginning of its tenacious spread across the globe alongside and as part of the spread of democracy in the post-World War II era.¹

Although the term *judicial review* has not been used in the Constitution of India, it can easily be inferred from Article 13, which says any law in contravention of the constitution shall be void. This provision was included out of abundant caution, as in its absence, such a power could have

¹ Mauro Cappelletti, *Judicial Review in the Contemporary World*, 1969

been exercised by the constitutional courts. High Courts under Article 226 and the Supreme Court under Article 32 look at the violation of rights.

The power of judicial review is one of the basic features of our Constitution and that aspect of the power which enables courts to test the constitutional validity of statutory provisions is vested exclusively in the constitutional courts:- the High Courts and the Supreme Courts. In this regard, the position in American Constitutional Law in respect of Courts created under Article III of the Constitution of the United States can be analysed to state that the functions of Article III Courts (constitutional courts) cannot be performed by other legislative courts established by the Congress in exercise of its legislative power. The following decisions of the U.S. Supreme Court have been cited for support: *National Mugal Insurance Co. of the District of Columbia v. Tidewater Transfer Co.* 93 L. Ed. 1156 337 US 582, *Thomas S. William v. United States* 77 L. Ed. 1372 289 US 553, *Cooper v. Aaron* 3 L. Ed. 2d 5 358 US 1, *Northern Pipeline Construction Co. v. Marathon Pipeline Co. and United States* 73 L. Ed. 2d 59 458 US 50.

Judiciary Should Not Overreach

To uphold the concept of rule of law, judicial review plays a vital role but it should play its role in extreme situation for a limited purpose, as it has no business to take over the governance of the country in its hands. Professor Faizan Mustafa in his piece for The Hindu, mentioned that to overcome the crises of legitimacy for its pro-government decisions during the Emergency, the Supreme Court revolutionized the doctrine of *locus standi* and initiated the Public Interest Litigation. However, has the Supreme Court really become a nuclear missile, with its judges having no accountability?, he added. Are we in the midst of civil or religious war and Justice Sanjiv Khanna, in his short tenure as Chief Justice of India, is to be blamed for this? Is judicial review anti-democratic?”Has the court misused its powers under Article 142, which provides for “complete justice”? It no more asks petitioners what right of theirs has been violated but rather whose right has been violated. In the process, it has helped the prisoners who were blinded by needles being pierced in their eyes; paying compensation for the custodial deaths and upholding rights of workers etc.²

The Democratic and Undemocratic Character of Judicial Review

Here, let me bring some interesting views shared by Professor Waldron and Prof. Sam Issacharoff in the discussion “Respectfully Dissent series” by New York University Law School wherein Prof. Waldron³ says, “On the issues, which are major issues on which you get intense disagreement in the society among citizens, among civil society organizations, intense disagreement among representatives and candidates for representation, intense disagreement among officials and judges on various issues of grave nature, the society's final position may be settled by legislation. But if a panel of judges decides to intervene on the basis of simple majority

² Faizan Mustafa, Is India Witnessing Judicial Despotism?, The Hindu, April 24, 2025

³ Professor at New York University Law School, Adjunct Professor at Victoria University of Wellington

rule, then the complex majoritarian arrangements of the legislature and think how complicated legislative decisions are. Bicameral, involving executive signature or the overriding of an executive veto, multiple stages, various points of unilateral veto within institutions like the Senate. Committee stages and so on. We have a very, very complicated system of majority decision by legislatures. And our practice of judicial review, which is what we're talking about today, allows that to be stopped in its tracks by a simple crude majority decision among judges who disagree with one another on the same basis as the representatives disagree with one another on the same basis as the citizens and officials disagree with one another. And so we worry about the problem of allowing judicial power in that way to affect the basic policy of the society."

As Abraham Lincoln put it once in his first inaugural address, the candid citizen must concede that if matters of general importance for the society are to be settled, the instant they're raised in litigation between parties by the Supreme Court of the United States, then the people will have ceased to be their own governor, having to that extent resigned their power to the members of that eminent tribunal. That's the problem-The problem of the democratic or the undemocratic character of judicial review. It's sometimes called a counter majoritarian difficulty. This is Alexander Bickel's phrase, but it's not counter majoritarian. There are majorities all over the place. And this allows majorities among judges to decide certain matters. So it's not a matter of majorities, it's a matter of who the majority constituency is, or a majority of whom are allowed to decide these matters. There is something problematic about that practice from the point of view of democracy. There's something problematic about that practice from the point of view of democratic legitimacy. There's something problematic allowing these matters to be settled by majority voting among judges and unrepresented array of judges, lawyers, Yale law school graduates, Harvard Law School graduates.

If you look at the religious credentials of the judges in the United States, you find there isn't a great deal of diversity there. There is a very considerable contrast between the diversity of our legislators and the diversity of the judges. But nevertheless, we allow the judges to settle these matters. We allow them to settle it by simple majority voting, even though we could have set up a system of super majority requirement. So that legislation may only be struck down by the court if six or seven out of the nine judges votes to strike it down. Some states have that as a rule for their State Supreme Courts, North Dakota and Nebraska, I believe both have requirements of super majority rule, or we can insist on unanimity to preserve a strong presumption in favor of the democratic solution, with a no striking down of legislation, no refusal to apply legislation except pursuant to a unanimous verdict among the judges.

There are many chapters included in this book, these chapters which are written by scholars and academics, I hope they'll give new dimension to discuss those options and possibilities. But I think the simple majority idea is perhaps the least defensible form of judicial review.

Judicial Review and Its Legitimacy

It's a practice that plays havoc with our assumptions about legitimacy. And I want to just say a word about that. Legitimacy is a difficult concept. And there are different definitions of it all over the place in political philosophy. I'm a political philosopher as well as a legal philosopher. There are different definitions of legitimacy all over the place, but the one essential idea of political legitimacy envisages a situation where there is disagreement, massive good faith and principled disagreement on some issues, where a decision nevertheless has to be reached by the society as a whole. So there are going to be winners and losers in terms of people's views and what that outcome, what that decision should be. A decision is legitimate.

If there is a way of reconciling those who lost in the decision making to the upholding and imposition of the decision that prevailed in the decision procedure. If there is a something that we can say to the losers, we understand you lost and we understand that you continue to disagree, but here is why you should perhaps comply or fall in with the decision that we have made here. Here is why it is a legitimate basis for the exercise of power in your situation. It's a legitimate basis for the exercise of power over you, despite the fact that you disagreed with what the outcome was. We have to be in the position to be able to reconcile our fellow citizens to the decisions that we make. And my worry is that judicial review suffers from a sort of legitimacy defect because all we can say is a majority of judges voted against you on this matter. Majority of wise justices, a majority of serious minded justices no doubt. But these were unelected justices, justices who had no democratic credentials to their name. Whereas when the decision that was struck down was by the legislature, it had a relation, a complicated relation certainly, but a relation to majority voting among the citizenry. And it represented a process, a complicated process, but a process nonetheless in which everybody in the society was given an opportunity to voice their opposition. And everybody in the society was given a vote, a vote that was as strong as possible for each member of the society, compatible only conditioned only by the requirement of political equality among all the members of the society. So if we can say something like that, we can say, we understand you still disagree, but at least there was a fair process that yielded the result. And my worry is if someone can point out some basis for thinking about legitimacy that doesn't require us to abandon democratic principles.

Why Judicial Intervention is Important

Some scholars come with a different perspective. Here Sam Issacharoff ⁴says, "Let's try and find the answer to these questions;-what are the disabilities of democratic governance? And how does legislative primacy play into that?" There is no dispute that the legislature has to be the core of any democratic system. Chapter II of Part V of the Indian Constitution deals with the Parliament of India. Article 19 provides that there shall be a Parliament for the Union consisting of the President, Council of States and the House of the People. It is where democratic processes, if working well should play out But do they always present themselves? So let me give you two

⁴ American legal scholar whose scholarly work revolves around constitutional law, voting rights and civil procedure

major problems of our day. One is that sometimes legislators act in contradistinction to the interest of democracy. And what's going to happen there, a lot turns on the rules of administration. Democracy is fundamentally about repeat play. We win this time, you win next time.

In the United States, the rules are such that each of us can take our turn in office. There's rotation in office. What happens if the legislatures in manners that are self-interested begin to close up the political process? Now the most obvious of course is legislation that prevents blacks from voting or women from voting, things of that sort. But let's go more deep down. Assume for example, that a legislature has to be voted on by the people and that people must have some kind of equality in their presentation before the voting possibilities. What happens if the legislature says, it doesn't want to reapportion the seats because that's going to give out groups more of a chance to get in and it's going to diminish the power of those who are there now.

What if they did that? Well in fact, that's the history of the United States in the 20th century. That's basically the history from 1910 until the 1960s where state legislatures and Congress refused to reapportion because there was the fear that power would shift to new communities away from rural areas to urban areas, away from traditionally white areas to areas that now had immigrants and then blacks who could vote and so forth. And all of a sudden there was a refusal.

So what happens when the legislature locks up the political process? Where are you going to turn? And an important concurrence in a case called *Baker v. Carr*. Justice Tom Clark said, you know, at some point the conscience of the public can't be mobilized because the system is closed up and that's why you need judicial intervention because there's no other body that can do it at that point. And this is not simply an American story from the 1960s, this is a story that every democratic country has confronted. You have public subsidies of political parties in Europe. What they wanted to do? They wanted to constantly increase the public subsidies and limit the number of parties who can get public subsidies. What a shock that that they think that they are the best exponents of the best interest of the society and should be rewarded economically in turn. That's another process. So what happens there? Court after court, beginning with the German constitutional court and then spreading through Eastern Europe, intervenes and says, you can't do that in a way that forecloses political competition and political competition turns out to be central to democracy and political competition organized through political parties. And that's something that the United States recognized. The avenues of democratic contestation are to be kept open.

If you go around the world and you see the same thing. In Taiwan, there was basically a dictatorship by the Kuomintang beginning in 1949. In the 1990s, they started to lose power. And all of a sudden they were challenged electorally. So the legislative won, democratically elected under the rules of the time, passed a law that said that they were going to suspend elections for a couple of years. And we're going to say that from here on in the legislative, you want basically the equivalent of our House of Representatives will have percentage allocations that reflect the

percentage allocations today. So they locked in permanently their legislative majority. What happens, who can intervene in that circumstance? It has to be the court. And that was the first major decision by the Taiwanese constitutional court interpretation number 499 in 1999. They struck that down. And today, Taiwan is a thriving democracy.

In India, the Prime Minister Indira Gandhi being challenged on some of her basic policies: -The declaration of the state of emergency, the expansion of executive authority and the foreclosing of judicial review of the actions taken by the Congress party, which was dominant in the legislature. In the Indian Supreme Court, and this was a signal move that has been followed by courts around the world, declared the doctrine of basic structures of democracy and says, you can legislate on whatever you want. You cannot alter the basic structures, meaning that you must maintain the political accountability that was there. We saw the same thing in South Africa, where the African National Congress came out of the negotiations for the end of apartheid with too strong a majority. They got to the Parliament and which was also sitting as the constituent assembly; they voted themselves too many majoritarian powers. The first major decision of the South African constitutional court, the certification decision in 1996, was to strike down the first constitution as being unconstitutional. You got to work with that a little. But nonetheless, it was the idea that they violated the basic pact that allowed South Africa to peacefully transition from apartheid to a multiracial democracy. And so what these instances have in common is that they ask a question, not about the rights domain, but about the basic structures of democratic integrity. And there's a reason that we don't let the players in the middle of a cricket game negotiate the rules and we don't let them change it. You have to have an outside arbiter who enforces the rules of the game. Otherwise the temptation to lock yourself in power is too strong.

Failing Legislative, Not Playing Its Role

It is a characteristic of virtually every democratic country in the world today that the legislative branch is failing. The legislative branch is not the center of policy determinations, it is not the center of political debates, it is not the center of the type of legislative engagement, and instead, what we have is largely to the breakdown of the party system, which brings coherence and organization to legislative politics. The problem is that the legislature's not playing its role. And so what's the threat there? Well, in some instances it may be that the courts are too active and there are examples of the courts being preemptive, in some cases downright destructive. The Venezuelan constitutional court on the behest of Maduro abolished legislature. The Bolivian court at the behest of Evo Morales abolished the limits on the tenure of a presidency.

The Nicaraguan court did the same thing. And you see that these institutions can be captured and certainly the Hungarian court has been a dreadful institution as Orban has consolidated power. But it's generally not the courts that are the problem. The problem is that power has passed to the executive branch and the executive branch now in country after country dominates the legislature.

Separation of Powers in a Parliamentary System

The Head of the real executive is the head of the majority party in Parliament. And so it's not structured around separation of powers. And so long as the prime minister is truly accountable to the Parliament, you have some sense that there's a difference in function between the executive and the legislative function. The legislative function can still be the site of deliberation and the Prime Minister becomes the centre of attraction. But what happens when it fails, then all of a sudden the majority caucus in the legislature basically reorganizes itself as the cabinet.

And then you have the same kind of problem of executive unilateralism that you get when you have a President in the US who's not checked by Congress. So, this judicial review of executive conduct with the judiciary being necessary to review the executive, but judicial review of executive-conduct spills over into judicial review of legislation. Because when you get somebody like Orban, when you get somebody like Kaczynski in Poland, they find that the easiest way to govern is just to ram through endless amounts of regulation and law, which serves as the instrument of the suppression of dissent, the instrument of maintenance of themselves in power. And so the line between executive and legislature is blurred and the judiciary is called upon to confront both. And you know, the downside of this story is in most such cases, the judiciary ultimately loses. Because they just can't hold off against the concentration of power. Looking at where the weaknesses or the likely failings of democracy are, the legislature doesn't come out quite so clean. The legislature comes out often as an actor seeking to curtail its own political accountability. And in those instances in particular, the need for judicial intervention is great.

We need to have some tissue of connection between the considerations of the two points mentioned above, the considerations that both reflect the possibility of political process being locked up in various ways. We need to have some connectivity between that and the particular issues within the bill of rights that tend to be the subject of judicial review.

The judicial review is not always, but often oriented to upholding issues about rights on which the citizens disagree and on which the representatives disagree and on which the judges disagree. So we need to map the important considerations that have been developed onto issues of rights and see how they survive that mapping. We know it is possible that the legislature can act in ways that lock up the political process and make it very difficult for the political process to operate in ways that idealists about legislation and the dignity of legislation may desire it to act. One way I think, which is enormously important, is that theoretically and in the ideal theory of the dignity of legislation, I want to emphasize that we legislate in complex ways so that it is possible for legislative minorities or for representatives of minorities in the society at large, to play a part in that legislation, to insist on certain conditions being satisfied, to insist on certain contributions being taken seriously in the course of legislative debate.

And in the course of the manufacture of legislative positions, we think it's very important that if minorities have concerns about a piece of legislation that in the first instance they don't immediately go into an oppositional posture, but they say, look, we have concerns about this, what can you do about that? So far as rephrasing or reorganizing the legislative proposal as concerned, we have ways in which minorities and majorities work together within the legislative process. And from time to time, that particular aspect of the legislative process gets locked up or gets sabotaged or doesn't work properly.

And then we have, I think the second part which is how to think about how legislative processes work when minorities that are as Justice Stone said in the *United States v. Carolene Products*, 1934 I think what do we do in situations where minorities are discreet, utterly separate from the rest of the society, insular with no clear ties to the rest of the society, making it much harder for their objections to be taken seriously, for their participation to be seen as part of a coalition for their contributions to be entertained in the legislative solution.

In some circumstances, we are worried that that way of organizing majorities and minorities working together, forming and reforming coalitions, forming and reforming majorities that goes wrong. And in those cases we say as a democratic idealist, an ideal political procedure, a legislative procedure would find ways of accommodating concern for the minority position on the basis in which the legislative process has been organized. But it doesn't always happen. And in these cases, maybe allowing the judges to act as they think a good legislature might have acted, maybe an important contribution that can be made. I don't know whether this can work for all cases. But, there is an open question in constitutional jurisprudence about how much in the way of the items on the constitution can be thought to be affected by this kind of argument. It's the argument for judicial review or for judicial intervention that I most respect.

THE ORIGIN AND DEVELOPMENT OF JUDICIAL REVIEW

-Deep Singh

Abstract

This chapter explores the historical evolution and foundational principles of judicial review, a constitutional mechanism that empowers courts to invalidate government actions or laws that contravene the Constitution. It traces the origins of judicial review from early legal traditions such as the Magna Carta, which introduced the rule of law, to the development of English Common Law, where landmark cases like *Entick v. Carrington* and *Dr. Bonham's Case* laid the groundwork for judicial oversight of executive actions.

The chapter further examines the colonial era, highlighting how British legal institutions introduced judicial review in colonies like India, with cases such as *Emperor v. Burah* and *The Secretary of State for India vs. J. Moment* demonstrating early applications of the doctrine. It also discusses the American Revolutionary period, where courts in the U.S. began asserting the power to invalidate unconstitutional laws, culminating in the seminal case of *Marbury v. Madison* (1803), which formally established judicial review in the United States.

In the Indian context, the chapter outlines the transition from colonial legal systems to the post-independence constitutional framework. It emphasizes the role of the Privy Council, the Federal Court, and eventually the Supreme Court of India in institutionalizing judicial review. Key constitutional provisions—Articles 13, 32, 143, 226, and 227—are identified as the legal basis for judicial review in India, empowering courts to safeguard fundamental rights and uphold constitutional supremacy.

Overall, the chapter underscores judicial review as a vital tool for maintaining the balance of power, ensuring government accountability, and protecting individual rights within a constitutional democracy.

Keywords: Judicial Review, Rule of Law, Magna Carta, Common Law, Colonial Era, Federal System

1. Introduction

Today, judicial review is a well-known process in the Constitution that allows people to go to court if the government does something that goes against the Constitution.

Judicial review is a clear process in the Constitution that allows courts to cancel any government action or law that goes against the Constitution. It is a way for people to challenge the government if it does something unconstitutional. This is the only way to limit the government's power through the Constitution.

In a federal system, the legislature, executive, and judiciary each have specific roles, which are usually written in the Constitution. The Constitution gives the government power over things like land, people, and money. The government uses this power to make decisions and take actions. But to make sure the government doesn't misuse its power and stays answerable to the people; the idea of judicial review was added to the Constitution. This means courts can check if the government's actions follow the Constitution and stop them if they don't.

The idea of adding judicial review to the Constitution was to create a way to check the government's actions and limit its power. By doing this, judicial review helps make sure the government follows the law and is responsible for what it does. It also protects people's rights like dignity, freedom, equality, and justice by canceling any actions by the government that go against the Constitution. This process makes sure that the laws and actions of the government follow the rules in the Constitution. The idea of judicial review has grown over time, and it started from old legal traditions, important ideas in philosophy, and major court decisions.

The judicial review is a fundamental mechanism for keeping government and its authorities within due bounds and for upholding the rule of law. It is well established principles that statutory power should be exercised with reasonable care and diligence. If the executive exercises a power unreasonably, the supreme court has the power intervene into the matter and declare such exercise of power as unlawful. Now, we will explore a gather information how this concept of judicial review was developed.

2. Historical background

The idea of judicial review has grown and improved over time. This happened because people became more aware of their legal rights. Judicial review is actually better and more advanced version of an older idea called 'constitutional review.' The roots of judicial review can be found in the history of law, especially development of common laws systems, Magna Carta, etc.

2.1 Magna Carta:

"The Magna Carta is also called the 'Great Charter.' It is a very old document for development and protection of the rights of the people. This can be called as first constitutional law in English-speaking countries. Today, the main intent of the constitutional law is to limit the power of the government. The Magna Carta didn't directly incorporate the concept of judicial review, but it introduced the idea of the 'rule of law,' which means everyone, including the king, must follow the law.¹

¹ <https://www.unitedforhumanrights.in/what-are-human-rights/brief-history/magna-carta.html#:~:text=It%20established%20the%20right%20of,forbidding%20bribery%20and%20official%20misconduct.>

The most important parts of the Magna Carta are clause 12, clause 28 and clause 39 and they protected the rights and liberties of the people. for example, the Clause 12 provided that the king could not collect taxes or take land without permission, clause 28 provided that no arbitrary confiscation of property by royal officials and Clause 39 provided that no one can be punished or jailed without a fair trial.²

In 1215, King John and a group of rebellious barons agreed on the Magna Carta during a break in a civil war and they created rules that supported justice and fairness in society. Magna Carta is the first written document available in human history which provided for the limitation on the King's power. These ideas helped shape modern laws and protect people's rights. Magna Carta did not establish the concept of the judicial review as we know it today, it developed key legal principles that later influenced its development.

2.2 Development of English Common Law

English Common Law was created by the group of judges in England over many years. They made decisions based on precedents, traditions and customs and religious practices. These decisions became a set of rules and principles that judges used to solve legal problems. Over time, because these rules were used again and again, they became accepted as law in England. This developed of the law and rules were known as English Common Law.

English Common Law also helped in the development of the concept of judicial review. In simple language, judicial review means that courts can check action of the executive to assess whether the action of the executive were following the law or not. This idea was supported by important cases decided by English judges.

In November 1762,³ the Defendants being an enforcement officials entered plaintiff's house with a warrant from the British Secretary of State. Defendant were looking for papers related to a magazine and related documents which might have criticized the king and government. The Plaintiff was a writer of the magazine namely *The Monitor* and also the owner of the house.

While searching, the Defendants broken various boxes, drawers, and searched entire house very thoroughly. They took all the writings and other documents of the Plaintiff and gave them to the Secretary of State.⁴

The aggrieved by the action of the Defendants, the Plaintiff sued the officials for unauthorized search. He said they had no right to enter his home. The Defendants argued that they were just following the warrant.

² ibid

³ Entick v. Carrington, (1765) 19 St Tr 1030

⁴ ibid

But the Court agreed with the Defendants and said the officials had no legal right to enter into the house because the Secretary of State wasn't allowed to issue such a warrant. Only a justice of the peace could do that. So, even though the Defendants worked for the government, they still had to follow the same laws as everyone else. The court said that without permission or a proper law, no one — not even the government — can enter someone's home.

In 1610, the Case of Proclamations in United Kingdom,⁵ is a landmark English constitutional law case which laid the foundation of the concept "Judicial Review". This case law developed a concept that "king's power to make laws is limited to those made through parliament / legislative, and not by royal prerogative/right alone. The case dealt with the situation where King's attempt to issue proclamations regarding building restrictions in London and to regulate the manufacturing of starch by issue a proclamation. The legislative / House of Commons had grievance with such act of the king and declared such action of the king as contrary to law.

In this case, King James I passed a Proclamations to control building activity in London and to regulate the manufacture of starch. The House of Commons challenged such act of the King and objected that such actions as contrary to the established legal framework. The main issue was before the Court was that whether the King could legally issue proclamations that altered the common law or imposed restrictions on citizens without the consent of Parliament. ⁶

Lord Coke delivered the judgment and held that "*The King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land... But the law of England is divided into three parts: common law, statute law, and custom; but the King's proclamation is none of them.*"⁷ Sir Edward Coke ruled against the King and declared that the monarch's prerogative was limited to enforcing existing laws, not making new ones.⁸

This case was important because it showed that even the King's power has limits. It helped build the idea that courts can check if government actions are legal, which is what we now call judicial review.

Dr. Bonham's Case ⁹ is also landmark judgment under English laws on the early concept of judicial review. The very famous case is also known as *Bonham v. College of Physicians* and was decided by Sir Edward Coke, Chief Justice of the Court of Common Pleas. In this case, Bonham practiced medicine in the city of the London without

⁵ Case of Proclamations in United Kingdom, (1610) 12 Co Rep 74; 77 ER 1352

⁶ ibid

⁷ ibid

⁸ ibid

⁹ *Dr. Bonham's Case* (1610) 10 Co. Rep. 107

obtaining a necessary license of practice from the College. He was fined and imprisoned by the College by exercising the power granted to it charter / statute. The main issue in this case was whether the college could not be a judge in its own case.

The court held that "when an act of Parliament is against common rights and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void." Sir Edward Coke ruled that the College could not act as both a prosecutor and a judge in the same case (a violation of natural justice).

These cases were important because they confirmed that even the King's power has limits. They established the principle of review of the king's act by the Court and cancelled such acts of the king in case such acts are not in accordance with existing laws. These two cases in UK laid the foundation of the idea that courts can check if government actions are legal, which is what we now call judicial review.

2.3 Colonial Era

The Colonial Era was a time in history when powerful European countries took control of lands outside their own. This period started around the 15th century and lasted until the mid-20th century. Their main goal was to take control over the valuable resources like gold, spices, cotton, and labor from these colonies and use them for their own benefit. At first, these powerful countries just wanted to trade with weaker or less developed countries. But over time, they began to take control of these places and rule over them. The powerful Countries like Britain, Spain, Portugal, France, and the Netherlands set up colonies in places like the Americas, Africa, and Asia.

To control the people and resources in their colonies, the colonizers forced their own language, religion, laws, and government systems on the local people. For example, India was a colony of the British Empire. To control India, the British set up their own systems of rule. The idea of judicial review—where courts check if the government is following the law—started in India during British rule, from 1756 until India became independent in 1947.

Since British acquired formal political power over India, the British Parliament was concerned to regulate its activities in India. They appointed first Governor-General of India and also created 'Supreme Courts' in Calcutta, Bombay and Madras. They also enacted Regulating Act of 1773 which allowed appeal against the order of these three courts to the Privy Council.

The concept of judicial review was also adopted or used by the courts and Privy Council in their judgement. The Privy Council had employed the concept of judicial review in a very limited way to review colonial legislation and its validity under the colonial charters. The power of the judiciary review to assess the decisions of the executive has found a place in the canonical legal systems.

The Emperor v. Burah ¹⁰ is known as first case of Judicial Review in India. In 1877, India was ruled by the British and during such colonial period, the Governor-General of India in Council passed an act to delegate the legislative powers to the Lieutenant Governor of Bengal. This action of Governor-General of India led to controversy or arose a legal question was whether the Governor-General in Council had the authority to delegate legislative powers by passing act and whether such delegation was ultra vires (beyond the powers) of the Indian legislature as established by the British Parliament?

The Calcutta High Court held and confirmed that the act of the Governor-General of India was invalid because it involved an unconstitutional delegation of legislative power. However, the Privy Council reversed the decision of the Calcutta High Court and confirmed that the Indian legislature had the authority to delegate powers, and such delegation was not unconstitutional. This was first case of judicial review in India during colonial era and opened the door for judicial review of the legislative actions.

The Secretary of State for India vs. J. Moment¹¹ was a landmark judgment that addressed the limits of legislative power in colonial period. The case decided an important question relating to civil remedy regarding access to civil courts for land disputes involving the government. The main question or controversy arose in the case was whether Section 41(b) of the Burma Laws Act, 1898, which barred civil courts from entertaining claims against the government regarding land rights, was constitutionally valid or not? The court examined whether the Government of India had the authority to enact a law that removed the right of individuals to sue the government in civil courts. The lower court had ruled that Section 41(b) was ultra vires because it violated Section 65 of the Government of India Act, 1858, which guaranteed that individual would have the same legal remedies against the Crown as they had against the East India Company. The judgment emphasized that statutory provisions cannot override fundamental legal remedies unless explicitly authorized by a higher constitutional authority.

The colonial laws do not explicitly give colonial courts the power of judicial review and they did not have the power to strike down any laws passed by the British Parliament of UK. They exercised a very limited form of judicial review on the power and functions of the executive. The colonial courts were assessed whether executive actions were consistent with the law or not, and They interpreted statutes and applied precedents, laying the foundation for judicial reasoning and review in India.¹²

We can also find some case law in other colony countries which were once upon a time a colony of the powerful country. For example, North and South America were colonies of

¹⁰ Emperor v. Burah, (1878) 3 AC 889

¹¹ The Secretary of State for India vs. J. Moment

¹² ibid

British, Spain, France and Sweden. In order to control people and resources, British, Spain, France and Sweden enacted laws and regulations to control the people and resources.

2.4 Revolutionary Era

During the American Revolution period, we saw that the colony challenged British authority over the system not just politically but legally. The Revolution was as much about redefining the rule of law as it was about independence. Now, we will examine and review the decided case laws relating to the concept of the judicial review by the Colonial Court in US. We will also examine how the Court has exercised the power to invalidate the acts or actions of the government and reasons given by the Court.

The Symsbury Case¹³ was one of the earliest and oldest case in the history of American legal systems which applied the modern principle of judicial review. It is also important to mention here that Court of Connecticut had passed a judgment for invalidation of the laws passed by the state legislator on the basis of the principle of judicial review even before the same was formally established by the U.S. Supreme Court in *Marbury v. Madison* in 1803.

The main dispute in the Symsbury Case was involved land titles. The State Legislature of the Connecticut had passed an act for transfer of the land ownership from the defendant to another. The plaintiffs challenged the act of the State Legislator and, argued that State Legislator violated their vested property rights without giving opportunity to being heard. The Court of Connecticut ruled that the state legislative act was unconstitutional. The court emphasized that legislative power is not absolute and must conform to constitutional principles, especially regarding property rights.

Holmes v. Walton (1780)¹⁴ a landmark case in early American legal history and can be considered as first judicial review case. During the Revolutionary period, New Jersey passed an act namely Seizure Law, 1778 to prevent trade with the enemy (British). The law was passed to prevent trade and commerce with the enemy and made it lawful for the seizure of goods for violation of the law and for the prosecution of the offenders by trial before a jury of six men. The jury of six found Holmes and Ketcham guilty of violating the Seizure Law.

Holmes and Ketcham filed an appeal to the Supreme Court of New Jersey on the basis that the trial by jury of six was unconstitutional under the provisions of the New Jersey

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¹⁴ Holmes v. Walton, <https://federalism.org/encyclopedia/no-topic/holmes-v-walton-1780/>

Constitution. The Supreme Court held that the Seizure Law was unconstitutional because it violated the constitutional guarantee of a twelve-person jury.¹⁵

The Ten Pound Act Cases (1786–1787)¹⁶ in New Hampshire is another important case law in the history of American and lead to the development of the concept of the judicial review in American. New Hampshire passed the Ten Pound Act in 1785. The newly enacted law allowed for the trial of the civil cases without a jury to speed up debt recovery process. The Court ruled that the Ten Pound Act was unconstitutional because it interfered with the judiciary's authority. The also court argued that the legislature could not dictate jurisdictional limits in a way that undermined the courts' independence.

Rutgers v. Waddington, 1784¹⁷, was one of the most important cases that arose out of the Trespass Act of 1783. Elizabeth Rutgers, a widow of Harman Rutgers, sought rent from Waddington, as agent of Benjamin Waddington and Evelyn Pierrepont. The two merchants had occupied her premises under the authority of the British Commissary General during the British occupation. The provisions of the Trespass Act 1783 provided for recovery of rent during the specified period.

The Plaintiff's submitted its arguments based on the provisions of the newly passed Trespass Act and in accordance with the provision of the State Constitution. The Defendant considered that the provisions of the Trespass Act were inconsistent with the obligations under the Treaty of Peace with Britain and also was concerned that the Trespass Act would lead to the departure of thousands of Loyalists and negatively impact New York.¹⁸

This case was the first in the history to establish the principle that State legislation in conflict with the provision of a United States Treaty shall be void. It also set State precedent for the doctrine of judicial review.

There was no formal mechanism for the judicial review of the act or action of the government. It is the inherent power of the Court to check and review whether an action is lawful or not and to grant appropriate relief.

3 Marbury v. Madison (1803)

In the late 18th century, the Federalist Party was led by President John Adams, and the Democratic-Republican Party was led by Thomas Jefferson for the election of the US President. There was a fierce battle between them to control the power and also for formation of the new government. The election resulted a victory for Thomas Jefferson and there was a shift in political power from the Federalist Party to Democratic-

¹⁵ *ibid*

¹⁶ Ten Pound Act Cases (1786–1787)

¹⁷ *Rutgers v. Waddington*, 1784 , <https://history.nycourts.gov/case/rutgers-v-waddington/>

¹⁸ *ibid*

Republican in this election. On January 20, 1801, President John Adams selected and nominated the name of John Marshall as the new Chief Justice of the United States to the Senate for its approval. The Senate approved the appointment, of John Marshall as new Chief Justice and he finally took the oath of office on February 4, 1801. In addition to this, the existing Congress Governments took several actions in an effort to control the systems even after expiry of the term of President. The actions of the existing government had a direct impact on the US federal judiciary.

On February 13, 1801, just few days after Marshall took office as Chief Justice of US , , the Federalist Government adopted the new Judiciary Act, 1801 and this act altered the US federal judiciary by relieving Supreme Court Justices from the obligations and duty of circuit court and also reduced the number of Supreme Court Justices from six to five so that new president could not able to fill the casual vacancy in the office.

Pursuant to a newly enacted Act, Adams appointed various new judges to influence the judiciary system. All these new appointments of judges were also confirmed by the Senate on March 3, 1801, just one day before the appointment of Thomas Jefferson as new President. The commissions for these positions were sent to John Marshall's office, as he was still serving as holdover Secretary of State. It may be noted that some of the commissions were not successfully delivered to the new appointees. William Marbury did not receive his commission before Jefferson became president and he could not take office without the official commissions.

On December 21, 1801, Marbury filed suit in the Supreme Court seeking a writ of mandamus to compel Madison to deliver his commission.

The second landmark judgment relating to judicial review in USA was *McCulloch v. Maryland*. In this case, Chief Justice of US Supreme Court had invalidated the one of the decisions of the Federal Government. This case involved the power of Congress to charter a bank and issue of the division of powers between state and the Federal Government.¹⁹

In 1816, US Congress opened second Bank of the United States in Philadelphia. The second Bank had much more power as compared to first Bank and also it had wider scope for providing large credit to farmers and corporation and credit for shipping of goods to domestic markets as well as foreign markets.

In 1818, State Legislator of Maryland passed a law for imposition of tax on currency issued by second Bank in order to hinder it from doing business. After enactment of new law, James W. McCulloch, being cashier of the second Bank, refused to pay the tax. The State Government of Maryland then sued McCulloch for violation of the state law for circulating unstamped banknotes in Maryland.

¹⁹ USA was *McCulloch v. Maryland*, *McCulloch v. Maryland - Summary, Decision & Significance*

State government had won the case in the Maryland courts. Aggrieved by the decision of the Maryland courts, James W. McCulloch filed an appeal to the U.S. Supreme Court.

The US Supreme Court ruled that US Congress had the constitutional authority to establish a second national bank, even though the US Constitution does not explicitly mention the power to establish national bank. The Court also held that State Government of Maryland could not tax the federal bank, as “the power to tax involves the power to destroy,” and allowing states to tax federal institutions would undermine federal authority²⁰

4. Conclusion

The concept of judicial review is not developed or evolved in a one or two years. It has long history and step by step procedure in the development. The starting point was development of common English law in England and also implementation of rule of law in the society particularly separation of power and king are also subject to same law. In 15th century, the federal system was intruded or used in the England and under such system, the court has power to review the action of the executive but not the parliament and King. We can say that there was a system under which the English Courts have very limited power to invalidate the action of the executive which were not in accordance with laws of land. During colonial rule in India, East India company established legal system that imported English legal concepts in India with indigenous Indian customs. In addition to this, East India Company managed legal and justice systems by creation of institutions such as Mayor’s Courts, Bombay Court, Madras Court and Calcutta Court for adjudication for civil and criminal cases in India. The Privy Council has made significant contributions to the evolution of India's legal system.

Till 1935, Privy Council functioned as a source of final and last resort justice for Indian for almost two centuries. Being an appellate body in the legal systems only in India and also for other colonial countries, the Privy Council was a global court. Privy Council helped in the devolvment of the legal systems, law principles and concepts, and amendment in the India's substantive laws. The big achievement of the Privy Council was enforcement of the concept of Rule of Law to ensure justice in the colony countries. The Privy Council paved the way for the establishment of the English Common Law in India and finally the concept of the “judicial review”. The Privy Council played significant contribution to personal law, and commercial law in India.

In 1935, UK Parliament introduced federal system in India by enacting the Government of India Act 1935. Under the Government of India Act 1935, both the Central and State legislatures were given powers in their respective spheres. The Act of 1935 established the Federal Court and empowered to scrutinize the violation of the constitutional

²⁰ ibid

directions regarding the distribution of powers. The power of judicial review to Federal Court was not specifically provided in the Government of India Act 1935 but the Federal court followed the procedure developed by Privy Council.

In 1951, the Supreme Court of India was established as a successor of Federal Court of India after the commencement of Constitution of India. the Supreme Court of India inherited the great traditions built by the Federal Court and Privy Council. The Constitution of India incorporated various articles to ensure the concept of the judicial review.

In India, the doctrine of judicial review was established in Article 13, Article 32, Article 143, Article 226, and Article 227 of the Constitution of India. Article 13(2) of the Constitution of India states that any laws made by the legislative contravening of the Fundamental rights as provided by the Constitution of India shall be void, and therefore it falls upon the constitutional courts to interpret such new law and to review whether a statute is in violation of fundamental rights and thus, declare such new law as void. The Article 32 of the Constitution of India guarantees the right to approach the Supreme Court to enforce fundamental rights as provided by the Constitution and empowers the Supreme Court to issue writs in case of violation. This is a key mechanism for citizens to seek judicial review of executive actions that violate their rights. The Articles 226 and 227 of the Constitution of India authorize the High Courts to exercise judicial review powers in certain cases, enabling them to examine and invalidate laws or actions within their jurisdiction.

Since the independence of India, the Supreme Court of India has used judicial review many times and invalidated several laws or actions that are not in consonance with constitutional provisions.

The Supreme Courts have examined statutes, rules, notification legislations and acts or action of the executive based on the provision contained in the Constitution and principles evolved from constitutionality and finally declared such legislative and executive action as unlawful. In this role of checking the acts or actions of the parliament and executive of the Government, the Supreme Court has acted as true guardian of the constitution and ensuring the compliance with the provision of constitution from other two organs of the Government.

EMERGING STANDARDS: THE IMPACT JUDICIAL REVIEW ON IPR ENFORCEMENT

-Dr. Dilshad Shaik & Mohan Kumar K P

Abstract:

Intellectual Property Rights is the protection of artistic innovations, and acts as a tool of protection from unauthorized use of inventions or creations and primarily safeguards the monetary investment of the creator. IPR is a vast topic comprising diversified domains; the primary domains of IPR are Patent, Copyright, Trademark and Geographical Indications. The chapter shall follow a Normative Juridical Method of research emphasizing the role of legislations and rules pertinent to IPR. The chapter also relies on landmark judgements and the principles pertinent to the subject matter. There are various legislations and rules governing IP, for instance, The Copyright Act, 1957 & The Copyright Rules, 1958. The Intellectual Property Appellate Board is considered as the final authority in deciding upon the cases of IP. The Judicial System has been proactive in safeguarding the IP. In spite of the fact that there is no specified provision to appeal to the Supreme Court in the matters of IP, the aggrieved party can file an appeal under Article 136 of the Constitution of India and the petitions can also be filed in High Courts through the appropriate legislation or under Article 226 & 227 of the Constitution. The Supreme Court pronounced judgements on various landmark cases, as *Novartis Ag v Union of India* discussed the constitutional validity of The Patents Act, 1970 and its relevance to TRIPS. The author employs doctrinal research in this chapter, by interpreting and analysing landmark judgements, statutes pertaining but not exceeding the jurisdiction of India.

Keywords: IPAB, Constitution of India, TRIPS, Intellectual Property, SLP

1. Introduction:

Intellectual Property Rights, considered as a paramount domain to the contemporary world pertaining to diversified inventions brought into existence, protecting the rights of the creators or inventors ensuring that they do not suffer any monetary loss due to unauthorized use of the inventions. Since IPR reflects people's original creative efforts, they help defend innovations from being used without permission. Ever since the first patent law was created in 1474 Venice, the concept of IPR has advanced a great deal. Currently, IPR is designed to defend the economic positions of innovators and encourage creativity which helps to advance our communities. The decisions on intellectual property are made in court that shaped their implementation and enforcement and created standards that guide protection of these rights in different places.

The main idea behind IPR comes from understanding that creators are linked to what they create which gives them a set of special benefits. These rights are to hold, use and the authority to consume, transfer or alienate any intellectual creation. Because tangible assets are easy to spot

and safeguarded by the law, they need different types of protection to stop anyone from taking intellectual material unlawfully. So, much attention has been given to setting up a detailed system to defend intellectual property rights from infringement.

Because IPR protection is limited to specific territories, it introduces special difficulties in the global market. Just registering intellectual property in one country does not guarantee protection elsewhere; each area where protection is wanted will require its own registration process. That same territorial principle is why countries establish agreements such as Paris Convention (1883)¹, Berne Convention (1971)² and others like them, ensuring worldwide agreement on protecting intellectual property worldwide. As IPR is recognized as important for advancement worldwide, international mechanisms have changed to keep up.

In India, contours of intellectual property protection have been influenced by the way IPR matters are reviewed in the courts. Though the Constitution of India does not cover intellectual property rights, it allows people facing IPR issues to seek legal help from the courts. Intellectual property enforcement in India is governed by the Constitution, thanks to the special jurisdiction provided by Articles 226³, 227⁴ and 136⁵ for high courts and the Supreme Court. India's system for protecting intellectual property has changed a lot since gaining independence, now covering a range of related matters. With the amendments in 1999, 2002 and 2005, the Patents Act of 1970 made important progress by adding product patent protection to food, pharmaceutical and chemical inventions in 2005. In the same way, changes in laws governing copyright, trademarks, geographical indications and industrial designs have all contributed to a complete and international-standard based framework.

Intellectual Property Appellate Board (IPAB) was formed to better deal with India's Intellectual Property Rights (IPR) disputes. Because it manages disputes on intellectual property, the IPAB has helped form the legal framework for enforcing IPR. Because the decisions made by the Board can be checked by the High Courts and Supreme Court, they have greatly explained how IPR laws are used in different ways. Important judgments from the Supreme Court have guided the way IPR laws are understood and carried out. Novartis AG brought its case against Union of India, the Court studied the validity of the Patents Act, 1970, considering India's commitments under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.

The result demonstrates that the principles of judicial review have shaped how IPRs are protected in India, while taking into account both international and domestic needs. Judicial review in this area has effects that reach many policies and amendments affecting intellectual

¹ Paris Convention for the Protection of Industrial Property, 1883

² Berne Convention for the Protection of Literary and Artistic Works, 1971

³ The Constitution of India, art. 226.

⁴ *Supra* note 4, art. 227.

⁵ *Id.*, art. 136.

property. Ensuring harmony between domestic and world IPR rules and serving the general public has required the careful interpretation carried out by the judiciary. As intellectual property gains importance in the knowledge economy, the standards decided by courts will play a bigger role in deciding how well IPR is enforced and how it helps advance innovation and economic growth.

2. Overview of Judicial Review and its Relevance in Intellectual Property Rights:

2.1. Judicial Review

In constitutional democracies, Judicial Review is considered as an integral provision because it controls both the legislature and the executive and protects the Constitution. The separation of powers principle, courts, especially constitutional courts, can assess laws and executive orders against the rules of the constitution. The judiciary in India is empowered and recognized under Articles 13⁶, 32⁷, 226⁸ and 227⁹ of the Constitution to ensure that the principles laid down in the Constitution are not being violated.

The *Kesavananda Bharati V. In State of Kerala*¹⁰, the Supreme Court of India included judicial review as a structural requirement within the Constitution. The Court showed that Parliament's authority can be reviewed by the courts. Its function is to allow the judiciary to monitor and legally analyze laws and actions related to Intellectual Property Rights by analyzing the same if it is found to be acting against the Constitution.

2.2. Invocation of Constitution in Judicial Review

The principles laid down in the Constitution of India authorizes the judicial review. If a law impairs someone's fundamental rights, then this Article says it will be made null and void. Article 32 of the Constitution of India¹¹, the Supreme Court is authorized to order steps to enforce basic rights. High Courts are authorized by Articles 226¹² and 227¹³ to give writs and stick to subordinate courts and tribunals.

Article 136 of the Constitution of India¹⁴ demarcates about Special Leave Petition (SLP), the Supreme Court can deal with cases where big legal problems have come up. It is an eye – opening provision in the Indian Constitution, where the Indian judiciary is able to decide upon enforcing and protecting intellectual property that are legal and proper. In most cases, the Indian

⁶ *Supra* note 4 at 2, art. 13.

⁷ *Id.*, art. 32.

⁸ *Id.*, art. 226.

⁹ *Id.*, art. 227.

¹⁰ *Kesavananda Bharati Sripadagalvaru ... V. State of Kerala and Anr*, AIR 1973 SUPREME COURT 1461

¹¹ *Supra* note 4 at 2, art. 32.

¹² *Id.*, art. 226.

¹³ *Id.*, art. 227.

¹⁴ *Id.*, art. 136.

Judiciary system looks at whether the intellectual property rights schemes of India serve the wider public, help safeguard freedom and are consistent with India's international engagements i.e., treaties, agreements.

2.3. The relevancy of IPR in Constitutional Law

The way IPR has developed in India shows a conflict between encouraging creators and ensures that the public can use what is created. Although the Patents Act, 1970¹⁵; the Copyright Act, 1957¹⁶; the Trademarks Act, 1999¹⁷; and the Designs Act, 2000¹⁸ give rights to innovators, these acts can still be evaluated by the courts. The judiciary is now a main place for settling this conflict, especially if enforcing the rights involves key rights such as the right to life, freedom of expression and the right to earn a living.

Further, in the case of *Novartis AG V. Union of India*¹⁹, dealt about the Patents Act's Section 3(d)²⁰ and upheld its rule since it promotes access to affordable medicines for everyone. This demonstrates that judicial review can level out the relationship between intellectual property rights and those in the Constitution related to people's lives.

2.4. A Study of Judicial Review in Intellectual Property Right

Cases related to IPRs such as patent disputes, are decided by using several doctrines spelled out by both the constitution and other legislations. The Doctrine of Proportionality, it is checked if the rules to use build on or weaken basic rights depending on what they bring to the community. The principles and doctrines elucidated and mandated by a law leads to a comprehension that IPR legislations and the executive rulings will not be considered arbitrary. The primary role of the Judiciary is to review all conditions within IPR laws to ensure they help and promote the common welfare.

There are other prominent doctrines prevailing in the Indian Legal system pertaining to the IPR, the Doctrine of Manifest Arbitrariness ensures that the legislations referring to IPR and the executive decisions are not deemed to be as arbitrary. The doctrine of Reasonableness reiterates the fact that the restrictions imposed by the judiciary serves a legitimate purpose to the democratic society. In explaining the laws about intellectual property, the courts have referred to doctrines and theories. *Bayer Corporation V. Union of India*²¹ can be used as an example where it happened. Earlier this month, the Delhi High Court backed the Delhi Controller of Patents who accepted using a compulsory license to limit the patent's scope.

¹⁵ The Patents Act, 1970 (Act 39 of 1970)

¹⁶ The Copyright Act, 1957 (Act 14 of 1957)

¹⁷ The Trade Marks Act, 1999 (Act 47 of 1999)

¹⁸ The Designs Act, 2000 (Act 16 of 2000)

¹⁹ *Supra* note 1 at 1

²⁰ *Supra* note 16, s.3(d).

²¹ *Bayer Corporation V. Union of India*, MANU/DE/1411/2019

2.5. The role of High Courts and the Supreme Court of India

Indian High Courts can reconsider decisions taken by IPR tribunals as well as the actions of any government body, according to Articles 226²² and 227²³. Following the IPAB (Intellectual Property Appellate Board) was dissolved, the importance of the appellate role in court grew much larger. After its functions were handed over to the High Courts, reviewing cases through the courts is now more important in IPR adjudication.

Article 136 of the Constitution of India²⁴, the appellate jurisdiction empowers the Supreme Court to review any injustices created during the enforcement of IPR laws in appeals from lower courts. Even so, the Court uses its power over federal-state disputes when important questions about law or the constitution are involved.

The Court emphasized the fact in the case of *Entertainment Network (India) Ltd. V. Super Cassette Industries Ltd.*²⁵ that copyright protection should not interplay between the public's right to freedom of expression guaranteed under the constitution and assured it is subject to judicial review.

2.6. Relationship with TRIPS and International Obligations

Trade related aspects of Intellectual Property Rights (TRIPS) related IPR rules are harmonized in a country through judicial review. Indian judges have emphasized that TRIPS rules must be followed, even as they pay attention to access to drugs, education and new research within the country.

In the case of *Novartis AG V. Union of India*²⁶, the Court analyzed the existence and its relevance of Section 3(d) of the Patents Act with the TRIPS, emphasizing the fact that TRIPS do not prevent countries from enforcing stringent standards of patentability to prevent and safeguard the evergreen of pharmaceutical patents. Furthermore, judicial review transfers international rules into domestic law by following Indian principles and development plans.

2.7 Multifaceted domains of IPR

2.7.1 Patent

The Patents Act of 1970 established a detailed definition of the term 'patent' within Indian law to safeguard new inventions. The year 2005 saw comprehensive revisions to the law to bring it in line with the TRIPS agreement that established product patents for pharmaceuticals and agrochemicals. The Judiciary has been active in the enforcement of the legislation by trying to

²² *Supra* note 4, art. 226.

²³ *Id.*, art. 227.

²⁴ *Id.*, art. 136.

²⁵ *M/S. Entertainment Network (India) Ltd V. M/S. Super Cassette Industries Ltd*, (2008) 13 SCC 30

²⁶ *Supra* note 1 at 1.

address the interests of the public along with the patent holder. The apex court, in **Novartis AG V. Union of India (2013)**²⁷, refused to provide patent protection for the cancer drug Glivec on the basis that it would only result in preventing ‘evergreening’. This led to the realization that the medicine could be provided to a wider public at a cheaper price. This judgment represents a shift of the judiciary’s approach to public health as opposed to policies dominated by patent monopolies.

Challenges With all the noted enforcement mechanisms put in place, enforcement of the patent is still a challenge because of the slow pace in the adjudication process and the lack of sufficient training among judicial officers. There is hope to resolve some of these problems that were brought about by the construction of the Intellectual Property Division of the High Court of Delhi which aims to streamline the resolution of IP related disputes by establishing specialized benches with advanced knowledge of patent issues.

2.7.2 Copyright

The term ‘Copyright’ denotes the inventions made by the creator protect and the copyright of the invention is vested with the creator and are protected under The Copyright Act of 1957²⁸. The Act gives authors both economic and moral rights which include the right to receive recognition as the author and to object to the derogatory treatment of the work. Judicial decisions have shaped the extent of copyright protection in different cases. The case **R.G Anand V. M/S. Delux Films & Ors**

²⁹, The Supreme Court held that copyright only protects expression, not ideas. This distinction is very important and helps determine if a case has the elements of infringement and ensures that innovation is not stifled while still protecting creativity.

Issues related piracy and unlawful content distribution has made it easy to breach copyright in the digital age. The judiciary’s fix has been to grant infringement injunctions and forcing IP providers to block access to pirated content. But because the internet and anonymity are lawless frontiers, enforcement remains a problem.

2.7.3 Trademarks

The Tariffs and Trade Act of 1994³⁰ gives power to registering and protecting trademarks which are indicators of goods or services. Marks include traditional signs like words and logos as well as non – traditional ones like colours and shapes. Tracked trademark violations have always been prevailing in the Indian courts because of its considerable commercial value. In **Yahoo!, Inc. V. Akash Arora & Anr.**³¹, the Delhi High Court ruled that domain names should be granted

²⁷ *Supra* note 1 at 1.

²⁸ *Supra* note 17 at 4.

²⁹ *R.G Anand V. M/S. Delux Films & Ors*, AIR 1978 SUPREME COURT 1613

³⁰ Tariffs and Trade Act, 1994

³¹ *Yahoo!, Inc. V. Akash Arora & Anr.*, 78(1999)DLT285

trademark rights which forecloses the possibility of cybersquatting and enhances trademark value in the domain world.

Trade mark conflicts involving counterfeiting and passing off brand impersonation are some of the obstacles encountered during enforcement. The court has granted some relief through injunctions and damages but there is a continuous battle against the overwhelming number of counterfeit goods in particular the informal economy.

2.7.4 Industrial Designs

The Designs Act of 2000³² safeguards the beauty features of an article which include shape, configuration, pattern and ornamentation. Under Registration of the Act the proprietor is given an exclusive right to the Designs for a period of 15 years. The courts have for a long time now been adjudicating design infringement cases by looking at the general impression that is formed visually. In the case of **Tata Tea Ltd. V. PTC Industries Ltd.** the court held that use of the same packaging could lead to consumer confusion, which was infringement of design. These types of decisions go a long way in strengthening the protection of the visual appeal of products. Design piracy is still a major issue especially in the fashion and consumer goods industries. The fact that there is little information in the public domain concerning the registration and enforcement procedures makes it more difficult to protect industrial designs.

2.7.5 Geographical Indications (GIs)

The term ‘Geographical Indications’ is defined and delineated in The Geographical Indications of Goods (Registration and Protection) Act, 1999³³, extensively protects products that are manufactured from various regions and their product quality that results from the specific geographical location. There are a few examples for GIs in India that includes Darjeeling tea, Kanchipuram silk and Basmati rice. The judiciary has maintained the rights of GI holders by acknowledging the economic and cultural value that these indications possess. In the case of **Madhya Kshetra Basmati Growers Association Samiti V. IPAB and Ors**³⁴, the case emphasized and established a precedent for the Supreme Court to directly get involved in issues pertaining to GI registration disputes. The enforcement framework works through two main strategies that protect GIs by stopping unauthorized usage and verifying producer registration for GI tag usage. The enforcement of GI rights faces challenges due to producers requiring joint efforts and the widespread occurrence of fake products. International protection of Indian GIs depends on signing bilateral agreements and following international treaties.

2.7.6 Plant Varieties and Farmers' Rights

³² *Supra* note 19 at 4.

³³ The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act 48 of 1999)

³⁴ *Madhya Kshetra Basmati Growers Association Samiti V. IPAB and Ors*, SLP (C) No(s). 8461/2020

The term ‘Plant Varieties and Farmers’ Rights’ operates through the Protection of Plant Varieties and Farmers’ Rights Act of 2001³⁵ to safeguard plant breeder interests and agricultural product protection. The law establishes plant breeders’ exclusive registration authority for new varieties while giving farmers power to control seed ownership through saving and utilization together with seed exchange. The Supreme Court analyzed the patent rights of genetically modified seeds in ***Monsanto Technology LLC V. Nuziveedu Seeds Ltd.***³⁶ to establish proper patent protection for farmers. The Supreme Court case highlighted the necessity of establishing a fair system that links intellectual property rights to food security and agricultural practices. The current enforcement model for plant variety rights faces several complex issues that need solutions to protect biodiversity and traditional knowledge while preserving farmer interests. The continuous problem of fair benefit-sharing implementation persists while efforts continue to combat biopiracy.

2.7.7 Trade Secrets

India operates without a dedicated legal framework that protects trade secrets which depend on contract rules and traditional legal standards. The legal system in India upholds private contractual agreements that safeguard against trade secret disclosure. The judiciary maintains the confidentiality of business secrets through legal enforcement while providing damages and injunctions to protect these assets in employment and business contexts. Courts maintain the confidentiality of trade secrets through legal enforcement of breach of confidentiality cases in business relationships. In the case of ***Niranjan Shankar Golikari V. Century Spinning & Manufacturing Co. Ltd.***³⁷, the court upheld the constitutional validity of the clauses in the employment contracts, mandated that it should be reasonable and for the limited duration of time. The lack of a dedicated statute causes enforcement standards to differ in different situations. The absence of statutory protection for trade secrets necessitates reliance on contractual safeguards, which may not be sufficient in all scenarios. The combination of employee movement alongside digital data exchange creates an increased possibility for the theft of trade secrets.

2.7.8 Semiconductor Integrated Circuits Layout Design

The Semiconductor Integrated Circuits Layout-Design Act, 2000³⁸ provides protection to integrated circuit layout designs by granting exclusive rights to their creators for a 10-year period. The Act establishes civil and criminal remedies to address infringements even though judicial decisions remain scarce in this legal area. In the case of ***J.R. Kapoor V. Micronix India***³⁹, the court emphasized on the protection of the chip products in semi-conductor and the patented rights over the same. The evaluation of originality and infringements in layout design

³⁵ The Protection of Plant Varieties and Farmers Rights Act, 2001 (Act 53 of 2001)

³⁶ *Monsanto Technology LLC V. Nuziveedu Seeds Ltd*, AIR 2019 SUPREME COURT 559

³⁷ *Niranjan Shankar Golikari V. The Century Spinning and Mfg. Co. Ltd*, AIR 1967 SUPREME COURT 1098

³⁸ The Semiconductor Integrated Circuits Layout-Design Act, 2000 (Act 37 of 2000)

³⁹ *J.R. Kapoor V. Micronlx India*, AIRONLINE 1994 SC 696

requires advanced technical knowledge for enforcement purposes. The people in the Semiconductor industry face challenges in enforcement and awareness because of the specialized nature of this sector and the fast-paced technological developments.

3. Legislations pertaining to Intellectual Property Rights

Intellectual Property Rights (IPRs) exist to grant creators legal protection so they can manage their original innovations and artistic creations. The rights work to advance innovation while building essential structures for knowledge-based economic development. Indian IPR regulations stem from national requirements and global agreements such as TRIPS. The Indian judiciary uses both its interpretative capabilities and review functions to establish that laws are constitutionally valid while ensuring fair and effective implementation.

3.1 The Patents Act, 1970

India's law on inventions revolves around the Patents Act of 1970⁴⁰ as its fundamental piece of legislation. The legislation provides inventors with the right to control their new, unobvious and industrial inventions. The 2005 amendment to the Act brought it in line with TRIPS by establishing product patents in pharmaceuticals. The act Covers inventions in all fields of technology. There are various key provisions present in the act dealing with the duration of the patent, that is 20 years from the filing date. Section 3(d) of the Patents Act prevents perennial practices which extends the life of a patent by implementing small modifications. The Supreme Court in *Novartis AG V. Union of India*⁴¹ backed Section 3(d) by highlighting medical affordability as more important than permitting monopolistic rights to exist.

3.2 Copyright Act, 1970

India established the Copyright Act in 1957⁴² as its first intellectual property rights legislation which protects the creative works of authors and creators and film and sound recording rights. The act grants authors and creators a combination of financial rights and moral rights that enable them to duplicate works and distribute them and perform them and modify them. The legislation contains an essential principle that copyright protection emerges naturally at the moment of creation so registration is not mandatory although it provides evidence. Several amendments have been made to this law since 1957 but the most significant one occurred in 2012 to recognize digital technology progress and follow WIPO Internet Treaties⁴³. The 2012 amendment established new rights for lyricists and composers to receive royalties from film works while creating a method to stop digital piracy. Most works receive copyright protection throughout the author's lifetime combined with another sixty years after their death. The law grants authors moral rights according to Section 57 which enable them to maintain authorship identification and

⁴⁰ *Supra* note 16 at 4.

⁴¹ *Supra* note 1 at 1.

⁴² *Supra* note 17 at 4.

⁴³ WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (known together as the "Internet Treaties")

stop any changes that distort their work. Through *Eastern Book Company & Ors V. D.B. Modak & Anr*⁴⁴, the Supreme Court established a legal framework which separates non-copyrightable judgments from creative editorial elements that receive protection. The judiciary extended moral rights through *Amar Nath Sehgal V. Union of India*⁴⁵ to include national cultural heritage as protected works while confirming that artistic works removed or altered without justification violated the artist's dignity.

3.3 Trade Marks Act, 1999

Trade Marks Act, 1999⁴⁶ came into existence by replacing the Trade and Merchandise Marks Act, enacted in the year of 1958 to protect the trademarks that are used to differentiate goods or services in trading sector between the traders. The Act remains compliant with TRIPS guidelines and recognizes both goods and service marks while protecting both collective marks and certification marks. Once registered a trademark enables its owner to control the mark's use and to pursue legal action against infringement or passing off. Registered trademarks maintain their validity for a period of ten years and after that time they can be continuously renewed. According to the Act a party commits infringement by using an identical or deceptively similar mark during commercial activities and the Act allows for civil as well as criminal legal actions. The role of judiciary in supporting trademark holders has been in a consistent manner and; a pivotal decision in *Yahoo! Inc. V. Akash Arora*⁴⁷ clarified that domain names can be recognized under trademark law, especially where their misuse causes consumer confusion or economic harm. The judiciary also emphasized the doctrine of “passing off” as a common law remedy available even for unregistered marks, ensuring brand integrity is preserved. The Act's enforcement mechanisms have evolved to handle modern threats like cybersquatting and digital counterfeiting.

3.4 The Designs Act, 2000⁴⁸

The Designs Act, 2000 provides legal guidelines for safeguarding decorative elements in products which include their form, structure, pattern and decoration that create visual attraction. This legislation has been considered as a remarkable change w.r.t the provisions as compared to the older Designs Act of 1911 to bring Indian regulations in line with global TRIPS Agreement standards. According to the Act the term "design" represents those visible elements which an industrial process applies to an article and which can be evaluated by sight alone. Before a design can receive registration, it must be both new and original in addition to never being used or published in India. The registered design allows its owner to implement the design on any product of the specific category for which it was registered. The design remains protected for ten years after registration with the possibility of extending this period by five additional years. In

⁴⁴ *Eastern Book Company & Ors V. D.B. Modak & Anr*, AIR 2008 SUPREME COURT 809

⁴⁵ *Amar Nath Sehgal V. Union of India (Uoi) And Anr.*, 117(2005)DLT717

⁴⁶ *Supra* note 18 at 4.

⁴⁷ *Supra* note 32 at 7.

⁴⁸ *Supra* note 19 at 4.

the case of *Bharat Glass Tube Limited V. Gopal Glass Works Limited*⁴⁹, the case was the first landmark judgement interpreting The Designs Act, 2000⁵⁰, the court clarified and emphasized on the object of the act is to protect and reward the creator's work. The Act establishes measures to stop unauthorized reproduction of registered designs while giving legal right for the owner to sue infringers for damages and injunction. Courts show limited interference in design disputes as compared to other intellectual property rights but they recognize the significance of distinctive looks and consumer approval in their decisions on packaging and car part cases.

3.5 The Geographical Indications of Goods (Registration and Protection) Act, 1999⁵¹

The Geographical Indications of Goods (Registration and Protection) Act, 1999 was enacted to ensure protection to the products which derive their uniqueness from various geographical locations. The Act provides the term geographical indication (GI) to describe an indication which shows that goods come from a specific location responsible for their essential quality, reputation or characteristics. The registration encompasses Darjeeling tea as well as Mysore silk and Nagpur orange. The registration provides exclusive rights to stop the use of the indication by others who fail to meet the established quality standards. Initially, registration lasts for ten years but can receive renewal. The registration benefits only approved geographic territory users and producers. The law defends against the unauthorized use and inappropriate handling and business competition of these products. The courts of India have established themselves as defenders of geographical indication protection through their defense of community ownership rights and economic value of these products. Through this legal system traditional product quality and market distinction become possible while simultaneously strengthening economic development in agricultural and artisanal sectors and rural livelihoods.

3.6 The Protection of Plant Varieties and Farmers' Rights Act, 2001⁵²

The Protection of Plant Varieties and Farmers' Rights Act, 2001 was enacted as a thought-provoking approach which is considered as associated with breeder rights to farmer traditional knowledge protection. Indian legislation emerged as a response to TRIPS commitments yet it maintains alignment with domestic agriculture strategies. The legislation extends intellectual property safeguards to fresh plant varieties that meet the NDUS criteria by granting breeders exclusive rights for commercial use. Through this Act farmers gain the legal authority to preserve and cultivate their seeds while enabling them to freely distribute these seeds which upholds the nation's biodiversity and honors historic farming traditions. Maintenance of protection lasts between 15 and 20 years depending on the specific plant variety. The judiciary maintains a neutral position through litigation regarding genetically modified crops because in

⁴⁹ *Bharat Glass Tube Limited V. Gopal Glass Works Limited*, AIR 2008 SUPREME COURT 2520

⁵⁰ *Supra* note 19 at 4.

⁵¹ *Supra* note 34 at 7.

⁵² *Supra* note 36 at 8.

cases like *Monsanto Technology V. Nuziveedu Seeds*⁵³ they work to harmonize breeder rights against both public policy goals and national food security needs.

3.7 The Semiconductor Integrated Circuits Layout-Design Act, 2000⁵⁴

The Semiconductor Integrated Circuits Layout-Design Act, 2000 protects the original structure of semiconductor chip designs that function as electronic device foundations. The law exists to encourage technological advancement and investment in microelectronics by recognising the creative work that results in circuit layouts. The law defines a layout design as a spatial organisation of parts and interconnections within a semiconductor integrated circuit. The apex court in the case of *J.R. Kapoor V. Micronix India*⁵⁵, emphasized on the protection of the chip products in semi-conductor and the patented rights and protection. The protected rights under the Act extend to actions that involve making copies or bringing products into a country or selling them or distributing products for business purposes. The electronics industry depends on this essential legal protection yet public understanding and national chip-making capabilities prevent its full utilization. The legislation has established a wide-reaching structure that follows international standards while it aims to grow in importance as India enhances its semiconductor production capabilities.

A strong IPR ecosystem in India receives support from all these legislative instruments which protect both public interests and creator rights. Through judicial review India's courts operate to interpret and enforce laws while following constitutional requirements and international standards and social requirements. Courts establish the equilibrium between private rights and public good through their landmark decisions on Novartis, Bayer, Yahoo and Eastern Book Company cases. To establish itself as a leading global innovation centre India must build stronger administrative enforcement while improving judicial power and adapting its laws to changing technological developments. There are rules prevailing to govern the IPR namely, The Copyright Rules, 2013, The Designs Rules, 2001.

4. Case Law Analysis

4.1 Novartis AG V. Union of India⁵⁶ (2013)

In *Novartis AG V. Union of India* was charged with interpreting Section 3(d) of the Patents Act⁵⁷, 1970, in relation to a patent application for the beta crystalline form of Imatinib Mesylate, which is marketed as Glivec, an anti-aging agent. According to Novartis, their new formulation exhibited better bioavailability, making it within the definition of an "invention" under the Act.

⁵³ *Supra* note 37 at 8.

⁵⁴ *Supra* note 39 at 8.

⁵⁵ *Supra* note 40 at 8.

⁵⁶ *Supra* note 1 at 1.

⁵⁷ *Supra* note 21 at 4.

In spite of this, the Court scrutinized the legislative intent behind Section 3(d)⁵⁸ to prevent "evergreening" from small modifications made to known drugs to extend patents.

The Court ruled that improvements in physical properties, such as solubility or stability, are not enough to meet the standard of "enhanced efficacy" unless they can be demonstrated as therapeutic advantages. To this the Court framed its interpretation in wider constitutional terms, and stressed that patent laws should not be treated as separate entities depending on India's socio-economic circumstances, most importantly the right to health under Article 21⁵⁹. Ultimately, the ruling was a strong legal argument that the preservation of public health is not dependent on commercial patent monopolies.

4.2 Bayer Corporation V. Union of India⁶⁰ (2014)

In the legal case *Bayer Corporation V. Union of India*, the judiciary took a stance supporting public access to pharmaceutical products. Bayer filed a lawsuit against the compulsory license which Natco Pharma received for producing the high-priced cancer treatment called Nexavar. The Bombay High Court based its judgment on Section 84 of the Patents Act⁶¹ and fundamental constitutional standards which later received affirmation. The Court established and emphasized on the supremacy of national health goals above the patent system. The Court maintained a careful equilibrium between statutory principles and India's Doha Declaration⁶² commitments while considering Bayer's arguments about exclusive patent rights and innovation rewards. The case established judicial review beyond executive oversight by establishing a new legal doctrine which combines international treaty analysis with legislative intent and constitutional ethical standards.

4.3 R. G Anand V. M/S. Delux Films & Ors (1978)⁶³

In Indian copyright law, *R.G Anand V. M/S. Delux Films & Ors*, the case continues to be a seminal. The Court established the distinction between concept and expression in addressing claims of plagiarism between a playwright and a filmmaker, stating that only the latter is covered by the Copyright Act. It decided that incidental resemblance resulting from a shared theme did not constitute infringement and used the "lay observer" test to evaluate substantial similarity. An analytical approach that strikes a compromise between maintaining the creative commons of ideas and safeguarding original expression was introduced by this case. Its reinforcement of judicial discretion in deciding copyright claims, especially in cases where aggressive enforcement could hinder creative diversity, is what gives it its lasting relevance.

⁵⁸ *Ibid.*

⁵⁹ The Constitution of India, art. 21.

⁶⁰ *Supra* note 22 at 4.

⁶¹ *Supra* note 16, s.84.

⁶² Doha Declaration on the TRIPS Agreement and Public Health, 2001

⁶³ *Supra* note 30 at 6.

4.4 Amar Nath Sehgal V. Union of India⁶⁴ (2005)

Amar Nath Sehgal V. Union of India was decided by the Delhi High Court with an important ruling. Union of India was the case in which the meaning of moral rights under Section 57 of the Copyright Act, 1957⁶⁵ was redefined. The case was about how the Indian government illegally took down and destroyed the mural made by Sehgal at Vigyan Bhawan. On thorough examination, the Court arrived at the conclusion that moral rights go beyond economic interests, as they are meant to protect the integrity of an author's work. Further, the Court laid down a constitutional basis for copyright law by holding that authors have rights over the integrity of works irrespective of physical possession; this position is in accordance with the doctrine of individual dignity as envisaged under Article 21⁶⁶. The Court's ruling established moral rights as a fundamental part of the Indian cultural and constitutional order and set a precedent for the protection of artistic work and cultural objects under the veil of public legal norms.

4.5 Yahoo!, Inc. V. Akash Arora & Anr.⁶⁷ (1999)

In *Yahoo!, Inc. V. Akash Arora & Anr.*, A groundbreaking verdict was delivered by Akash Arora, the Delhi High Court, which established the basis for domain name safeguarding under Indian trademark law. Akash Arora initiated a legal battle by initiating e-commerce under the name "YahooIndia.com," which bore resemblance to the globally recognized trademark "NYUI!" owned by the plaintiff. This triggered an argument. Yahoo! The use of unauthorized activities on websites was deemed by Inc. as a form of deception and posed ambiguous risks to consumers, particularly considering the identical services offered on their respective websites.

To counter the claim, the respondent argued that "Yahoo" was a generic term and that the suffix "India" provided enough differentiation to eliminate confusion with the domain name. This reasoning did not speak to the Court. The forward-thinking interpretation posits that domain names are not just technical addresses on the internet, but also serve as unique brand markers in commercial settings, independent of trademarks in traditional marketplaces. Taking into account the strong connection and popularity of Yahoo!, the Court determined that the defendant's domain name could potentially mislead users into believing they had any association with Yahoo!" (e.g. Inc, thereby amounting to misrepresentation.

4.6 Satyam Infoway Ltd. V. Sifynet Solutions Pvt. Ltd. ⁶⁸(2004)

In *Satyam Infoway Ltd. V. Sifynet Solutions Pvt. Ltd.*, the Supreme Court addressed the respondent's unlawful domain name registration in a way that closely mirrored Satyam Infoway's. The Court emphasized that the law of passing off applies to internet identifiers and upheld the functional equivalence of domain names to trademarks. It made clear that protecting

⁶⁴ *Supra* note 46 at 10.

⁶⁵ *Supra* note 17, s.57.

⁶⁶ *Supra* note 60 at 13.

⁶⁷ *Supra* note 32 at 7.

⁶⁸ *Satyam Infoway Ltd. V. Sifynet Solutions Pvt. Ltd.*, AIR 2004 SUPREME COURT 3540

domain names is essential to preserving business integrity in the digital economy because they have inherent economic worth and consumer goodwill. The ruling emphasizes how judicial review can modernize statutory interpretation in a technologically changing context and illustrates the judiciary's proactive approach to adjusting IPR enforcement regimes to new commercial realities.

5. Conclusion:

The Indian legal system regarding intellectual property rights operates within an evolving framework that incorporates innovation support and property protection and public welfare maintenance. The examination in this section demonstrates that Indian intellectual property rights enforcement bases on the fundamental relationship between legal interpretation through judicial processes and administrative actions. Judicial review stands as more than a constitutional control mechanism for evaluating governmental actions because it functions as a living process for the judiciary to improve legal systems by adding interpretive strength and constitutional morality and fair discretion.

This chapter analyzes essential laws such as the Patents Act together with Copyright Act and Trade Marks Act and other statutes to demonstrate how Indian IPR law stands on a complex foundation of exclusive rights and social responsibilities. The statutes exist as dynamic legal tools which require continuous interpretation. The legal system in India has started to accept its duty of combining national intellectual property laws with constitutional standards especially articles 14, 19, and 21. The judiciary has maintained its focus on statutory protections versus public interest requirements through cases which evaluate compulsory licensing provisions and moral rights conflicts with commercial utility and digital innovation versus traditional copyright standards. Indian courts enforce intellectual property rights through decisions that maintain the constitutional standards of proportionality and reasonableness and non-arbitrariness as a foundational principle.

The constitutional principles which guide intellectual property rights enforcement in India are evident in judicial decisions which require proportionality and reasonableness and non-arbitrariness. The judiciary maintains executive agencies and quasi-judicial bodies accountable through Articles 226 and 32 writ petitions which result in lawful and reasoned administrative IP actions with proper procedural elements. Copyright, trademark and trade secret laws have experienced transformative changes during the digital era which led to court innovations including passing off for domain names and moral rights extension to digital reproductions and recognition of intellectual property's non-material aspects. The Indian courts have issued important legal decisions in the cases *Yahoo!, Inc. V. Akash Arora & Anr.*⁶⁹ and *Satyam*

⁶⁹ *Supra* note 32 at 7.

Infoway Ltd. V. Sifynet Solutions Pvt. Ltd.⁷⁰ which demonstrates their ability to develop new enforcement strategies to protect digital identities and maintain IP rights' relevance in cyberspace.

In conclusion, the judiciary's function to interpret and enforce intellectual property rights using judicial review has established an IPR regime which stands constitutionally strong while meeting social demands and global applications. Through the examination of cases and legislative frameworks, it is clear that judicial review functions both to nullify decisions while also providing a framework for constructive involvement which evolves as the judiciary maintains intellectual property law's main objective of knowledge development and creative protection and societal enrichment. Through the ongoing development of India as a worldwide technology and cultural center, the active relationship between law and judicial supervision will determine how intellectual property enforcement functions in the upcoming years.

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⁷⁰ *Supra* note 69 at 14.

GUARDIAN OF THE GREEN: FEDERALISM AND JUDICIAL REVIEW IN INDIA AS PROTECTOR OF OUR PLANET

-Dr. Mirza Juned Beg¹

Abstract

In an era marked by the urgent crescendo of ecological crises, the intricate tapestry of environmental federalism emerges as a pivotal construct in navigating the labyrinthine challenges of sustainable governance. This scholarly exploration delves into the dynamic interplay between federalism and judicial review, illuminating the delicate balance between national imperatives and local aspirations in environmental stewardship. Through a kaleidoscope of legal frameworks and judicial interpretations, the narrative intricately weaves the threads of authority, accountability, and ecological integrity, revealing the profound implications of judicial oversight in enhancing or constraining environmental policy.

As the judiciary assumes its role as both arbiter and guardian of the environment, this examination posits that judicial review serves as a vital fulcrum, ensuring that the imperatives of environmental justice resonate across the fragmented landscape of governance. By scrutinizing landmark cases and legislative milestones, this work elucidates how the judiciary shapes the narrative of environmental federalism, fostering a symphony of cooperative engagement while grappling with the discordant notes of state versus federal authority. This discourse aspires to catalyze a deeper understanding of the harmonious interplay between law and nature, urging stakeholders to engage in a collective. Ultimately, this work aspires to contribute to the ever-evolving narrative of environmental jurisprudence in India, urging a contemplative reflection on our collective responsibility toward the Earth and future generations.

Keywords: Environment, Federalism, Judicial Review, India.

Introduction

“It is horrifying that we have to fight our own government to save the environment.”

-Ansel Adams²

Navigating Indian federalist issues is a significant aspect of the art of governance. The nation is vast in terms of both people and land area, possesses a remarkable diversity of cultures, and is made up of constituent regions with drastically disparate economic histories. Indian federalism has alternated between eras of state autonomy to meet local demands and periods of central dominance to reconcile conflicting interests.

The localized requirements of climate governance are not well served by India’s federal system. With a federal government that has more fiscal, administrative, and jurisdictional authority than in more traditional, decentralized federations, it is extremely centralized. However, Indian states are in charge of a number of areas that are essential to combating climate change, ranging from health and water to the emissions-intensive energy industry. Because of this, complex forms of collaboration between the two levels are crucial.

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² An American Photographer and Environmentalist (1902-1984).

The distribution of power in environmental problems among governmental levels has become increasingly contentious. As environmental activists and non-governmental organizations strive for increased autonomy and decentralization on environmental concerns to the States and Panchayat Raj Institutions, the issue is also becoming more significant in the Indian setting. In India, the Union government has traditionally had the authority to make environmental decisions pertaining to the creation of laws, policies, and governance. The Indian Constitution consistently favors the federal government and its laws, giving states a smaller say in environmental policymaking and governance.

The rights of the traditional, indigenous people, whose life depends on preserving the symbiotic link between humans, nature, and the environment, are now in conflict with the current environmental regulations. The central government of India's environmental regulations, which are created and implemented by vertically oriented bureaucratic machinery, usually ignore this mutually beneficial relationship and the vital role that traditional communities and groups play in grassroots environmental protection. Furthermore, local indigenous communities are frequently targeted by the capitalist market model of development and local intervention in the name of industrialization and privatization, with little consideration for their inherent rights over the environment and the lands they occupy.

In the guise of environmental preservation, this has frequently led to disputes and contestations between the State and indigenous people at the local level. Therefore, when it comes to environmental challenges in India, there is a misperception of centralized institutional procedures and policy frameworks.

The author in this chapter investigates how judicial activism and India's federal system work together to protect the environment. The chapter looks at how important courts especially the Supreme Court are in interpreting environmental protection clauses in the constitution. In putting eco-friendly policies into effect, it talks about the conflicts and cooperation between the federal and state governments. The author also cites important rulings that demonstrate the judiciary's dedication to ecological preservation, highlighting the critical role that judicial review plays in protecting India's natural heritage under the federal system.

Constitutional Cornerstones for Environmental Stewardship

Since, the environment provides all of life's necessities, humans and the environment have a close relationship. Without a natural and friendly environment, humans could not survive on Earth. Humans have intentionally tried to use natural resources and modify their surroundings since the beginning of time in order to mitigate the adverse impacts of predators, precipitation, and temperature changes. Nature has always been exploited by man in an effort to improve living conditions. Exploitation of nature and natural resources is a result of industrialization, infrastructure development, and agriculture.

Man's ability to survive and lead a healthy life depends on how wisely he uses natural resources, preserving the standard of the environment around him in the process. It should be remembered that the ever-increasing harmful compounds found in our soil, water, and air can get into our bodies by way of the food we consume, the water we consume, and the air we breathe. We may have reached the maximum amount of tolerance on most fronts, and further deterioration of the environment could lead to disease outbreaks, disability, and gradual poisoning. The only option left to man is to make a sincere effort to improve the current environment and natural resources. A better, balanced, and environmentally friendly

development that guarantees poison-free air, drinkable water, and other environmental elements free from defilements could become a reality if plans, schemes, and projects with negative environmental repercussions are investigated and examined.

Political boundaries do not apply to the ongoing attack and its effects on the environment; pollution can spread to extremely large areas from its source. Smoke from one nation can lead to acid rains in another, and the world will undoubtedly be impacted by the loss of forest cover, global warming, and biodiversity. Therefore, action must be taken to protect the environment at an international level. Key international organizations, such as the United Nations Organization, have already taken action and are working toward a cleaner and greener world after realizing their duties in this area. Two significant attempts to raise worldwide awareness of environmental issues and hold the world community accountable for environmental conservation are the Rio Declaration and the Stockholm Conference on the Human Environment which is known as **“Earth Summit.”**

In response to global efforts, the Indian Parliament has passed significant environmental legislation that, with the right implementation, may address the majority of environmental issues. In 1972, the International Conference on Human Environment adopted the Stockholm Declaration. appears to have raised awareness in parliament. The Declaration emphasized that protecting and improving the environment for present and future generations is a serious responsibility of man. When the Indian Constitution was drafted, environmental issues were not as important as they are today; therefore, it is not necessary to examine the shortcomings of the original Constitution in this regard. Even at that time, the Constitution contained provisions for both direct and indirect environmental protection. Later, the 42nd Constitutional Amendment of 1976 added provisions for environmental protection under Articles 48-A³ and 51-A(g).⁴ The courts have interpreted the right to life as a right to a clean and healthy environment by utilizing these clauses in conjunction with Article 21.⁵

The Supreme Court has frequently applied Article 39 as a guidance for issuing environmental justice decisions,⁶ which provides that:

“the State shall, in particular, direct its policy towards securing ... that the health and strength of workers, men and women, and the tender age of children are not abused ...”

Numerous rulings⁷ concerning environmental issues have also cited Article 47 by India’s higher judiciary which said that:

“the State shall regard the raising of the level of nutrition and standard of living of its people and the improvement of public health as among its primary duties ...”

Environmental issues are clearly covered by Articles 39(e), 47, and 48-A under Directive Principles of State Policy. They place an obligation on the state to protect the environment, promote public health, and improve public health, both alone and jointly. The State is

³ Directive Principles of State Policy.

⁴ Fundamental Duty.

⁵ MC Mehta v. Union of India, (1991) 2 SCC 353,356.

⁶ MC. Mehta v. Union of India (2002) 4 SCC 356; Samatha v. State of A.P., AIR 1997 SC 3297; Bandhua Mukti Morcha v. Union of India, 1991 4 SCC 177; Consumer Education & Research Centre v. Union of India, AIR 1995 SC 922; Charanlal Shahu v. Union of India, AIR 1990 SC 1480.

⁷ Vellore Citizens' Welfare Forum v. University of India AIR 1996 SC 2715 3 SCC 715; Union of India v. M.C. Mehta (1998) M.C. Mehta v. Union of India (2002) 4 SCC 356; 6 SCC 60.

required to protect monuments of national significance from environmental contamination in accordance with Article 49 of the Constitution. The State is directed under Article 51(c) to encourage organized peoples to cooperate in a way that respects treaty obligations and international law. As a result, numerous international treaties covering various facets of environmental protection were put into effect.

According to Article 51A(g), every Indian citizen has a responsibility to protect and improve the nation's natural environment, which includes its forests, lakes, rivers, and animals, as well as to have compassion for all living creatures. Legislation is required to implement the obligations because they are imposed on citizens rather than the state.⁸ However, some courts have found this clause to be a useful instrument for environmental preservation. In resolving a public interest case, the Rajasthan High Court interpreted this clause in a very intriguing way.⁹ Therefore, the Indian Constitution imposes a common obligation on the State and all Indian residents to protect and improve the nation's natural environment. **Justice Ranganath Mishra** claims that:

*"it is the responsibility of both the government and every person to preserve the environment and maintain the ecological balance. Let us remind all citizens that it is their fundamental duty, as stated in Article 51-A(g) of the Constitution, and that it is a social obligation."*¹⁰

Environmental justice is not listed alongside "justice" in the preamble of the Indian Constitution, which outlines the document's primary goals and values, political, social, and economic. Following the full codification of the Constitution's substantive provisions, the preamble was created. Therefore, it is a clear statement of what is contained in the Constitution rather than just a list of goals or a tool to help legislators think more clearly. According to the Indian Supreme Court, the preamble of the Constitution¹¹ is a component of the document and also said that:

*"Although the preamble guarantees individual dignity, it does not indicate its meaning. Is it to be judged on cultural tradition, education, or material possessions? Cultural bondage had been based on the human spirit and its relationship to nature otherwise, the environment's quality also affects a person's dignity."*¹²

After some deliberation, the Supreme Court recognized several unexplained liberties suggested by Article 21 and interpreted the right to life and personal liberty to include the right to a healthy environment. Thus, Article 21 of the Constitution guarantees the right to life, which includes the right to a healthy environment. By focusing on sustainable development and preserving natural resources for both current and future generations, it guarantees environmental protection.

The right to the healthy environment is safeguarded by Articles 32 and 226 of the Indian Constitution. Article 32 allows anybody to petition the Supreme Court directly, whereas Article 226 grants High Courts the power to issue writs for environmental protection.

⁸ M.P. Singh (ed.), *V.N. Sukla's Constitution of India* 313 (Eastern Book Company, 9th edn., 2001).

⁹ L.K. Koolwal v. State of Rajasthan, AIR 1988 Raj 2.

¹⁰ Rural litigation and Entitlement Kendra v. State of U.P., AIR 1987 SC 359,364.

¹¹ Kesavamlana Bharati v. State of Kerala, AIR 1973 SC 1461.

¹² Ashok A. Desai, "Constitutional Accountability Towards Environment" 42 *JILL* 160-165 (2000).

Enactment relating to any of the topics in list III may be passed by the Union Parliament and the legislature of any state. often known as the “**Concurrent List.**” Therefore, it is clear that the essential elements of ecology have been adequately addressed, and that the Center and States share responsibility for enacting laws to protect the environment. The concurrent list includes “*forests*”, “*wild animals*”, and “*birds*”, but in reality, the majority of the laws have been passed by Parliament.

The Constitution states that environmental issues are included in the Concurrent List, which gives the Union and State Governments the authority to enact laws on them. The significance of environmental federalism, which divides duties and powers across several governmental levels, is highlighted by this shared authority. It makes environmental protection a shared priority by facilitating integrated efforts for conservation, pollution reduction, and sustainable development. Across the country, this collaborative structure fosters environmental sustainability and improves effective government.

Justice P.N. Bhagawati in the case of ***Francis Coralie v. Union Territory of Delhi***¹³, said that:

“We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the basic necessities of life such as adequate nutrition, clothing, and shelter over the head, as well as facilities for reading, writing, and expressing oneself in diverse forms, freely moving about, and mixing and mingling with fellow human beings.”

Because of this gap, India’s post-independence development pattern has led to more environmental harm than preservation. According to the Constitution, the Union government plays a major responsibility in the environment, which is a residual subject. Then Prime Minister of India, **Mrs. Indira Gandhi**, attended the Stockholm Conference in 1972 and personally addressed the issues of recently independent nations her in speech and said that, “**Poverty is the big Polluter in India.**”

Furthermore, once India signed the Stockholm Declaration in 1972, centralization trends persisted and larger obligations were assigned. As India was going through its harshest moments of authoritarian government under national emergency, the domestic context there was also unfavorable to environmental federalism or any devolution of power to States. The Union Parliament subsequently passed a number of environmental regulations based on the agreements made at the Stockholm Conference. They are:

- The Water (Pollution Prevention and Control) Act of 1974.
- The Water Cess Act of 1977 (Prevention and Control of Pollution).
- The Air (Pollution Prevention and Control) Act of 1981.
- The Environmental Protection Act, 1986.

Instead of a fresh idea of environmental federalism in the Indian context, this has led to a stronger centralization of environmental policies. States in India have enacted a variety of laws for the preservation and protection of the environment, which are listed under the State list, based on the national environmental laws passed by the Parliament. With the 73rd and 74th constitutional amendments, panchayats were granted a clear devolution of power, and the idea of environmental federalism emerged as a means of tackling environmental issues. The

¹³ AIR 1981 SC, 746.

constitution's eleventh schedule grants the panchayats authority over minor forest products, soil erosion, fuel and feed, water management, and social and farm forestry. The constitution's 12th Schedule grants municipalities authority over issues like public health, sanitation, and environmental preservation.

The Theoretical Underpinnings of Environmental Constitutionalism

In its literal term the “*environmental constitutionalism*” refers to a system of environmental standards that are supreme in hierarchy, unchangeable, and essentially acceptable as governing in situations when they contradict with regular legislation and are subject to legal action in courts. To make environmental governance more bearable and less vulnerable to political pressures, domestic environmental care has been moved from the ‘ordinary legal stage’ to the ‘constitutional stage’ in modern times.¹⁴

“Environmental constitutionalism” is simply defined by **Louis J. Kotzé** as, “*adopting environmental protection in constitutional terms*.”¹⁵ Enshrining environmental rights as justiciable substantive or procedural socio-economic-political fundamental rights within constitutional schemes, constitutionalizing sustainable development and its guiding principles as directive principles for future state laws and civic duties, and outlining specific State and non-State environmental protection functions and duties are some of the popular methods used to implement environmental constitutionalism at the domestic level.

Louis J. Kotzé examines the thin and thick metaphors of environmental constitutionalism, starting with the functional aspect to ascertain the composition, ordering, and architecture of environmental governance. While thick environmental constitutionalism grants people procedural environmental rights to enjoy fundamental substantive environmental rights and requires government actors to adhere to the responsibilities assigned under the metaphor of thin environmental constitutionalism, thin environmental constitutionalism places the burden of creating inviolably supreme environmental law on the State, enabling people with justiciable fundamental substantive environmental rights. Among these responsibilities are: preserving natural resources and guaranteeing fair access to their use; preventing adverse environmental effects; preventing environmental hazards and minimizing damages with emergency services; compensating for environmental damages; and ensuring ecological justice.¹⁶

Environmental constitutionalism offers legal underpinnings for environmental protection measures in addition to literal interpretations. The current environmental rules are comparable to a skyscraper whose upper floors were constructed before its base, according to Aguila, author of the landmark document “***A Global Pact for the Environment: The Logical Outcome of 50 Years of International Environmental Law***.”¹⁷ Both national and international environmental legislation are covered equally. A fundamental and legally enforceable text that successfully transfers environmental law ideas into both national and international legal systems is lacking. Eventually, the legal system's divisions, fissures, and

¹⁴ Louis J. Kotzé, “Arguing Global Environmental Constitutionalism” 1(1) *Transnational Environmental Law* 199–233 (2012).

¹⁵ *Ibid.*

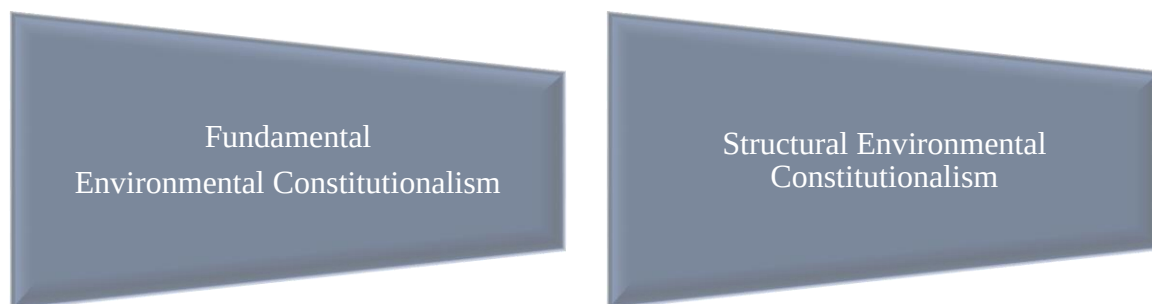
¹⁶ Louis J. Kotzé, “The Conceptual Contours of Environmental Constitutionalism” 21 *Widener Law Review* 187–200 (2015).

¹⁷ Yann Aguila, “A Global Pact for the Environment: The Logical Outcome of 50 Years of International Environmental Law” 12(14) *Sustainability* 5636 (2020).

riffs impede efficient national and international environmental regulation. By giving all members of society enforceable environmental rights to pursue sustainable economic development while carrying out environmental protection, environmental constitutionalism elevates the fundamental tenet of environmental laws into the supreme text with legal force that closes gaps, unifies disparate laws, and permits robust implementation of environmental provisions.

Exploring the Spectrum of Environmental Constitutionalism

Depending on the context, the term “*environmental constitutionalism*” might indicate several things.¹⁸ Two common varieties of environmental constitutionalism’s conceptual discourse emerge from the perspective of how it affects environmental quality and citizens’ environmental rights.¹⁹



Fundamental Environmental Constitutionalism: Integrating environmental rights and protections into constitutional legislation is a key component of fundamental environmental constitutionalism. It guarantees government accountability for environmental stewardship by acknowledging the importance of nature and ecosystems to human well-being. This strategy encourages the preservation of ecosystems for present and future generations, sustainable development, and the legal enforcement of environmental rights. In other words, it includes the protection of citizens’ fundamental substantive and procedural environmental rights to a healthy environment in the provisions of national constitutions. In addition to codifying common law principles relevant to the right to a healthy environment, such as the rights of wildlife, other natural resources, clean and drinkable water, and fresh air, such provisions may establish a new constitutional right.²⁰

Structural Environmental Constitutionalism

Integrating environmental safeguards within a country’s constitution is known as structural environmental constitutionalism. It guarantees the legal protection of fundamental rights pertaining to ecological preservation, giving environmental justice and policy a constitutional foundation. Through constitutional commitment, this strategy supports sustainable development and improves environmental governance.

The structural environmental constitutionalism that is highly effective in distributing environmental regulatory authority among all tiers of federal institutions within a given country is environmental constitutionalism as seen from the perspective of its effects on the

¹⁸Brian J. Gareau, “Global Environmental Constitutionalism” 40(2) *B.C. ENVTL. AFF. L. REV.* 403-04 (2013).

¹⁹ Blake Hudson, “Structural Environmental Constitutionalism” 21(2) *Widener Law Review* 201- 216 (2015).

²⁰ Michael C. Blumm and Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (Carolina Academic Press, 3rd edn., 2021).

environment and people's environmental rights.²¹ It provides a detailed regulatory framework that grants regulatory agencies at all governmental levels structural environmental governance rights.

The federal (national) government and the province or state (sub-national) governments are the two political institutions that often share regulatory responsibility over various topics, including environmental issues, under a federal constitution. If the structural environmental governance design is minimal in jurisdiction, this federal architecture of environmental government may present a variety of obstacles in environmental governance at each level of government. A provincial government may contest federal environmental governance initiatives on the grounds that the topic is constitutionally reserved for it, and the federal government may block a provincial attempt at environmental governance by arguing that the enterprise falls under its sole constitutional purview. The federal constitution's inconsistent narrative on environmental management may extend to provincial constitutions, resulting in conflict between local and provincial authorities. Judicial interpretation of the constitution or explicitly stated environmental constitutional provisions may give birth to such structural regulatory divides. In addition to impeding environmental governance, this structural regulatory division also makes it more difficult to develop creative environmental policies and implement international environmental rules domestically.

A poorly designed environmental governance framework has the ability to invite regulatory deficiencies and bring down the entire environmental constitutionalism framework. As a result, it is recommended that the structural environmental constitutional framework provide all levels of government with the best environmental governance jurisdictions. Fundamental environmental rights are strengthened by a robust structural environmental right.

Environmental Jurisprudence and Judicial Review in India

The Indian Parliament has passed some very important environmental laws in response to international initiatives; these laws have the potential to address the majority of environmental issues if effectively enforced. However, historical experience demonstrates that environmental laws are not being implemented to the required standard, mostly due to the current institutional and administrative framework, which is too weak and inefficient to meet the demands of environmental protection. To face the challenge, a new environmental ethics and ethos were therefore required. This is the exact point at which an informed and activist judiciary becomes necessary.

In India, environmental federalism ensures sustainable development throughout the country by dividing environmental governance between the federal and state administrations. With courts, particularly the Supreme Court, protecting environmental rights and upholding the law, judicial review is essential.²² Judicial Review and activism in environmental preservation is exemplified by landmark decisions such as the ***Ganga Pollution case***. Within

²¹ Blake Hudson and Jonathan Rosenbloom, "Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change" 64(4) *Hastings L.J.* 1272-1342 (2013).

²² See Gautam Bhatia, Corona Virus and the Constitution: Dialogic Judicial Review in Gujarat HC and Karnataka HC (May 24, 2020), available at: <https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-thegujarat-and-karnataka-high-courts/>, (accessed on 20th May, 2025).

India's federal framework, this interaction supports citizens' environmental rights, encourages responsibility, and strikes a balance between development and conservation.

The Indian judiciary's numerous rulings have actively improved environmental protection and cleared the path for the transfer of authority to different governmental levels for the appropriate application of environmental laws and regulations. This environmental judicial activism and judicial review raised awareness of environmental protection and ushered in a new era of environmental federalism in India. A new environmental consciousness has emerged in India as a result of numerous interventions made possible by NGOs, community organizations, and public-spirited individuals using Public Interest Litigation (PIL).

In the case of **Subhash Kumar v. State of Bihar**²³, the Court found that the petitioner's self-interest, which sought to profit from his company by collecting the sludge/slurry running out of the defendant washeries, was the main reason for initiating the public interest litigation rather than any public interest. The Court utilized this opportunity to rule that Article 21 guarantees the right to clean air and water since these are essential for a full quality of life and rejected the petition with costs.

The Apex Court of India in the case of **Virender Gaur v. State of Haryana**²⁴, in this instance, the Court noted:

"The right to life is protected as a fundamental right under Article 21. The preservation and protection of the environment, ecological balance free from air and water pollution, and sanitation all of which are necessary for the enjoyment of life and its attainment, including the right to live with human dignity are all included in its scope. Any negative behavior would pollute the environment. Air, water, pollution, ecology, environmental, etc. should all be considered violations of Article 21. As a result, a clean environment is essential to the right to a healthy life, and without a healthy and humane environment, it would be impossible to live with dignity."

In **Ratlam Municipality v. Vardhichand**²⁵, the Municipality was ordered by the Supreme Court to have a plan in place to make things better. Section 133 of the Criminal Code recognized the local citizens' right to petition the magistrate in this matter. The Procedure Code specifically granted them this right.

In **Vellore Citizens Welfare Forum v. Union of India**²⁶, some of the key tenets of sustainable development that were extracted from the Brundtland Report and other international texts were listed by the Court as follows:

- Precautionary Principle
- Polluter Pays Principle
- Inter-Generational Equity
- Use and Conservation of Natural Resources
- Environmental Protection

However, the Court stated that it believed the "*Precautionary Principle*" and the "*Polluter Pays Principle*" were crucial in light of the aforementioned characteristics of sustainable growth.

²³ AIR 1991 SC 420.

²⁴ (1995) 2 sec 577.

²⁵ AIR 1980 SC 1622.

²⁶ AIR 1996 SC 2715.

In **M.C. Mehta v. Union of India**²⁷ also known as **Badkhal and Surajkund Lakes case**, without hesitation, the Supreme Court ruled that the “*Precautionary Principle*” required the State Government to foresee, stop, and combat the causes of environmental degradation. Limiting development activities near the lakes was important to prevent environmental degradation and safeguard the two lakes.

In **A.P. Pollution Control Board v. Prof M. V. Nayudu**²⁸, the Supreme Court noted, following the development of the precautionary principle:

“The ‘assimilative capacity’ norm, which was revealed in Principle 6 of the 1972 Stockholm Declaration of the United Nations Conference on Human Environment, served as the foundation for the concept before this. According to the aforementioned principle, when environmental harm was predicted, relevant technical expertise would be available, and there would be sufficient time to take action to prevent such harm. It also assumed that science could provide policymakers with the information and resources they needed to avoid encroaching on the environment’s capacity to absorb impacts. The ‘Precautionary Principle’ was repeated in Principle 15 of the Rio Conference in 1992 and was highlighted in the 11th Principle of the 1982 U.N. General Assembly Resolution on World Charter for Nature.”

In **Narmadda Bachao Andolan v. Union of India**²⁹, the Supreme Court rendered a decision regarding the Sardar Sarovar Project’s dam building on the Namada River. In elucidating the novel notion of burden of proof, the Court determined that the “*Precautionary Principle*” and

in situations involving pollution or other projects or businesses where the possible degree of harm is unclear, the burden of evidence usually rests on the party attempting to change the status quo.

For the first time, the Supreme Court of India specifically used the polluter pays principle in the case of **Indian Council for Enviro-Legal Action v. Union of India**³⁰, and believed that the offending industry was accountable for fixing the environmental harm. The Court additionally determined that the Central Government was authorized by sections 3 and 5 of the Environment (Protection) Act, 1986, to issue directives and implement policies that would implement the polluter pays principle.

In **M. C. Mehta v. Kamal Nath**³¹, the Court reaffirmed that, “*one who pollutes the environment must pay to reverse the damage caused by his acts*” after referring the Vellore case. The Court determined that the Motel must reimburse the area's ecology and ecosystem through costs in accordance with the Polluter Pays Principle. It is necessary to remove and reverse the pollution that the Motel’s many structures have generated in the riverbed and along the banks of the River Beas. The Hon’ble Court further evolved the “**Doctrine of Public Trust.**”

²⁷ (1997)3 SCC 715,720.

²⁸ AIR 1999 SC 812

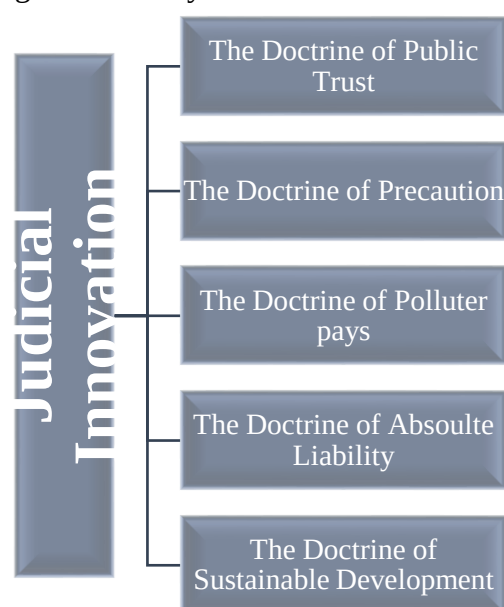
²⁹ AIR 2000 SC 3751.

³⁰ AIR 1996 SC 1446.

³¹ (1997) 1 sec 388.

In *S. Jagannath v. Union of India*³², the shrimp farming and culture sector was found to have polluted coastal areas, and the court once again used the Polluter Pays Principle to issue orders against them. In order to address the issue brought about by the shrimp farming sector in the Coastal States and Union Territories, the Court ordered the Central Government to establish an Authority under section 3(3) of the Environment (Protection) Act, 1986. According to the '*Polluter Pays Principle*', the Court determined that the shrimp culture sector was responsible for compensating the impacted parties. The Court also decided that the aforementioned Authority should identify the individuals or families who were hurt by the pollution, assess the extent of environmental damage in the affected areas, and decide how much compensation should be provided to them. In addition, the Court decided that the Authority should determine the amount of money that should be paid to the polluters to restore the damaged environment.

In the Indian context, states and organizations have gotten their power in environmental federalism from the following theoretical tenets. These ideas have served as the foundation for certain landmark rulings rendered by Indian courts. These are as follows:



In the case of *S.P. Sampath Kumar v. Union of India*³³, the Supreme Court ruled that a statute would violate the fundamental framework and be open to “*judicial review*” if it were passed without creating a “*effective alternative institutional mechanism or arrangement for judicial review.*” In the case of *LRS & Ors. v. the District Collector, Chittoor District & Ors.*³⁴, the Supreme Court also noted that “*judicial review*” applies to the administrative decisions made by the authorities. Thus, it is clear the in case of environmental protection any malafide act or violation of the Constitutional mandate for the protection of green environment by the legislature or administrative authorities shall be subject to judicial review. We now move on to the second problem, which was the dangerously high levels of air pollution in Delhi. Another serious problem that necessitated court action to safeguard the

³² (1997) 2 sec 87.

³³ (1987) 1 SCC 124.

³⁴ 2019 (4) SCC 500.

lives and welfare of impacted persons is this one in *M.C. Mehta v. Union of India & Ors*³⁵, through a Public Interest Litigation, the gravity of the situation was initially brought to light. In order to protect the fundamental right to health under Article 21 of the Constitution, the Supreme Court ordered the conversion of public transportation to compressed natural gas (CNG) in 1998 after providing the government with ample opportunity to correct the situation and repeatedly ordering the authorities to carry out their duties. Due to the other branches' failure to uphold the population's fundamental rights, the Court has now issued numerous directives addressing the problem of vehicle pollution. The Supreme Court's necessity for "*judicial review*" and intervention was further reinforced by the government's persistent disregard for the Court's directives in the interest of public health.

A PIL filed in the case of *Aditya Dubey & Anr v. Union of India & Ors.*³⁶, since no practical steps were taken to address it, the problem persisted. The government only established a framework without carrying it out. This emphasizes the necessity of judicial review once more. They have employed a number of evasive tactics and failed to sufficiently address the situation, even after sternly calling for accountability from the state and reminding them of their responsibility to safeguard and advance public health. Without the courts' ability to perform "*judicial review*", citizens' rights would be gravely jeopardized and they would have little options for remedy.

The Indian judiciary attempts to serve as a link between the current state of the law and its ideal state through the "*judicial review process.*" Judicial review will always be a crucial component of democracy and the legislative process, despite the fact that there is much disagreement about its scope and that there will always be some sort of barrier to its execution. The preservation of the separation of powers and the sound operation of each branch of government are at the heart of this concept, regardless of the tendencies in judicial review development.³⁷ The public's continued and increased trust in the courts is a result of its efficient use of this instrument. Upholding local constitutional norms is our responsibility as Constitutional Courts in quickly growing nations with rich histories.

Conclusion

The Constitution states that the federal government and state governments share authority over environmental matters because the topic of "*environment*" is included in the concurrent list. This model places a strong emphasis on environmental federalism, in which environmental issues are addressed independently and cooperatively by both governmental levels. The goal of this section is to guarantee thorough and efficient environmental protection in all areas. Conflicts could occur, nevertheless, if the government does not carry out its responsibilities or imposes insufficient policies. Judicial review becomes essential in these situations, enabling courts to step in and guarantee that environmental laws and policies comply with constitutional requirements. In protecting the environment for current and future generations, judicial monitoring serves as a protection, guaranteeing accountability and the appropriate operation of both federal and state agencies.

³⁵ WP (C) No. 13029/1985.

³⁶ WP (C) No.1135 of 2020.

³⁷ Mukhiit Rom and Anar Rentsenkhoroov (eds.), *Implementation of Constitutional Review Challenges and Development Trends* 25-40 (Ulaanbaatar, Mongolia, 2022).

JUDICIAL OVERREACH IN ECONOMIC GOVERNANCE

*-Varun Pathak and Akshita Narula**

Abstract

Over the years the increasing intervention of the judiciary in the economic matters has become a focus point of discussion in both legal as well as political spheres. Traditionally, the formation of policies and economic decision-making and governance have been the responsibility of the executive and the legislature but over the years this balance has seen a shift gradually.

The involvement of the Judiciary in the economic decisions has increased notably over the years for reference one can follow high-profile corruption scandals like the Coalgate controversy, the 2G Spectrum case, and the Commonwealth games scam. While this judicial intervention and scrutiny has been significant in upholding transparency and accountability, it has also led to many unintended consequences like hesitation in policy implementation, regulatory uncertainty, decline in investor trust in making investments.

Through this article the authors dive critically into the judicial interventions in economic governance and how it has had an effect on the economic regulation in India. The article will also look at the relevant Constitutional provisions in this regard.

The article will look to empirical evidences such as statistics across sectors and trends in Foreign Direct Investment. It also introduces economic concepts like regulatory chill, where the fear of legal repercussions discourages policy action, and the potential for investor-state disputes that may arise from unpredictable regulatory changes.

To draw a comparative analysis the authors of this article have reflected on how courts in countries like the United States and the United Kingdom handle economic matters. This comparative analysis highlights the importance of restraint in judicial action in economic matters to ensure economic stability and also preserve policy clarity.

In conclusion this article advocates for a balanced approach. This article encourages the judiciary to exercise reasonable caution while stepping into economic domains while continuously safeguarding constitutional values. In the pretext it recommends reforms that will allow for good and effective governance without compromising legal oversight. In essence this article encourages the need for a system where both economic growth and constitutional values are safeguarded.

Keywords: Judicial Overreach, Economic Governance, Separation of Powers, Regulatory Uncertainty, Judicial Activism, Economic Policy-making, Constitutional Accountability.

I. Introduction

Judicial overreach is defined as circumstances where the judiciary encroaches on its constitutionally mandated powers and intrudes into the domain traditionally reserved for the executive and legislatures.¹ Recently, the President of India has questioned a form of judicial overreach with respect to the functions of a governor in a presidential reference under Article 143, and this is a

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¹ JUDICIAL OVERREACH IN INDIA: DISRUPTING THE BALANCE OF POWER IN POLICY-MAKING, Lawful Legal, available at <https://lawfullegal.in/judicial-overreach-in-india-disrupting-the-balance-of-power-in-policy-making/> (last visited May 14, 2025)

recent example of the constant tussle and churn regarding separation of powers within the Indian Constitution. In economic governance, judicial overreach means interventions by the judiciary in economic policymaking, regulatory issues, and commercial disputes under the cover of enforcing constitutional standards or ensuring transparency.² Traditionally, judicial review is a set of legal standards, enforced through litigation, to enable people to challenge the lawfulness of decisions made by public bodies while exercising public functions. It plays a necessary role in creating accountability, limiting arbitrariness, and creating fairness in decision making but overreach can have unintended consequences, including policy paralysis, stalemate and regulatory uncertainty. This part explores limits of judicial overreach in economic policy and regulation that distinguishes it from legitimate judicial review. India's constitutional framework provides a stark distinction between powers exercised by the judiciary, executive, and legislature and the final power to interpret the Constitution rests with the Indian Supreme Court.³ However, there have been instances where unwarranted judicial interferences in economic has resulted in unintended consequences for the economy and have given the Courts, at times an extra constitutional status, — raising questions of propriety in judicial review.

High-profile cases such as the 2G Spectrum case and Coalgate have not only highlighted the judiciary's intervention in uncovering corruption but also the larger economic implications of such interventions.⁴ This chapter calls for certainty and stability in judicial interventions that affect economic stability, investor trust, and policy predictability. Authors will analyse the constitutional provisions and examine illustrative precedents to highlight and differentiate between necessary and excess judicial oversight. The article also compares the Indian jurisdiction with other democracies such as the United States and the United Kingdom and provides lessons on balancing judicial review and governance in economic issues. Lastly, the authors will provide recommendations for maintaining judicial oversight without undermining executive policymaking in economic issues.

II. Historical Development of Judicial Review

The origins of judicial review can be traced back to 17th-century England, where the landmark case of *Dr. Bonham's Case* (1610)⁵ laid the foundational principles. In this case, Sir Edward Coke, then Chief Justice of the Court of Common Pleas, asserted that common law had the authority to override parliamentary statutes if they were found to be against reason or natural law. Dr. Thomas Bonham, a physician, was fined and imprisoned by the Royal College of Physicians for practicing medicine without a license. Bonham challenged the legality of the College's authority, arguing that the College was both the complainant and adjudicator, leading to a conflict of interest. Coke ruled that certain acts of Parliament were void if they were against common right or reason, thereby asserting the power of the judiciary to review legislative actions. This decision was controversial and not widely accepted at the time but set a significant precedent for the future development of judicial review.

Judicial review in the United States developed more explicitly, with the initial seeds being sown in the case of *Hylton v. United States* (1796).⁶ The case involved a challenge to a federal tax on

² M.P. Jain, *Indian Constitutional Law* (8th ed., LexisNexis, 2018) 1532–1535; Bar & Bench, “President refers 14 questions to Supreme Court on timelines for deciding bills reserved by Governor”, Bar & Bench, May 22, 2025 (last visited on May 13, 2025).

³ Surya Deva, “Judicial Activism and Overreach in India: A Critique,” (2014) 5(2) NUJS Law Review 169.

⁴ T.R. Andhyarujina, “Judicial Activism and Constitutional Democracy in India,” in B.N. Kirpal et al. (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2000) 335–352.

⁵ *Dr. Bonham's Case*, (1610) 8 Co Rep 113b, 77 ER 646.

⁶ *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

carriages, and while the Supreme Court upheld the tax as constitutional, the decision marked the first instance where the Court addressed the constitutionality of a federal law. The definitive establishment of judicial review, however, came in *Marbury v. Madison* (1803)⁷, a landmark decision by Chief Justice John Marshall. The case arose from the political conflict surrounding the appointments made by outgoing President John Adams. William Marbury, whose commission was not delivered, petitioned the Supreme Court for a writ of mandamus compelling Secretary of State James Madison to deliver the commission. Marshall's ruling established the principle that the Supreme Court could declare acts of Congress unconstitutional, thus firmly establishing the judiciary's power to interpret the Constitution and act as a check on the other branches of government.

In the United Kingdom, the principle of parliamentary supremacy historically limited the scope of judicial review, as courts could not override legislation passed by Parliament. However, the evolution of judicial review in the UK gained momentum with the rise of administrative law and the incorporation of the European Convention on Human Rights through the Human Rights Act 1998. This Act enabled courts to review the compatibility of domestic laws with human rights principles, though they could not strike down legislation outright. The landmark decision in the case of *Anisminic Ltd. v. Foreign Compensation Commission* (1969)⁸ further expanded the scope of judicial review, establishing that even decisions labeled as 'final' by statute could still be subject to judicial scrutiny if they involved a jurisdictional error. The principle was further solidified in the case of *R (Jackson) v. Attorney General* (2005)⁹, wherein the House of Lords suggested that in extreme circumstances, the courts might review primary legislation, a significant departure from the traditional doctrine of parliamentary supremacy.

The concept of judicial review in India evolved through a combination of British colonial legal principles and post-independence constitutional mandates. During the colonial era, the power of judicial review was limited, but certain cases, such as *Emperor v. Burah* (1877)¹⁰, laid the groundwork by establishing the principle that courts could scrutinize legislative competence. Post-independence, the Constitution of India explicitly incorporated the doctrine of judicial review under Articles 13, 32, 131-136, 143, 226, and 246. The landmark decision in *Kesavananda Bharati v. State of Kerala* (1973)¹¹ underscored the significance of judicial review as a part of the basic structure doctrine, thus preventing Parliament from amending the Constitution in a manner that undermines its fundamental principles. The doctrine of judicial review has since been reaffirmed in numerous cases, including *Minerva Mills Ltd. v. Union of India* (1980)¹² and *Indira Gandhi v. Raj Narain* (1975)¹³, establishing it as a cornerstone of Indian constitutional law.

III. Constitutional Framework and Principles

The constitutional framework for judicial review in India is firmly grounded in specific articles of the Constitution, most notably Articles 32, 141, and 142. Article 32 is often referred to as the 'heart and soul' of the Constitution, empowering the Supreme Court to issue writs for the enforcement of fundamental rights. It serves as a fundamental instrument for judicial review, allowing citizens to directly approach the apex court in case of rights violations. Article 141 establishes that the law

⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸ *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 AC 147 (HL).

⁹ *R (Jackson) v. Attorney General*, [2005] UKHL 56; [2006] 1 AC 262 (HL).

¹⁰ *Emperor v. Burah*, (1878) 3 ILR Cal 64; 5 IA 178 (PC).

¹¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461.

¹² *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; AIR 1980 SC 1789.

¹³ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; AIR 1975 SC 2299; 1976 2 SCR 347.

declared by the Supreme Court shall be binding on all courts within the territory of India, thereby reinforcing the authority of the judiciary as the ultimate interpreter of the Constitution.¹⁴ Article 142 further enhances the powers of the Supreme Court, granting it the authority to pass orders necessary for doing complete justice in any matter before it, thus enabling the Court to exercise broad discretionary powers in exceptional cases.¹⁵ This constitutional framework establishes the judiciary as a crucial check on the exercise of power by the executive and legislature.

The doctrine of basic structure was devised as a protection against arbitrary amendments to the Constitution that would go on to change its basic nature. The doctrine for the first time was enumerated in the case of *Kesavananda Bharati v. State of Kerala*¹⁶, where the Supreme Court opined that Parliament had the authority to amend the Constitution but not to change its basic structure. The cardinal elements recognized to constitute the underlying framework are the primacy of the Constitution, rule of law, separation of powers, judicial review, and basic rights. The doctrine has since been reaffirmed in a series of judgments, such as *Minerva Mills Ltd. v. Union of India* (1980)¹⁷ and *S.R. Bommai v. Union of India* (1994)¹⁸, as a vital constitutional guarantee against possible abuse of power by the legislature.

The separation of powers is integral to the Indian constitutional setup. It guards against the three arms of government – the executive, legislature, and judiciary – exercising powers and functions that overlap and become cumulative, with one arm dominating the others. While the judiciary is authorized to scrutinize executive and legislative actions, it is also supposed to exercise restraint so that it does not intrude into the spheres of other branches. This balance has been a matter of widespread judicial interpretation, especially in cases when the judiciary is charged with judicial activism or overreach.

Judicial activism and judicial overreach are confused with each other but are basically two different things. Judicial activism is the activist role of the judiciary in defending the rights of citizens and maintaining constitutional principles, usually intervening where the legislature or executive does not. Examples of judicial activism are the case of *Vishaka Guidelines*¹⁹, wherein the Supreme Court established guidelines against sexual harassment at the workplace where there was no legislative action taken. Judicial overreach, on the other hand, is where the judiciary goes beyond its constitutional role and encroaches into the areas of the executive or legislature, which amounts to legislating from the bench. Critics contend that such examples of judicial encroachment subvert the guarantee of separation of powers and can create potential confrontations between the judiciary and the other arms of government. The continuing debate surrounding these ideas captures the fine balance the judiciary has to preserve in order to stay within the confines of the Constitution without encroaching on its authority.

IV. Judicial Overreach in Economic Governance

Judicial activism in economic governance has had a revolutionary impact in the shaping of regulatory structures in major sectors of India. The mining industry has seen a path-breaking intervention in the case relating to the coal block allocations, where the 2014 ruling of the Supreme

¹⁴ Constitution of India, Art. 141.

¹⁵ Constitution of India, Art. 142.

¹⁶ *Id* at 12.

¹⁷ *Id* at 13.

¹⁸ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

¹⁹ *Vishaka & Ors. v. State of Rajasthan*, (1997) 6 SCC 241

Court resulted in the cancellation of 214 allocations of coal blocks.²⁰ The court with one brush on a wholesale basis, ruled that allocations made between 1993 and 2011 were arbitrary and violated established legal procedures. This ruling created chaos, which is being felt by the economy till date [Refer to the Niti Aayog study]. The Court ought to have examined each allocation separately, through a judicial commission or court appointed tribunal, and should have avoided a wholesale cancellation which resulted in a cascading effect within the economy. The Supreme Court had done something similar earlier when it applied the doctrine of prospective overruling in the *Golak Nath* case²¹ to avoid economic hardship and protect past actions taken by the executive. The cancellation of coal mines, while reinforced the judiciary's readiness to curb corruption and bring about accountability in the allocation of natural resources, but it created unintended consequences within the Indian economy. The economic consequences of cancellation were profound, affecting the industrial production and resulted in serious financial losses to companies who had offered the coal blocks. Moreover, the judgment made the government introduce competitive bidding mechanisms for allocation of coal according to principles of fairness and transparency.

Following the controversy surrounding the 2G spectrum allocation, the Government of India sought the Supreme Court's opinion through a Presidential Reference in 2012²² to clarify whether auction was the only permissible method for allocating natural resources. The Court responded by stating that while auctions are indeed a fair and transparent way to distribute public resources, they are not the only legal method. It further stressed that the government has the flexibility to choose an appropriate allocation method as long as it upholds the Constitutional values, particularly the principle of equality under Article 14. Though this is a balanced approach it has not been followed uniformly; sectors like telecom and coal saw a shift towards auctions, other areas like land and environmental resources continue to rely on different and at times opaque methods. This inconsistency in application has raised questions about policy consistency.

The telecommunication sector also suffered at the hands of judicial intervention in the 2G spectrum case, a benchmark instance of the judiciary acting as a watchdog against executive malfeasance. Today, after the culmination of the 2G criminal trial, the convictions were minimal.²³ In 2012, the Supreme Court cancelled 122 telecom licenses distributed in 2008, declaring the distribution process as arbitrary and unconstitutional.²⁴ The Court reaffirmed that natural resources must be allocated through transparent and competitive bidding processes to eliminate nepotism and ensure public interest. This ruling not only restructured regulatory policies within the telecom industry but also called for systemic changes to avoid similar malpractices. Economically, the cancellation of licenses led to significant financial losses for telecom companies affected investor confidence, and triggered a re-evaluation of foreign direct investment (FDI) policies in the sector. It also marked a

²⁰ *Manohar Lal Sharma v. Principal Secretary & Others*, (2014) 9 SCC 516; see also "Supreme Court cancels allotment of 214 coal blocks," *Down To Earth*, Sept. 24, 2014, available at <https://www.downtoearth.org.in/environment/supreme-court-cancels-allotment-of-214-coal-blocks-46561> (last visited May 7, 2025); "Allocation of Coal Blocks," Press Information Bureau, Govt. of India, Sept. 25, 2014, available at <https://www.pib.gov.in/newsite/PrintRelease.aspx?relid=112252> (last visited May 7, 2025).

²¹ *I.C. Golaknath and Ors. v. State of Punjab and Anrs.*, AIR 1967 SC 1643; (1967) 2 SCR 762 (SC).

²² *In Re: Special Reference No. 1 of 2012*, (2012) 10 SCC 1 (SC).

²³ *Subramanian Swamy v. Union of India*, (2012) 9 SCC 257 (SC).

²⁴ *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1; see also Comptroller and Auditor General of India, "Performance Audit Report on the Issue of Licences and Allocation of 2G Spectrum by the Department of Telecommunications," Report No. 19 of 2010-11, available at https://cag.gov.in/webroot/uploads/download_audit_report/2010/Union_Performance_Civil_Issue_Licenses_Allocati_on_2G_Spectrum_19_2010.pdf (last visited May 15, 2025); Pratap Bhanu Mehta, "The 2G Verdict: Judicial Overreach or Corrective Justice?" (2012) 47(7) *Economic and Political Weekly* 10.

shift in the judicial approach towards economic governance, highlighting the judiciary's proactive stance in addressing economic corruption.

The infrastructure sector, particularly the Commonwealth Games (CWG) 2010 project, provides another significant instance of judicial intervention in economic governance. Initially envisioned as a showcase of India's infrastructural capabilities, it became synonymous with corruption, mismanagement, and financial irregularities.²⁵ The Comptroller and Auditor General (CAG) report highlighted widespread malpractices, including inflated contracts, substandard construction, and misuse of public funds.²⁶ Judicial scrutiny intensified as investigations revealed that key officials had colluded to embezzle funds and compromise quality standards. The judiciary's intervention led to heightened oversight of public procurement processes, emphasizing transparency, accountability, and stringent enforcement mechanisms. Despite the various types of corruption and malpractices alleged in the CWG Scam, Suresh Kalmadi, the central figure in this scam, was acquitted by the Court. Economically, the fallout from the CWG scandal underscored the cost of corruption in large-scale projects, resulting in financial losses, public disillusionment, and a tarnished global reputation.²⁷

The economic implications of these judicial interventions are multi-faceted, extending beyond the immediate sectors involved. Sectoral GDP statistics in the wake of these rulings indicate a discernible impact on industrial output, particularly in coal and telecommunications.²⁸ The coal sector faced a temporary decline in production due to the cancellation of coal blocks, necessitating increased coal imports to meet industrial demand. The telecom sector experienced financial instability as companies grappled with the fallout from license cancellations and regulatory uncertainty.

Foreign direct investment (FDI) trends also reflected investor apprehension, as judicial interventions signaled heightened regulatory scrutiny and perceived risks associated with business operations in India. Potential investors expressed concerns over policy consistency and the predictability of the business environment, highlighting the tension between judicial oversight and economic stability.²⁹ However, these interventions also underscored the judiciary's role as a corrective mechanism, ensuring adherence to constitutional principles and promoting systemic reforms to foster transparency and accountability in economic governance.

While judicial interventions have undoubtedly reinforced regulatory accountability and enhanced transparency, they have also had significant economic repercussions. On the positive side, such interventions have compelled policymakers to adopt more stringent regulatory frameworks and deter potential malfeasance, thus promoting a culture of compliance. On the other hand, the economic costs of abrupt judicial decisions, particularly in cases involving large-scale investments,

²⁵ B. N. Kirpal et al. (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2000), pp. 335–352; and “Delhi Commonwealth Games corruption cases: A timeline,” *The Hindu*, Aug. 19, 2016, available at <https://www.thehindu.com/news/cities/Delhi/delhi-commonwealth-games-corruption-cases-a-timeline/article9000488.ece> (last visited May 15, 2025).

²⁶ Comptroller and Auditor General of India, Report No. 10 of 2023: Performance Audit of National Social Assistance Programme for the year ended March 2021, Ministry of Rural Development, Government of India, pp. 42–44, available at https://cag.gov.in/webroot/uploads/download_audit_report/2023/Report-No.-10-of-2023_NSAP_English_PDF-A-064d229f832dad7.55068084.pdf (last visited May 5, 2025).

²⁷ *The Hindu*, “CWG scam: Delhi court acquits Suresh Kalmadi, others due to lack of evidence,” *The Hindu*, July 21, 2021 (last visited on May 24, 2025).

²⁸ *Id.* at 21.

²⁹ Arpit Kumar, “The Impact of Foreign Direct Investment on India's Legal Framework,” (2023) *The Amikus Qria*, available at <https://theamikusqriae.com/the-impact-of-foreign-direct-investment-on-indias-legal-framework/> (last visited May 15, 2025).

have been substantial.³⁰ In the coal sector, production delays and increased imports disrupted supply chains, affecting industrial output and contributing to inflationary pressures. In the telecom sector, investor confidence was eroded as companies faced financial losses and regulatory uncertainty, impacting FDI inflows.³¹ The Commonwealth Games scandal, though instrumental in highlighting corruption, also led to reputational damage for India on the global stage, affecting future infrastructure investments.³²

Therefore, while the interventions of the judiciary have been essential to ensuring constitutional norms and protecting public interest, they have also served to highlight the imperative of a more subtle interventionist approach balancing regulatory accountability and economic stability. A stable legal framework and a minimization of the unintended economic impacts of judicial interventions continue to be essential for maintaining investor confidence and ensuring economic growth.

V. Economic Repercussions of Judicial Overreach

Judicial overreach, or cases where the judiciary goes beyond what is constitutionally expected to intrude into executive or legislative activities, has significant economic impacts. The effects are especially notable in the instance of regulatory uncertainty and policy gridlock.

Excessive judicial activism can inadvertently stymie policymaking, as executive authorities become hesitant to implement bold economic reforms due to fears of judicial invalidation. This regulatory uncertainty can paralyze critical sectors, leading to stalled infrastructure projects, delayed regulatory clearances, and loss of investor confidence. Instances such as the ban on iron ore mining in Goa and Karnataka by the Supreme Court illustrate the unintended economic consequences of well-intentioned judicial orders.³³ While aimed at curbing illegal mining and environmental degradation, the abrupt cessation of mining activities led to massive job losses, revenue deficits, and a decline in export earnings, exacerbating economic distress in these regions.

Investor-state dispute risks are another significant economic repercussion of judicial overreach. Unforeseen judicial interventions may lead to foreign investors to move arbitration proceedings against the state under bilateral investment treaties (BITs), claiming expropriation or discrimination.³⁴ The retrospective imposition of tax in the Vodafone case, although a legislative

³⁰ NITI Aayog, *Economic Impact of Select Decisions of the Supreme Court and National Green Tribunal of India* (2023), available at <https://www.niti.gov.in/sites/default/files/2023-03/Economic%20Impact%20of%20Select%20Decisions%20of%20the%20Supreme%20Court%20and%20National%20Green%20Tribunal%20of%20India.pdf> (last visited May 12, 2025).

³¹ Debashri Chowdhury, “Regulatory Stability and FDI in Indian Telecom Infrastructure: Lessons from the AGR Dispute and Pathways for Reform,” (2025) 5(3) *International Journal of Advanced Legal Research* 1, 7–9, available at <https://ijalr.in/wp-content/uploads/2025/04/Infrastructure1.pdf> (last visited May 12, 2025).

³² Esha Jain, “Shallow Window of Opportunity: Examining Scandal Surrounding the Commonwealth Games (CWG) Hosted in India,” (2025) *Lawful Legal*, available at <https://lawfullegal.in/shallow-window-of-opportunity-examining-scandal-surrounding-the-commonwealth-games-cwg-hosted-in-india/> (last visited May 15, 2025); MJ ILE Multidisciplinary Journal, “Commonwealth Games Scam,” (2024) 3(1) *MJ ILE Multidisciplinary Journal* 42, available at <https://mj.iledu.in/wp-content/uploads/2024/12/V3I142.pdf> (last visited May 15, 2025).

³³ “Indian economy lost Rs 50,000 crore on iron ore mining ban,” *The Economic Times*, 28 Oct. 2014, available at <https://economictimes.com/industry/indl-goods/svs/metals-mining/indian-economy-lost-rs-50000-crore-on-iron-ore-mining-ban/articleshow/44953539.cms> (last visited May 13, 2025); “K’taka mining ban has caused socio-economic havoc: Survey,” *Deccan Herald*, 22 May 2020, available at <https://www.deccanherald.com/business/ktaka-mining-ban-has-caused-socio-economic-havoc-survey-797602.html> (last visited May 15, 2025); “Supreme Court lifts ban on iron ore mining in Goa,” *Business Standard*, 22 Apr. 2014, available at https://www.business-standard.com/article/economy-policy/supreme-court-lifts-ban-on-iron-ore-mining-in-go-114042100501_1.html (last visited May 13, 2025).

³⁴ Kshama A. Loya, Ashish Kabra & Mohammad Kamran, “The Delhi High Court held that interference by domestic courts in arbitral proceedings under BIT is permissible only in ‘compelling circumstances’ in ‘rare cases’,” Nishith Desai Associates, *Dispute Resolution Hotline*, 15 Feb. 2019, available at <https://www.nishithdesai.com/generateHTML/4512/4> (last visited May 15, 2025); SCC Online, “Bilateral Investment

move, was subject to rigorous judicial oversight, causing concerns about the stability of investment climate in India.³⁵ Such instances not only increase the financial liabilities of the state but also project India as a high-risk investment destination, adversely affecting foreign direct investment (FDI) inflows. Consequently, investor-state disputes have not only strained India's financial resources but also undermined its reputation as a stable investment jurisdiction.

A comparative analysis of the United States and the United Kingdom provides valuable insights into the economic repercussions of judicial overreach. In the United States, judicial activism is often tempered by the doctrine of judicial restraint, emphasizing adherence to statutory interpretation rather than policy formulation.³⁶ Cases like *Bush v. Gore* (2000) highlight the contentious nature of judicial intervention in politically sensitive matters, yet the economic fallout was minimal due to the judiciary's measured approach.³⁷ In contrast, the UK's judicial framework is characterized by the principle of parliamentary sovereignty, limiting judicial encroachment on policy matters. The UK Supreme Court's decision in *Miller v. Secretary of State for Exiting the European Union* (2017)³⁸, which mandated parliamentary approval for Brexit negotiations, underscores the judiciary's cautious yet decisive stance in economically impactful decisions.

Empirical evidence further illustrates the economic repercussions of judicial overreach. Data analysis reveals that sectors subject to abrupt judicial interventions, such as mining, infrastructure, and telecommunications, experience significant fluctuations in output, employment, and investment.³⁹ For example, the ban on mining in Karnataka resulted in a 30% drop in iron ore production, which negatively impacted related industries and caused a high decline in state GDP.⁴⁰ Likewise, the revocation of telecom licenses in the 2G spectrum case resulted in investor uncertainty, as shown by falling FDI inflows and smaller growth in the telecommunication sector.⁴¹ These empirical tendencies highlight the greater economic price tag of judicial excess, insisting upon a balanced practice that upholds constitutional norms while avoiding economic stability at the cost of the former.

Treaty and Investment Arbitration – A Critique from India Perspective,” (2020) available at <https://www.sconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective/> (last visited May 13, 2025); Oxford Business Law Blog, “Can Devas Make a Valid Case for Judicial Expropriation Against India under the India-Mauritius BIT?” (2022), available at <https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/can-devas-make-valid-case-judicial-expropriation-against-india> (last visited May 13, 2025).

³⁵ S A Rishikesh & Gargi Lad, “Vodafone Idea arbitration case: A case study,” iPleaders (20 May 2024), available at <https://blog.ipleaders.in/international-arbitration-case-vodafone-against-india-case-study/> (last visited May 13, 2025); “Retrospective taxation: the Vodafone case, and the Hague court ruling,” *The Indian Express*, 27 Sept. 2020, available at <https://indianexpress.com/article/explained/retrospective-taxation-the-vodafone-case-and-the-hague-court-ruling-6613799/> (last visited May 13, 2025).

³⁶ “Article III, Judicial Restraint, and This Supreme Court,” (2019) 72(3) *SMU Law Review* 471, available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=4790&context=smulr> (last visited May 14, 2025).

³⁷ *Bush v. Gore*, 531 U.S. 98 (2000).

³⁸ *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5.

³⁹ NITI Aayog, *Economic Impact of Select Decisions of the Supreme Court and National Green Tribunal of India* (NITI Aayog, New Delhi, 2023) 5–29, available at <https://www.niti.gov.in/sites/default/files/2023-03/Economic%20Impact%20of%20Select%20Decisions%20of%20the%20Supreme%20Court%20and%20National%20Green%20Tribunal%20of%20India.pdf> (last visited May 14, 2025).

⁴⁰ “K’taka mining ban has caused socio-economic havoc: Survey,” *Deccan Herald*, 22 May 2020, available at <https://www.deccanherald.com/business/ktaka-mining-ban-has-caused-socio-economic-havoc-survey-797602.html> (last visited May 14, 2025); Anticipating the labor market challenges of the clean energy transition: Evidence from an iron ore mining ban, SSRN, 12 Mar. 2024, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4650793 (last visited May 14, 2025).

⁴¹ Kumar, N., & Singh, P. (2013). Impact of 2G spectrum case on FDI inflows in Indian telecom sector. *Journal of Business and Economic Policy*, 2(4), 45-52.

Although judicial intervention plays a significant role in confronting systemic corruption and upholding regulatory accountability, unbridled judicial overreach can breed economic instability, policy uncertainty, and investor fear. It is therefore equally important to continue striking a fine balance between judicial oversight and economic governance in order to cultivate a stable and predictable legal environment for sustainable economic growth.

VI. Remedies and Reform Proposals

Tackling the economic impact of judicial overreach demands a balanced but cautious approach, with a focus on judicial restraint to protect constitutional values while promoting economic stability. Judicial restraint, as a corrective measure, involves the judiciary adhering strictly to statutory interpretation, and refraining from encroaching upon executive and legislative policymaking domains. This principle ensures that courts do not inadvertently create policy vacuums or regulatory ambiguities that may stifle economic progress.⁴²

To mitigate regulatory uncertainty, comprehensive guidelines for judicial review in economic and regulatory matters must be established. These guidelines should also account for the economic impact of judicial decisions, considering how they might affect things like industry output, jobs, and investment. By weaving economic reasoning into their judgments, courts can make more balanced decisions, ones that respect the law while also recognizing their broader economic consequences.

Furthermore, enhancing transparency in the judicial decision-making process is crucial to minimizing unintended economic fallout. Judicial rulings with significant economic consequences need to be supported by reasoned rationale explaining the justification for intervention. Transparency can reduce investor fear and create a more certain regulatory regime, ensuring economic stability.⁴³

By working together more closely on policymaking, many policy gaps can be addressed early on—reducing the need for courts to step in later. This kind of collaboration could include regular legislative reviews of economic policies, engaging with stakeholders to ensure diverse perspectives are considered, and setting up specialized economic tribunals with the expertise to handle complex regulatory issues. These tribunals can help resolve disputes more efficiently, easing the burden on constitutional courts and contributing to more stable and predictable economic governance.⁴⁴ Applying these reform mechanisms can balance judicial supervision and economic management, maintaining the judiciary as a constitutional watchdog without hindering economic stability and development.⁴⁵

VII. Conclusion

The examination of judicial review, particularly economic governance, underscores the fine balance between upholding constitutional values and economic stability. It has recognized that although judicial review is vital for keeping the executive in check as well as avoiding executive excesses, unrestrained judicial overreach can have the counterproductive effect of generating regulatory uncertainty, investor unease, and policy gridlock. Through comparative analysis and case studies, the argument has highlighted the positive and negative impacts of judicial review on the mining, telecommunications, and infrastructure sectors.

⁴² Chandrachud, A. (2017). *Balanced constitutionalism: Courts and legislatures in India and the United Kingdom*. Oxford University Press.

⁴³ World Bank. (2017). *World Development Report 2017: Governance and the Law*. World Bank Publications.

⁴⁴ Bhatia, G. (2019). *The Transformative Constitution: A Radical Biography in Nine Acts*. HarperCollins India.

⁴⁵ *Id* at 37.

A suggested framework for equitable judicial intervention recommends judicial restraint, emphasizing statutory interpretation over policy-making. Such a stance addresses the threat of judicial overreach into executive and legislative spheres, lowering the risks of economic instability. Furthermore, using economic impact analysis in judicial decision-making can offer a systematic framework for measuring the wider economic impacts of judicial rulings, creating a more certain and stable regulatory climate.

Future research needs to examine empirical data further to quantify judicial intervention costs and benefits, as well as analyse sectoral fluctuations in GDP, foreign direct investment patterns, and employment statistics. Additionally, evaluating the effectiveness of specialized economic tribunals elsewhere can give much-needed guidance to streamline India's judicial setup when it comes to economic governance. By harmonizing judicial review practices with the realities of the economy, a more refined and balanced style of judicial intervention can be attained that combines constitutional integrity and economic growth.

ROLE OF JUDICIARY IN CLIMATE-REGULATION: HOW FAR CLIMATE LITIGATION AND JUDICIAL ACTIVISM CAN FILL THE GAPS IN CLIMATE GOVERNANCE IN THE INTERNATIONAL AND INDIAN CONTEXT

-Amrita Chakravorty

Abstract

The unmitigated impacts of climate change and the continuing minimalistic attitude of global and national policy-makers towards it are increasingly putting the idea of a decent life, and even survival, beyond reach for many. Due to many demographic, social, and economic factors, the repercussions of climate change are disproportionately felt in a large portion of the developing part of the world, even though owing to delayed and in some cases minimal industrialization, this is the part of the globe that has contributed least to factors leading up to climate change.

It may also be said regarding the general overall practice in the Global South, that governments' responses to the causes and impact of climate change have been either inadequate or inconsistent with applicable laws and policies. While international climate change negotiations are crucial, and significant strides are undoubtedly being made in that direction, national initiatives perhaps count for more in achieving climate change mitigation. Hence, to fill the glaring void, the global tide of climate litigation has made a forceful impact on the Global South.

Judicial activism in India has come to refer to the phenomenon wherein the judiciary takes up the role of the executive or the legislature when their respective actions fall short of rising to the modern-day challenges, rather than limiting itself to interpreting the law. Despite being fiercely debated and even characterized as bedrock of judicial overreach or judicial despotism, the current chapter proposes that judicial activism is indeed an essential element of modern-day constitutionalism.

This chapter firstly describes the shortfalls in the present international climate governance, and the climate policies in the Indian context; secondly, it talks about climate litigation as a possible and potential solution for the climate action gap; thirdly, it discusses the evolving phenomenon of judicial activism in India, especially focusing on its absolute necessity in the current times, when often the dynamics of democracy may constraint the optimal functioning of the executive and the legislature; and lastly, how the apex court has in recent times, through landmark judgments like in *M.K. Ranjitsinh*, made the nation embark on the path of climate adaptation and sensitivity, which is an absolute necessity in present times.

Key words: Climate-Change, Judicial Activism, Constitutionalism, Policy-Making, Judicial Overreach, Democracy

1. International Governance of Climate Change and Climate Policies in India: Present Trends and Shortcomings

The International Governance of Climate Change is presently spearheaded by the main decision-making body of the United Nations Framework Convention on Climate Change (UNFCCC) – the Conference of the Parties, or the COP. The primary function of the COP is to assess the emission inventories received by it from State Parties, based on which it evaluates how effective the measures taken by Parties are, and the resultant advancement towards achieving the broad targets of the UNFCCC.¹

In this regard, COP21, held in Paris, France, in December 2015, can be stated to be instrumental in laying the foundation for the present-day international policy-making in climate matters. The Paris Agreement, which is a binding international instrument on climate change and is the main legal framework governing global action on the issue presently, was adopted at the said conference. The overall purpose of the agreement is to limit ‘the increase in the global average temperature to well below 2°C above pre-industrial levels’ and to push towards limiting ‘the temperature increase to 1.5°C above pre-industrial levels.’² However, evidence led by expert bodies such as the United Nations Environment Program (UNEP), is proof of the gap that continues to exist between goals and reality.³

For instance, the UNEP in its most recent Emissions Gap Report (EGR) of October, 2024, reported that current commitments of nations through the Nationally Determined Contributions (NDCs)⁴ or Intended Nationally Determined contributions (INDCs) under the Paris Agreement for 2030, are not being acted upon by nations, and even if such actions are to be taken by nations in the future, it would hardly meet the Paris goals, ‘limit[ing] the temperature rise only to 2.6-2.8 degrees Celsius’.⁵

In other words, nations continuing with their current policies, as is, could lead to a cataclysmic ‘temperature rise of up to 3.1°C’. The Report concluded by stating that in order to keep the Paris Agreement relevant, nations need to ‘commit to drastically cut greenhouse gas emissions in the next round of reporting of NDCs in 2025’.⁶ Therefore, it may definitively be stated that there is a lag, not just within nations, in the form of inadequate national commitments to reduce greenhouse gas emissions, but also there exists a discernible gap

¹ *Conference of the Parties (COP)*, available at <<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>> (last visited on 13 May 2025).

² *The Paris Agreement*, available at <<https://unfccc.int/process-and-meetings/the-paris-agreement>> (last visited on 13 May 2025).

³ UNEP, *Emissions Gap Report*.

⁴ NDCs under the Paris Agreement differ drastically from the Kyoto Protocol adopted at COP 3 in 1997, in that the former consists of national plans, determined by each country, whereas the latter, set binding targets for developed nations only. NDCs may, thus, be described as entailing a bottom-up approach, with countries setting their own targets, and the Kyoto Protocol prescribing a top-down approach, which ultimately could not work. From 2020 onward, countries have been presenting their NDCs to the concerned authorities under the Paris Agreement. Each successive NDC, which is supposed to be submitted every five years, is meant to commit to a greater degree of GHG emission reduction, as compared to the previous one.

⁵ UNEP, *Emissions Gap Report* (October 2024).

⁶ UNEP, *Nations Must Close Huge Emissions Gap in New Climate Pledges and Deliver Immediate Action, or 1.5 degrees Celsius Lost* (24 October 2024), available at <<https://www.unep.org/news-and-stories/press-release/nations-must-close-huge-emissions-gap-new-climate-pledges-and>> (last visited on 13 May 2025).

between existing national commitments and actual climate action on the part of the national governments.

The Global Stocktake is another process for assessing the collaborative growth of countries towards the aims and objectives of the Paris Agreement. The first Global Stocktake concluded in 2023, at the COP28, in Dubai, UAE, noting that the national efforts are far from being adequate in actually meeting the objectives of the Paris Agreement.

The most recent COP concluded last year in Baku (COP29) with another set of non-impactful outcomes, especially from the perspective of developing nations, or the Global South, with the annual *target* for climate finance for the South being tripled, and yet remaining far below the actual requirement for meeting the climate costs, and with no strategies in place for actually meeting those targets.⁷

Further, being hailed as a significant achievement, State Parties agreed on rules and methodologies for the international carbon trading system, as envisaged under Article 6 of the Paris Agreement. This idea of an open carbon market, without any checks and balances, in itself has always been an irresolute proposal to the climate crisis solution, as it ends up exposing vulnerable developing countries to an open market without the means to hold private actors accountable.⁸

The Global Multilateral Framework on Climate Action, therefore, continues to fail to bridge the chasm between promises and actions, when it comes to climate justice, leaving the (developing) nations most impacted to tackle the consequences of a problem they did not create, with minimal assistance from industrialized countries, who did cause it.

Climate change policies in India have carved out a balance between development goals and climate action. India's climate change policy primarily consists of administrative initiatives, such as the National Action Plan on Climate Change (NAPCC), 2008, which is a grouping of 8 sub-missions to help build India's strategies in attaining its development and climate goals in a sustainable way; executive actions based on international commitments, namely, India's INDCs to the Paris Agreement, and the renewable energy targets based on commitments made in the Paris Agreement and at other COPs; and actions based on the regional and international collaborations initiated by and entered into by India, such as the International Solar Alliance (ISA), at the 2015 COP 21 Paris Summit, and the Global Biofuels Alliance launched at the 2023 G20 Summit in India.

⁷ See A. Chandrasekhar, *et al.*, "COP 29: Key Outcomes Agreed at the UN Climate Talks in Baku", *CarbonBrief* (2024), available at <<https://www.carbonbrief.org/cop29-key-outcomes-agreed-at-the-un-climate-talks-in-baku/>> (last visited on 10 May 2025); A.C. Hill, *et al.*, "Was COP29 in Azerbaijan a Failure?", *Council on Foreign Relations* (Nov 25 2024), available at <<https://www.cfr.org/expert-brief/was-cop29-azerbaijan-failure>> (last visited on 10 May 2025).

⁸ See Varun Mohan, "Market Mechanism Debate: Article 6 Key To Emissions Reduction", *The New Indian Express* (Dec 28 2024), available at <<https://www.newindianexpress.com/xplore/2024/Dec/28/market-mechanism-debate-article-6-key-to-emissions-reduction>> (last visited on 09 May 2025); J. Gabbatiss, *et al.*, "In-Depth Q&A: Can 'Carbon Offsets' Help To Tackle Climate Change?", *CarbonBrief* (September 25 2023), available at <<https://interactive.carbonbrief.org/carbon-offsets-2023/index.html>> (last visited on 15 May 2025).

Coming to climate laws, even though there exists an abundance of legislation on the subject, including legislations on environment protection, forest management, electricity, and mining, many experts in the field agree, the laws, being largely incoherent, are often found to be inadequate to address the climate change problem.⁹ There is no doubt that many of these laws include the means to address climate change in their scope; however, as they are not climate-specific, they are not particularly suited to tackle the climate challenges faced by India, and to honour India's international commitments.¹⁰

In other words, it may be stated that while existing environment laws in India are broadly capable, they are, however, not 'specifically suited' to addressing climate change.¹¹ There are no easy solutions to this challenge, as experts continue to largely disagree on whether India needs an independent legal framework targeting climate issues or whether the existing laws need to be reinforced and enhanced, as many of them continue to suffer from the flaw of under-implementation.

Therefore, it may veritably be stated that demands internationally, as well as at home, are such that India needs to quicken its pace on the road to a compelling and cogent climate policy.

I. Can Climate Litigation Fill the Current Glaring Climate Measures Void

The UNEP Global Climate Litigation Report, 2023, quite accurately notes that '*[c]limate litigation represents a frontier solution to change the dynamics of the fight against climate change.*'¹²

As transnational and national efforts have time and again proven insufficient in tackling the problem of climate change¹³, as has been explained above, environmental climate litigation has categorically stepped up to strengthen the current shortcomings in climate governance frameworks.¹⁴ There has been a persistent global rise in climate litigation,¹⁵ which in many

⁹ Chandra Bhushan, *et al.*, "Environmental Laws and Climate Action: A Case for Enacting a Framework Climate Legislation in India", *International Forum for Environment, Sustainability and Technology* (2021).

¹⁰ *Ibid*; Parul Kumar, *et al.*, "India's Domestic Climate Policy is Fragmented and Lacks Clarity", 54(7) *Economic and Political Weekly (Engage)* (2019).

¹¹ *Supra* note 9.

¹² UNEP, *Global Climate Litigation Report: 2023 – Status Review* (27 July 2023), available at <<https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review>> (last visited on 14 May 2025).

¹³ While presenting the UNEP Global Climate Litigation Report, Sabin Center's Faculty Director, Michael Gerrard noted that '*There is a distressingly growing gap between the level of greenhouse gas reductions the world needs to achieve in order to meet its temperature targets, and the actions that governments are actually taking to lower emissions. This inevitably will lead more people to resort to the courts.*' See UNEP, *Climate Litigation More Than Doubles in Five Years, Now a Key Tool in Delivering Climate Justice* (27 July 2023), available at <<https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering>> (last visited on 14 May 2025).

¹⁴ J. Peel, "Issues in Climate Change Litigation", *Carbon & Climate Law Review* (2012).

¹⁵ By December 2022, a total of 180 climate-related legal actions had been initiated across 65 jurisdictions worldwide, spanning international and regional courts, tribunals, quasi-judicial forums, and other adjudicatory bodies. This reflects a notable upward trend from 884 documented cases in 2017 to 1,550 in 2020. Notably, the momentum behind this surge is increasingly being driven by the most vulnerable populations—children and youth, women's organizations, Indigenous Peoples, and local communities—who are playing a pivotal role in advancing climate litigation and pushing for meaningful mitigation efforts. See *Supra* note 12.

jurisdictions has led to positive results in addressing the issue of climate change. Indeed, around the globe, it has been seen that lawsuits have been initiated against governments as well as companies for failures to meet climate targets, in disclosing financial risks of climate change, and in credibly representing their green credentials (to avoid the so-called ‘greenwashing’)¹⁶.

Climate change cases have grown tremendously since 2017¹⁷ and is continually expanding in scope as well as numbers. Additionally, the variety of jurisdictions within which such lawsuits have been initiated has increased in recent years, with the Global South increasingly including climate-related litigious jurisdictions.¹⁸

With regards to climate litigation producing significantly positive results for climate-awareness, and climate mitigation and adaptation, some landmark cases may be quoted, such as a significant number of cases in Asia that originated in Indonesia, wherein the government had initiated cases against palm oil mining that had resulted in the destruction of peatland ecosystems. In the said cases, climate damages arising from GHG emissions were calculated by typically quantifying carbon emissions. A lot of these lawsuits proved productive, as they often led to positive outcomes for the claimants, with the defendant entity being awarded adequate damages.¹⁹ *Shrestha v. Office of the Prime Minister et al.* (2018) is another example, where Nepal’s Supreme Court ruled that ‘climate change impaired the petitioner’s constitutional rights to a clean and healthy environment and a dignified life and ordered the Government to enact a new climate law’.²⁰ In 2022, the Brazilian Supreme Court held in *PSB et al. v. Brazil (on Climate Fund)* (2022)²¹ that ‘the Paris Agreement is a human rights treaty, which enjoys ‘supranational’ status’.²²

In India with the recent case in 2024 of *M.K. Ranjitsinh v. Union of India*,²³ fundamental right to protection against the harmful effects of climate change, has for the first time been recognized by the highest court of the country.

¹⁶ For example, in 2019 the Supreme Court of the Netherlands in a landmark judgment upheld the decision of the European Court of Human Rights (ECHR), wherein the ECHR stated that the Dutch government had a positive obligation to protect the ‘right to private life, family life, home, and correspondence, from the real threat of climate change’ (*The State of Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Supreme Court of Netherlands 19/00135 (20 December 2019). It was the first initial instance that a court ruled that a government was responsible for addressing climate change, and it literally inspired climate jurisprudence, and brought about a wave of climate litigations globally.

¹⁷ 2017 was the first time that Global Climate Litigation Report was published by the UNEP, subsequent reports being published in 2020 and 2023.

¹⁸ The 2017 Litigation Report documented climate cases across 24 jurisdictions, a number that rose to 39 in the 2020 report. By 2023, this figure had expanded significantly, encompassing cases from 65 jurisdictions. These span a wide range of forums, including international and regional courts, tribunals, quasi-judicial bodies, and other adjudicatory institutions. See *Supra* note 12.

¹⁹ See for example, *Minister of Environment v. PT Kalista Alam* 2017; *Ministry of Environment and Forestry v. PT Jatim Jaya Perkasa* 2018; *Ministry of Environment and Forestry v. PT Palmina Utama* 2018; *Ministry of Environment and Forestry v. PT Arjuna Utama Sawit* 2020; *Ministry of Environment and Forestry v. PT Asia Palem Lestari* 2021; and *Ministry of Environment and Forestry v. PT Rambang Agro Jaya* 2021.

²⁰ *Supra* note 12.

²¹ ADPF 708.

²² *Ibid.* See *Supra* note 12.

²³ *M.K. Ranjitsinh v. Union of India* (2024 INSC 280).

At the international and regional levels, most climate change litigation has taken a ‘rights-based approach’, that is, a nexus between human rights and climate change has been forged through many of these lawsuits.²⁴

Moreover, as climate science advances and novel legal theories emerge, the extent and range of climate litigation are steadily broadening.²⁵

In conclusion, it may be said that while robust climate action through cogent and coherent international and national climate policies remains imperative for any real solution to the climate problem, climate litigation can play a vital role in filling gaps in existing climate measures and holding relevant actors accountable. It veritably has the potential for pushing towards climate-changing practices, and ultimately the making of robust climate policy.

II. The Necessity of Judicial Activism in the Increasingly Constitutionalist Society of India

Since independence from the British rule, the three fundamental pillars of governance in India - Legislature, Executive and the Judiciary have worked in tandem with each other, creating quite a balanced atmosphere for the existing vibrant democracy to function in. In the maze of the concept of ‘Separation of Powers’, however, the part played by the judiciary has been as controversial, if not more than the other two branches.

As has been the experience, implementing the largely doctrinal concept of ‘separation of powers’ has been significantly more challenging than what had been suggested in the political theories of Montesquieu in *De l’Esprit des Lois*²⁶, or of John Locke’s *Second Treatise on Civil Government*.²⁷ That is because in the process of development of modern constitutionalism, it has become increasingly clear that in actual practice a radical separation among the three traditional powers is highly non-pragmatic.²⁸ This was the reason for the emergence of the modern system of ‘checks and balances’.²⁹

It needs to be further emphasized here that ‘Separation of Powers’ with the afore-mentioned necessary rider of ‘checks and balances’ not only implies independence of the judiciary, but also the assurance of its power to review the lawfulness and constitutional validity of legislative and executive actions.

Herein appears the concept of ‘judicial activism’ or a similar but separate (however, often erroneously characterized as overlapping) concept of ‘judicial-overreach’. There is an essential line to be drawn between the two concepts. Facing the rapidly changing demands and needs of a vibrant democracy, if at a time when the State is unable to enact proper laws required for fulfilling them the judiciary steps up to execute its responsibilities more than

²⁴ A.K. Rydberg, “Climate Change Litigation: General Perspectives and Emerging Trends”, 26 *International Community Law Review* 347-366 (2024); *Supra* note 12.

²⁵ *Supra* note 12.

²⁶ Montesquieu, *De l’Esprit des Lois*, (1748).

²⁷ John Locke, *Second Treatise on Civil Government*, (1689). See L.L. Guerra, “The Judiciary and the Separation of Powers”, *CDL-JU* (2000).

²⁸ L.L. Guerra, “The Judiciary and the Separation of Powers”, *CDL-JU* (2000).

²⁹ *Ibid*.

what was traditionally bestowed upon it by the Constitution, then the phenomenon can be characterized as the judiciary taking up the role of ‘judicial activism’.³⁰ ‘Judicial Overreach’, however, refers to the phenomenon where the judiciary usurps the power of the legislative or executive wings of the government. In other words, when judicial activism violates all rules of ‘Separation of Power’, stepping into what can be called the undemocratic “judicial adventurism”, then the resultant phenomenon is called “judicial overreach”.³¹ In doing so, the judiciary oversteps and interferes with the lawful operation of the legislative or executive branches of government, possibly breaking down the legal and political system, potentially resulting in anarchy.³²

Notions of *judicial review* and *judicial activism* are also distinct, each serving different purposes and operating through separate means. As outlined above, they can broadly be understood as reflecting the *traditional* and *modern* conceptions of judicial function, respectively. Over time, global society has seen a near-universal transition from the former to the latter, signalling a broader shift in the judiciary’s role across diverse legal systems.³³

As the term ‘judicial activism’ is becoming increasingly ubiquitous in academic and political parlance, the meaning of the term has begun to be ever more fiercely debated.³⁴ The standard function of the judiciary as commonly understood is to interpret the laws and review the justness, reasonableness and constitutionality of State action. However, increasingly (may be out of necessity or not - that is a point of contention) the judiciary is assuming roles surpassing those traditional limits. This kind of situation usually arises when the other two wings of the government are unable to fulfil their expected roles in a democracy.³⁵

Judicial activism in India, having had its origin somewhere in the mid-1970s, is increasingly attaining both prominence and relevance in the progressively constitutionalist society. The real catalyst for the Indian judiciary to be stepping onto a more activist role is believed to be the National Emergency, declared in 1975, which is still largely viewed as a phenomenon that undemocratically constrained the basic human rights of the people, the protection of which

³⁰ See M.N. Singh, “The Trend of Judicial Activism in Indian Context: Emerging Issue Areas”, 70(4) *Indian Journal of Public Administration* 879 (2024).

³¹ S. Anand, *et al.*, “Judicial Activism, Overreach, or Romanticism: What is the Supreme Court Up to?”, *Swarajya* (February 05 2019), available at <<https://swarajyamag.com/ideas/judicial-activism-judicial-overreach-or-judicial-romanticism-what-is-the-supreme-court-up-to>> (last visited on 20 May 2025); D. Mukhopadhyay, “Scrutinizing Judicial Over-Reach Within the Domain of the “New Wealth”: Public Policy Post the Coalgate Era”, *Manupatra*, available at <<https://docs.manupatra.in>> (last visited on 20 May 2025); P. Sharma, “Judicial Activism vis-à-vis Judicial Overreach: A Comparative Study”, 5(3) *International Journal for Multidisciplinary Research* (2023); and A. Vats, “Supreme Court’s Judicial Overreach? Vice President Joins Experts with Fierce Criticism”, *India Today* (April 18 2025), available at <<https://www.indiatoday.in/india/law-news/story/vice-president-jagdeep-dhankar-ignites-row-over-judicial-activism-versus-overreach-after-supreme-court-tamil-nadu-governor-judgment-2709337-2025-04-18>> (last visited on 20 May 2025).

³² Philip B. Kurland, “The Rise and Fall of the Doctrine of Separation of Powers”, 85 *Michigan Law Review* 592 (1986).

³³ See C. Bolick, “The Proper Role of “Judicial Activism””, 42(1) *Harvard Journal of Law and Public Policy* (2019); S. Sharma, “Myth of Judicial Overreach”, 43(10) *Economic and Political Weekly* 15-18 (2008).

³⁴ Arthur M. Schlesinger, Jr., an American public intellectual, is attributed with coining the term ‘judicial activism’ for the first time in a *Fortune* Magazine article in 1947, although he offered no precise definition. See *Supra* note 28.

³⁵ See *Supra* note 28.

has been articulately enshrined in the Constitution.³⁶ Experts believe that in the present era of ‘coalition’ politics in India also, the judiciary has essentially assumed a more important role, owing to the inherently precarious nature of governance in such systems.³⁷

In Prof. Ackerman’s words, there has been a “rise in world constitutionalism”, from 1789 to 1945.³⁸ Interestingly, what makes this rise post 1945 even more uniquely placed is that it is accompanied by a consistent increase in several factors, including: ‘1) judicial review of the constitutionality of legislation, 2)[...] bills of rights, and 3) [...] systems of checks and balances.’³⁹

In the theory of the ‘5 stages of World Constitutional History’⁴⁰ as articulately expounded by Iranian-American scholar, Prof. S.A. Arjomand, the latest and current stage is the ‘era of “new constitutionalism”’.⁴¹ Characteristically, this era, in particular, is marked by ‘the rise in the protection of human rights by establishing necessary implementation and review procedures’.⁴² In the same breath, the theory also posits that ‘there is a hierarchy, and in that hierarchy, constitutional law ranks higher than the rest of the statutes’.⁴³

With regards to this phenomenon of “new constitutionalism”, experts have further forged an essential connection between democratic constitutionalism and judicial activism.⁴⁴ It marks a distinct departure from the older and narrower concepts of constitutionalism, as well as democracy, which were based on majority rule and political liberties.⁴⁵

Nonetheless, from the time ‘judicial activism’ came to be acknowledged and accepted as a politico-legal phenomenon, more often than not it has been charged with usurping the power of the legislature and/or the executive. However, largely supporting the ‘activist judiciary’ view, it is argued that the modern understanding of democracy is such that it is much more than merely majority rule, and that modern tenets of constitutionalism require that courts necessarily act on specific issues, and that is the only way to uphold the constitution.⁴⁶

One of the remarkable examples of judicial activism in India is the issuance of directions and guidelines for protecting Fundamental Rights in the absence of required laws. Two of the

³⁶ See *Supra* note 28 at 877; Upendra Baxi, “The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice”, in S.K. Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* 156-209 (Oxford University Press and Indian Law Institute, Delhi, 2001).

³⁷ See *Supra* note 28 at 877.

³⁸ B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press, 2019).

³⁹ S.G. Calabresi, “The Global Rise of Judicial Review Since 1945”, 69 (3) *Catholic University Law Review* 417 (2020).

⁴⁰ S.A. Arjomand, “Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions”, 33(1) *European Journal of Sociology* (1992).

⁴¹ *Ibid.*

⁴² J.J. Chu, “Global Constitutionalism and Judicial Activism in Taiwan”, 38(4) *Journal of Contemporary Asia* 516 (2008).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Id* at 517.

⁴⁶ *Ibid.*; K.D. Kmiec, “The Origin and Current Meanings of Judicial Activism”, 92(5) *California Law Review* (2004); G.M. Tezcur, “Judicial Activism in Perilous Times: The Turkish Case”, 43(2) *Law and Society Review* (2024).

well-known and key examples, amongst others, are first, the Supreme Court of India's ruling of 1998 to cut down the pollution level in Delhi by using natural gas in vehicles, and second, the Vishaka case guidelines framed in 1997 to tackle sexual harassment of women in the workplace (*Vishaka & Other v. State of Rajasthan & Others*, AIR, 1997, SC 3011).⁴⁷

III. Increasingly Activist Role of the Indian Judiciary in Climate Matters

The Indian judiciary has by far taken an enterprising and forward-looking stance on environmental issues, especially in its employment of national as well as global legal principles to mete out holistic justice in the cause. Over the years the Supreme Court has utilized and expanded the scope of various principles of environment law, for example, the 'polluter pays principle'⁴⁸, 'precautionary principle'⁴⁹, 'intergenerational equity'⁵⁰, 'public trust'⁵¹, etc.

In the context of environment litigation especially, the Supreme Court of India, in its role as the guardian of the fundamental rights of the citizens, has often in the past, indulged in legitimate judicial law-making and regulation, which together, particularly in the present parlance, has been termed as environment-related judicial activism.⁵²

This has been accompanied by the deregulation of the principle of *locus standi*, in the form of the emergence of Public Interest Litigation (PIL), which has empowered public-minded individuals or institutions to approach the Supreme Court or High Courts under Articles 32 and 226 of the Constitution, respectively, seeking judicial reparation for the infringement of fundamental rights. The judiciary has, in this regard, very often in environment-related cases interpreted Article 21 (right to life and personal liberty), especially and liberally, to include an unarticulated right, including the right to a wholesome environment.⁵³

Another notable development in this regard has been the development of the National Green Tribunal (NGT), through the NGT Act of 2010. As noted by experts in this regard, despite the statutory limitations (for example, those relating to jurisdiction or power of execution), over the years, the tribunal has succeeded in expanding its jurisdiction while delivering exceptional environmental jurisprudence.⁵⁴ An example of the former could be that the tribunal visibly expanded its *locus standi* provision, making itself accessible to a wider range

⁴⁷ See *Supra* note 28 at 879.

⁴⁸ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 5 SCC 281.

⁴⁹ *Vellore Citizens' Welfare Forum v. Union of India*, AIR 1996 SC 2715.

⁵⁰ *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149.

⁵¹ *M.C. Mehta v. Kamal Nath* 1997 1 SCC 388.

⁵² Eeshan Chaturvedi, "Climate Change Litigation: Indian Perspective", 22 *German Law Journal* 1463 (2021).

⁵³ See *Subash Kumar v. State of Bihar* (1991) 1 SCC 598; See also *Virender Gaur v. State of Haryana*, (1995) 2 SCC 577. See especially case of *M.K. Ranjitsinh v. Union of India* (2024 INSC 280), in the context of climate change (explained later).

⁵⁴ An example would be the incorporation of the 'doctrine of non-regression' in the environmental jurisprudence, not being a part of the Indian Law (*Society for Protection of Environment & Biodiversity v. Union of India*, O.A. No. 677 of 2016, decided on Dec. 8, 2017). See *Supra* note 52 at 1464.

of people (even though more recently the scope of the said doctrine of *locus standi* seems to have been restricted by the tribunal)^{55, 56}

Judicial activism in relation to climate change, specifically, however, constitutes a relatively new phenomenon.⁵⁷ In this regard, it is relevant to reiterate herein that India does not have a designated statute on climate change. Nonetheless, as mentioned in previous paragraphs, India does have the NAPCC, adopted in 2008, and the INDC as submitted to the UNFCCC; however, as the two are essentially non-enforceable in courts, there exists a legislative gap when it comes to adjudication relating to climate change issues.⁵⁸ Therefore, the situation as it presently exists, the current abundance of environmental legislation in the country is the only means available presently to address climate change issues.⁵⁹

It is further interesting to note in this regard that in the case of *Gaurav Kumar Bansal v. Union of India and Others*,⁶⁰ wherein the applicant prayed for the NAPCC to be implemented, and for the State governments to be seriously working on the State Action Plans, including implementing them, and further restraining from violating them, the NGT simply disposed of the case by issuing a direction to the State Governments to comply with the necessary directions of the Ministry of Environment, Forest and Climate Change (the then Ministry of Environment and Forests), in that regard. The tribunal refused to issue further directions as it was not a specific case with regard to a specific violation and resultant climatic consequences.⁶¹

In another case of *M/S. Goel Ganga Developers India Pvt. Ltd. v. Union of India through Secretary Ministry of Environment and Forest and Others*⁶², the Supreme Court (SC) in appeal from the original matter of *Tanaji Balasaheb Gambhire v. Union of India*⁶³ before the NGT, wherein the NGT had ordered M/s. Goel Ganga Developers India Private Limited, who

⁵⁵ See Gill Gitanjali Nain, “Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?” 7 *Asian Journal of Law and Society* 85 (2020).

⁵⁶ See for example, *Samir Mehta v. Union of India* (O.A. No. 24 of 2011, Decided On: Aug. 23, 2016), and *Samata v. Union of India* (NGT, *Samata v. Union of India*, NEAA Appeal No. 10 of 2010 (Dec. 13, 2013)).

⁵⁷ See A. Basu, “Climate Change Litigation in India: Seeking a New Approach Through the Application of Common Law Principles”, 1 *Environmental Law & Practice Review* (2011); A. Kodiveri, “The Genre-Bending of Climate Litigation in India”, *VerfBlog* (2024), available at <<https://verfassungsblog.de/the-genre-bending-of-climate-litigation-in-india/>> (last visited on 12 May 2025); P. Kumar, et al., “India’s New Constitutional Climate Right: Examining the Significance of *M.K. Ranjitsinh and Ors. V. Union of India* and others for Climate Litigation in India”, *VerfBlog* (2024), available at <<https://verfassungsblog.de/indias-new-constitutional-climate-right/#:~:text=In%20one%20fell%20swoop%2C%20the,origins%20of%20this%20new%20right>> (last visited on 12 May 2025).

⁵⁸ India is a “dualist” system, which means that international agreements (such as the Paris Agreement and the UNFCCC) have to be specifically incorporated into the domestic law in order to become a binding law (Articles 73 and 253 of the Indian Constitution). Furthermore, there is no statutory deadline requiring India to domestically legislate the commitments arising from these international accords.

⁵⁹ Individual legislations such as the Wildlife Protection Act, 1972, the Water (Prevention and Control of Pollution) Act, 1974, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, broadly govern all environmental matters, including climate change. See A. Naik, “Crisis, Sustainability and Environmental Justice in India”, *Socio-Legal Review Forum* (2018).

⁶⁰ *Gaurav Kumar Bansal v. Union of India and Ors.* (OA No. 498 of 2014).

⁶¹ *Ibid.*

⁶² [2018] 10 SCR 1005.

⁶³ NGT, *Tanaji Balasaheb Gambhire v. Union of India*, 2016 SCC OnLine 4213 (Jan. 8, 2018).

were alleged to have illegally constructed a commercial and residential complex, to pay the damages; observed that the courts ‘cannot introduce a new concept of assessing and levying damages unless expert evidence in this behalf is led or there is some well-established principle’⁶⁴ in that regard. It added that usually ‘carbon footprint is used to compensate and impose damages on nations, but the court cannot apply the method while imposing damages on persons who violate [the] Environment Clearance, [as] this method is not part of any law, rule, or executive instructions.’⁶⁵

In another important case before the NGT of 2017, a nine-year-old, Ridhima Pandey, moved the tribunal, on the basis of the doctrine of ‘inter-generational equity’ and the ‘Public Trust Doctrine’, petitioning that if adequate measures to address climate change is not taken today, the children of tomorrow will be unduly affected by the severe impacts of the phenomenon.⁶⁶ The plaintiff further pointed to the current failure of the government to address the climate change impacts under the existing environmental jurisprudence in the country.⁶⁷ In January 2019, the Green Tribunal disposed of Ridhima’s Petition by observing that ‘there was no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India, or are not taken into consideration in granting environment clearances; therefore, there was no need for the green tribunal to pass any further directions on this issue’.⁶⁸ The matter is presently sub-judice before the Supreme Court of India.

In recent times, however, the NGT as well as the Supreme Court are meting out astute and path-breaking verdicts in matters of climate change, such as in the cases of *Court on Its Own Motion v. State of Himachal Pradesh and Others*,⁶⁹ wherein the NGT took an innovative approach to tackle the issues of global pollution, through borrowing some parameters of the air pollution laws, which were within the ambit of its jurisdiction; in *Telangana v. Mohd. Abdul Qasim*,⁷⁰ wherein the Indian Supreme Court issued a ruling in favour of a protected forest, while connecting concepts of ecocentrism, rights of nature, and climate change with the economy, while pronouncing the judgment; and lastly, but most importantly, in the case of *M.K. Ranjitsinh and others v. Union of India*⁷¹, which is being widely acclaimed as the first real climate ruling issued by the Supreme Court, wherein the Court read the right to a clean climate into Articles 21 (right to life and personal liberty) and 14 (right to equality) of the Constitution.

Many scholars in the field are especially hailing the *M.K. Ranjitsinh* judgment as being ‘genre-bending’,⁷² as the court used environmental litigation as one of the ways to address

⁶⁴ *M/S. Goel Ganga Developers India Pvt. Ltd. V. Union of India* ([2018] 10 SCR 1005).

⁶⁵ *Ibid.*

⁶⁶ *Ridhima Pandey v. Union of India* (OA No. 187 of 2017).

⁶⁷ One of the main points of the petition was that the NAPCC is not target oriented, simply being a list of proposed activities lacking time-bound goals. See *Ibid.*

⁶⁸ *Supra* note 66.

⁶⁹ NGT, *Sher Singh v. State of Himachal Pradesh*, No. 237 (THC)/2013 (CWPIIL No.15 of 2010).

⁷⁰ 2024 INSC 310.

⁷¹ 2024 INSC 280.

⁷² A. Kodiveri, “The Genre-Bending of Climate Litigation in India”, *VerfBlog* (2024), available at <<https://verfassungsblog.de/the-genre-bending-of-climate-litigation-in-india/>> (last visited on 12 May 2025).

climate change.⁷³ The judgment has also been acclaimed as being a remarkable development for the evolution of constitutional climate-right litigation in India, as clear legal foundations of right to a clean environment were constructed, by deciphering such constructs from existing constitutional jurisprudence, in a case where no prior constitutional provision existed.⁷⁴ The judgement further doctrined a ‘recognition-based approach to climate justice’ by recognizing the needs of certain groups of people, such as, ‘indigenous, tribal, and forest-dwelling communities, women, low income households, and the inhabitants of specific geographical areas (the Lakshadweep islands and forest areas, for example)’, who are particularly vulnerable to climate change impacts.⁷⁵ The judgment is, therefore, being largely viewed as an outright triumph for rights-based climate litigation in India.⁷⁶

The evident trend of the rise in climate litigation globally has undoubtedly not just made an entrance, but veritably left a noticeable impact on the Indian jurisprudence. With some of its recent judgments, the Supreme Court has clearly expanded its environment-related judicial activism into the realm of climate change, to fill in the glaring legislative and executive gaps in the field.

IV. Conclusion

From 1992 onwards, since the time the UNFCCC was adopted under the aegis of the Earth Summit in Rio de Janeiro, climate governance has received increasing attention on a global scale. There is no doubt that academics, scientists and politicians alike, tangibly perceive the repercussions of the ongoing fall out of the very palpable phenomenon of climate change. Nonetheless, it is equally important to face the harsh reality of insufficient global efforts (in the forms of laws and policies) to adequately address its challenges. There should be no confusion, however, between the acknowledgment of issue, which is overwhelming, and the short-fall in actual climate-actions, which continues to occur for various reasons, ranging from economical obligations to political constraints.

In order to honor the afore-mentioned acknowledgment of the magnanimity of the issue, as well as to fill in the gaps that political and democratic limitations have continued to forge in the way of the global mitigation of the phenomenon, climate litigation has unquestionably stepped up as an ideological, and at the same time accessible solution. Climate litigation has been on a steady rise all over the world, and is indeed starting to deliver rights-based relief to the claimants. This is happening in part because of the ‘activist judiciary’, fearlessly filling in for inadequate legislative and executive efforts, as the tenets of modern constitutionalism have been demanding.

⁷³ *Ibid.*

⁷⁴ P. Kumar, *et al.*, “India’s New Constitutional Climate Right: Examining the Significance of *M.K. Ranjitsinh and Ors. V. Union of India* and others for Climate Litigation in India”, *VerfBlog* (2024), available at <<https://verfassungsblog.de/indias-new-constitutional-climate-right/#:~:text=In%20one%20fell%20swoop%2C%20the,origins%20of%20this%20new%20right>> (last visited on 12 May 2025).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

‘Judicial activism’ itself, is increasingly being accepted and acclaimed as a necessary modern functioning arm of the traditional notion of ‘judicial review’, while at the same time placing it distinctively from the more adventurist and less democratic ‘judicial overreach’.

In India environment-related judicial activism has been an evident characteristic feature of environment jurisprudence from as early as in the 1980s. This phenomenon is being extended to the field of purely climate-related cases slowly, but surely.

Climate change is not a scientific jargon or theoretical problem anymore. Ripples of its hazardous fallout are especially being experienced by developing countries like India, owing to their geographical, economic, and demographical characteristics. It is therefore essential that the judiciary’s role be free from narrow technical constraints of judicial restraint, especially when judicial action to ensure accountability and steering of climate issues towards an acceptance of climate rights may be imperative.

WHO WILL JUDGE A JUDGE?

-Dr.Bibhabasu Misra

Abstract:

The Judges are the most important pillar of the modern thriving democracy in all over the world. It is commonly said that, if judges are corrupt, every cherish able value in a society is lost. People look up to the Judiciary, when they are not given a fair treatment by the other important organs of the State. Judges are duty bound to defend the Constitution, balance individual and Community rights and provide corrective justice. But even among these Godly bodies, there are some black sheep, for which legislations in consonance with Indian Constitution has to be enacted to fix the judicial accountability. The Author in this article will try to peruse various legislations, Judgments, and existing literature to define the term “Judicial” and its couture to fix the judicial accountability.

Key Words: -Judicial, Liability, Constitution, Legislation, Accountability

Introduction:

From time immemorial, in every civilization Judges hold a very respectful position in the People’s heart. India is no exception. During ancient Hindu and Muslim era, in India, Judges were expected to be noble person without any kind of bias. Judges were expected to be patient enough to listen the litigants until they (Litigants) have emptied their grievances in their heart, completely out.

Before independence, British Colonial masters occupied Indian sub-continent and implemented their laws to exploit the natives. But still the judicial arm of the British Colonial State was known to implement the noble principle of “Justice-Equity- Good Conscience.” We understand that, during the regime of literal interpretation, and British tradition, the judges were handicapped to go beyond the black letter of the legislation. Till recently,unlike the American Judges, the judges in U.K. are not known for their creativity.After the independence, Indian Constitution came into existence, and it provided creative power to the Supreme Court and High Courts through the tool of interpretation. The third Schedule of the Indian Constitution provides the duty of the Judges to defend the Constitution. Thus the power lies with Higher Courts to declare legislation void, if it is infringing the Constitution. Judges provide corrective justice and protect individual right against the onslaught of the unjust majority.

The paragraphs written before are salutation of the Judges. Who are the Judges? Section 2(16) of the Bharatiya Nyaya Sanhita provides that, the word “Judge means a person who is officially

designated as a judge and includes a person,- who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body or persons, which body of persons is empowered by law to give such a Judgment.” Trial Court generally establishes fact and applies law to it. Appellate Courts generally settle question of law through interpretation.

But what are the accountability of the Judges to themselves and the existing democratic structure? Indian Constitution through Article 124(4),(5),(6) read with Article 218 provides the process of impeachment of a Supreme Court and a High Court Judge for their misbehaviour. We are not talking about the incapacity of the Judges, as it may be like financial (insolvency) or medical unfitness or any kind of legitimate ineligibility like where their own interest is involved. All the other grounds may be called as misbehaviour (As for example, wrong use of power vested in judges authorised by the Constitution and Law) as mentioned in the Judges Enquiry Act, 1968.¹ Again, after going through the phraseology of the Contempt of Courts Act, it seems Judges may “Contempt” their own Court also, as “Civil” and “Criminal Contempt.”²

The subordinate- Judiciary is protected from any kind of liability as long as they are acting judicially and in good-faith.³

If the Judge have jurisdiction, (Territorial, Pecuniary, Subject-matter), there is no question of lack of good faith. Now we can outline the scope of the judicial activity.

1. To follow the previous existing precedent of a larger bench of the Apex Court in the land.⁴
2. If the existing precedent is unjust and troublesome it may be sent to larger Constitutional bench for a definitive judgment.
3. The lower Court, smaller bench or bench of equal strength can use the method of distinguishing⁵ to avoid implementing bad law declared by the Apex Court.
4. Asking reference from a Higher Court and its opinion for the Constitutionality of a particular statute, if the subordinate Courts think that a particular statute and its provision(s) is Un- Constitutional.⁶

¹ This Act is applicable only for High Court and Supreme Court Judge. See section 2(C) of the Judges (Inquiry) Act, 1968.

² See section 2(b) and 2(c) of The Contempt of Courts Act, 1971.

³ See Section 15 of the Bharatiya Nyaya Sanhita:- Act of Judge when acting judicially- Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Section 2(11) of the Nyaya Sanhita “Good-faith”- Nothing is said to be done or believed in “good-faith” which is done or believed without due care and attention.

⁴ See Article 21 and 141 of the Indian Constitution.

⁵ Distinguishing is a method based on difference of the context, issues, fact of a particular case with other case(s).

⁶ See section 436 the Bharatiya Nagarik Suraksha Sanhita, Reference to the High Court. There is similar provision section 113, Civil Procedure Code, 1908.

5. High Court and Apex Court can justify/declare any type of legislations, delegated legislations, executive orders, executive actions Unconstitutional including a violation of the basic structure of the Indian Constitution.
6. The Judgemade law is ex-post facto in nature that is applying a law to the fact already happened.

Thus if a judge is not acting judicially, he / she/another will be liable under the ordinary Criminal law. As for example for committing Murder under section 101 of the Bharatiya Nyaya Sanhita, the Judge will be punished. It seems that for civil liability and tortuous liability of a judge, suits may be filed against him/her/another, under the Section 9 of the Civil Procedure Code(1908).⁷ To initiate a Civil / Criminal action permission needs to be taken from the Government. Sometimes permission is withheld. Time has come to provide a reasoned order by the competent authority for denying permission for not initiating legal action. We can refer the case law of KushalJethi v Ravinder and Others,⁸ where it is laid down in the paragraph 16, that procedural law is mere servant of substantive law. Justice cannot be denied insisting on the technicalities of procedural law. Article 32 the soul of the Indian Constitution does not insist on technicalities, it mentions about the appropriate proceedings.

All the defences like “ Mistake of Fact”, “Accident”, “ Legal insanity”, “ Involuntary intoxication”, “ Necessity”, “ Consent”, “Offences Trifling in nature” “ Right of Private Defences” will be available to a Judge under the Bharatiya Nyaya Sanhita, like an ordinary person.⁹ These defences are also available for liability incurred under the Special Criminal laws like Narcotic Drugs and Psychotropic Substances Act, Cattle Trespass Act etc.

For the proven misbehaviour and incapacity of the higher judiciary, the Article 124 and 218 of the Indian Constitution provides the impeachment process of the Judges.

Due to increase of various new statutes, delegated legislations;differentadministrative tribunals have been created. Here the presiding officers are called as Judge, but they are actually quasi-judicial body. In the tribunals, **precedents** are not **strictly followed**, **nor the Civil Procedure Code and B.N.S.S. Code are strictly applied** to the proceeding before the tribunal. The feasible administrative policy is the sole guideline along with principles of “Justice, Equity and good-conscience.” Thus it seems that, the Judges of these tribunals are also accountable in same manner as other judicial members. The relevant Acts under which liabilities incurred are the BNS,¹⁰ Contempt of Courts Act etc.

⁷ See section 218 the BNSS. Also see section 80, “Notice” under the Civil Procedure Code.

⁸<https://indiankanoon.org/visited on 10/2/2023>.

⁹See Chapter- III, General Exceptions, BNS.

¹⁰ Supra Note 2-3.

Justifiable:-We all know that, some problems with poly- centric issues¹¹ are not amenable for the solutions given by the Courts. We can refer Article 37 of the Indian Constitution, (Part IV of the Indian Constitution), where it has been mentioned that “Directive Principles of State Policy” are not enforceable in the Courts. However, laws made under the “Directive Principles of State Policy” are enforceable by the Courts. As for example, Equal Remuneration Act, enacted to implement the policy, “Equal pay for equal work” by men and women has been inspired from the Article 39 (d) of the Indian Constitution. We can identify a trend that, the Higher Courts in India, is interpreting, the “Directive Principles of the State Policy” in to the fundamental rights. As for example, right to education, right to clean environment, right to speedy justice, and right to free legal-aid, etc. are directive principles of the Indian Constitution, interpreted and implemented by the Higher Courts, through the fundamental right (s) like, Article 21 of the Indian Constitution.¹² Though the State, particularly the legislative branch is duty bound to implement the part –IV of the Constitution, the Judiciary cannot shake off its duty to defend the Constitution. If any policy pursued by the State, is against the Constitutional values, the Judiciary must step in and decide that whether the present policy of the State is in symmetry with the changing values of the Indian Constitution.

The nature and scope of the Judge made Law: -Though the traditional view is that, Judge cannot make a law, they can only implement it basing upon a fact and legislative provision(s). However, in our Indian Constitution, the Apex Court can make law interstitially.¹³ The judge made law will be operative, when there is a legislative vacuum.¹⁴

In absence of the legislative guidance, the Judiciary can fall back on established legal principles like, nobody can be condemned unheard, nobody should be a judge in his own cause etc.

Another type of decrees /order can be issued by the Apex Court, under Article 142 of the Indian Constitution, is a practice direction.¹⁵ This practice direction is not used in curial capacity. It may be called as obiter-dicta, practice direction and it has legitimacy. It may be followed by the future Courts.

We can examine the very famous provisions of the Transfer of the Property Act, that is section 13(Transfer for the benefit of unborn- person), section 14 (Rule against Perpetuity), to understand the nature of Judge made law.

The main ingredients of the section 13 of the Transfer of Property Act are:-

¹¹As for example, Court should not decide whether a particular project initiated by State is beneficial for the local people or not. Because then, there will be a need to investigate multifaceted issues, to be investigated by reliable agencies. Even the service of the learned Amicus-curiae in the Court is not enough to provide a solution.

¹²See Article 141 of the Indian Constitution.

¹³ Ibid.

¹⁴See Vishakha case (AIR 1997 SC 3011).and the resultant Enactment, The Prevention of Sexual Harassment of Women At Workplace Act, 2013.

¹⁵See LLOYD’S INTRODUCTION TO JURISPRUDENCE, NINTH EDITION p-1556-1557.

1. No direct transfer.
2. Creation of Prior/previous interest. (Life interest created in favour of trustee for the benefit of unborn person). (Life interest is restricted to enjoyment of the property).
3. The absolute transfer to the unborn person, when the person is born, after the consumption of life interest by the designated person.

As for example, as per section 13 of the Transfer of Property Act, “A” transfers his land to his wife “B” for life as trustee, and then to his unborn- child absolutely.

This transfer is valid in the eye of law.

The ingredients of the section 14 of the Transfer of Property Act are:-

- A. The unborn child must be in existence, when prior interest gets extinct.
- B. The property transferred may be tied up to the majority of the minor child.

Now the question is whether the unborn child include “Adopted” child? The Transfer of Property Act has not been revised for ages; neither has it come as a litigating issue before the Court.

There can be an argument that unborn child is having a natural connotation of origin from the biological parents. Thus, the concept of adoption is excluded.

Another counter- argument is, unborn child includes the concept adopted child.

We can refer the section 477 of the Indian Penal Code, (Now, 343 BNS) where punishment is given if somebody destroys a deed or written authority to take in adoption of a son. (Indian Penal Code, Enacted in 1860). (Transfer of Property Act, Enacted in 1882). Thus, the concept of adopted child was impliedly there/known, under section 13 and 14 of the Transfer of Property Act.

The third argument which may be advanced as, section 13 and 14 of the Transfer of Property Act are unconstitutional and infringing Article 14,15(1) and 21 of the Indian Constitution. The reasons are,

1. The prior interest created under section 13 of the Transfer of Property Act is unconstitutional because it provides only life interest (restricted to enjoyment) to the trustee.¹⁶ No example is given whether a Man can be a trustee. As for example, life interest of a wife is infringing Article 14(Unreasonable classification), Article 15(1) (Discrimination on the ground of sex), and Article 21 of the Indian Constitution. (Unfair Substantive and Procedural law).
2. If section 13 of the Transfer of Property Act is void, as failure of prior interest being unconstitutional, section 14 of the Transfer of Property Act(The pronoun he is used) **is**

¹⁶ The life interest seems to be infringing the Article 300 A of the Indian Constitution. Article 300 A of the Indian Constitution provides absolute proprietary ownership to Men, Women, Another, unless it is taken away by authority of law.

also void.¹⁷ There cannot be ownerless/occupier less property. The trial Court may ask for reference from Higher Courts.¹⁸

The problem, the Judiciary shall face in such novel issues, that there will be no legislative guide line and there will be monstrous poly centric issues. The Judge has to usurp the power of the legislature.

Inherent power of the Courts: - Section 151 of the Civil Procedure Code (1908) provides for the inherent power of the Court, which overrides other provisions of the Civil Procedure Code, and enables the Court to pass an order for the parties, to achieve the end of justice.

Similar power is vested with the High Court under **section 528 of the BNSS**, which enable the Court, (Notwithstanding other provisions of the BNSS), to provide any kind of order to the parties for the end of the justice.

We can understand that, if there is no express prohibition in law, Court can use its inherent power.

Writ Jurisdiction of the Supreme and High Courts:-As we are common law Country, we have borrowed the concept of Writ jurisdiction from the Britishers.¹⁹ Writ was held to be a written order issued by the King. After the passage of time, the common law Courts started to issue Writs. During the British rule, through Regulating Act 1773, the Supreme Court and High Courts were established in India.

After the Indian Constitution was enacted, Article 226 and 32 of the Indian Constitution incorporated the concept of Writ Jurisdiction. The scope of Article 226 is wider than Article 32; (remedy limited to fundamental rights) as unlike Supreme Court, High Court can be approached for violation of fundamental and legal rights both. Though the Apex Court can cite exhaustion of local remedies rule and ask the litigants to approach the concerned High Court first.

There are mainly four types of writ, namely- Habeas Corpus, Mandamus, Certiorari, Prohibitions and Quo- warranto.

Now the question is (1) whether Judiciary is State? (2)If yes, then what writs are relevant for the Judiciary other than Certiorari and Prohibition?

Article 12 of the Indian Constitution, defines the “Concept of State.”It is-

1. The Government and Parliament of India. Also, Executive and Legislature of the Union.
2. The Government and the legislature of each State. Also, Executive and legislature of States.

¹⁷See section 16 of the Transfer of Property Act.(GirjeshDutt v DataDin). See S.N.Shukla, “Transfer of Property Act”, (29th Edition-2015)p-74.

¹⁸ Infra Note 23.

¹⁹See Article 13 and 372 of the Indian Constitution.

3. All local or other authorities within the territory of India.
4. All local and **other authorities** under the control of the Government of India.

In Airport Authority case,²⁰ it was laid down by the Court that, **if a body is an agency or instrumentality of government it may be an authority within the meaning of the Article 12 of the Indian Constitution.**

The Court laid down a test;-

- A. Financial resources of the State is the chief funding source, if the **entire share capital of the corporation is held by Government, (Read considerable portion of the share),**
- B. Existence of deep and pervasive State control,
- C. Functional character being governmental in essence that is if the functions of the Corporation are of public importance, and closely related to governmental functions,
- D. If a department of Government is transferred to the Corporation,
- E. Whether the Corporation, enjoys monopoly status which is State conferred or State protected.

The superior Courts being the creature of the Constitution, having the interstitial law making power, can be termed as “**State**”(As **other Authorities**), under the Article 12 of the Indian Constitution.

In America, the Judiciary is within the ambit of the 14th Amendment.²¹ We all know that, part-III of the Indian Constitution are heavily borrowed from the “Bill of Rights” of the American Constitution. Mr Jurist H. M. Seervai, in his book, Constitutional Law of India, writes, Judge are part of State (Article 12 of the Indian Constitution) and should be under the Writ Jurisdiction of the Supreme Court.²²

Sub- ordinate judiciary, in India is amenable to the writ jurisdiction of the superior Courts. As for example, a Higher Court can issue the writ of Certiorari and Prohibition against lower Courts; if the lower Court violates their jurisdiction. The difference between the writ of Certiorari and Prohibition is,

Lower Courts judgments are quashed for lack of jurisdiction by the Higher Courts by issuing writ of Certiorari.

The lower Courts are prohibited from exercising jurisdiction by the writ of Prohibition issued by the Superior Court.

²⁰RamanaDayaram v The International Airport Authority of India. AIR 1979 SC 1628.

²¹Virina v Rives (1980) 100 US 313,318,25 L Ed. 667.

²²See H.M. Seervai, Constitutional Law of India, p-155. (First- edition)

Now, we can say that, if the Sub-ordinate Court is not acting judicially, apart from liability under the ordinary Civil and Criminal law, even the writ of Quo warranto can be filed against the Judge of the lower Court, in the High Court. Thus, the accountability of the sub-ordinate judiciary under the law is different and separate from the accountability of the Higher judiciary under the process of impeachment (Article 124 of the Indian Constitution, Article 218, read with the Judges inquiry Act, 1968).

As per Article 32 (3) of the Indian Constitution, without derogating from the clause (1) and (2) of the Article 32, the Parliament may by law empower any other Court to exercise within the local limit any power exercised by the Supreme Court.

Thus in future, the principal District and Session Court of an area can exercise writ jurisdiction and issue Writ of quo-warranto against a judge sub-ordinate to the District/Session Court, who is not acting judicially and liable under ordinary Civil and criminal law. The same writ may be issued by the High Court, if the District/Session judge is not acting judicially.

The Rule of Reference used by the subordinate Judiciary and the rule of practice²³:-

Under Section 113 of the Civil Procedure Code (1908), Court under the High Court or Supreme Court, can seek an opinion about the Constitutionality of any legal provisions, which is in the opinion of the lower Court as unconstitutional, but till now it has not been declared such by the competent Court. The sub-ordinate Court then will determine the legal issue as per the opinion/reference given by the Higher Courts.

Under section 436 of the BNSS, any Court where a case is pending, can ask for a reference from the High Court about a validity of the provision of law. Under section 437 of the BNSS, as per the order of the High Court, the trial Court will determine the issue.

Now the million dollar question is how many Judges will apply the provisions of reference under the Civil Procedure Code or BNSS?

Or the concerned Court will simply ask the litigants to challenge the law in the Courts of writ jurisdiction?

Are the provisions of reference under the BNSS and Civil Procedure dead letter?

Judges liability for failing to protect Constitutional and Statutory rights of the accused:-

In the Mohammad Ajmal v State of Maharastra,²⁴ the Higher Courts observed, if the judge is failing to protect statutory and Constitutional rights of an accused, like section 58 BNSS, or Article 22 of the Constitution, the judge/Magistrate is liable for departmental action. (As the safeguard of section 15 of the BNSS limited to acting “judicially”). One may opine that, the rule of

²³See section 113 Civil Procedure Code, section 436, section 437 of the BNSS.

²⁴See (2012) 9 SCC 1.

RudalSahacase²⁵(For violation of fundamental rights by State, State should pay compensation to the victim) can be extended to the activity of the Judges not acting judicially.

Doctrine of Legitimate Expectation:

Directive Principles of the State policy under the Indian Constitution are, (Part-IV) or seems to be the legitimate expectation of the People of India. We all know that, Part-IV of the Indian Constitution is not justifiable unless it is incorporated under the law. When it is incorporated under the law, we can approach the writ Courts and seek an issue of Mandamus, which is known for enforcing a Statutory/ Constitutional duty. Generally, the doctrine of legitimate expectation is a very narrow doctrine under the administrative law, and it does not provide a positive justifiable right. As for example, if a minister in a State announce a portable drinking water scheme, but does not implement it within reasonable period, the people of the area may approach the Court and claim a right to be heard, to know the reason behind the delay of the promised scheme etc. We all expect that this narrow doctrine should gradually be elevated to a Constitutional right and amenable under the judicial review/scrutiny.

Power of the Apex Court to appoint and transfer of Judges:-It is expected by the Constitutional makers, that Judiciary in India will always remain independent and corruption free and watchdog of the Indian Constitution. We know the Article 21 of the Indian Constitution is not suspended even in emergency. It is derived that Article 32 and 226 also should not be suspended. It is the duty of the Judges to defend the Constitution. Independent Judiciary is basic structure of the Indian Constitution. The appointment of Judges in the High Court and Supreme Court is done through a Collegiums system. The Judge of the Apex Court is selected by the Collegium of the Chief Justice and four senior most Judges of the Supreme Court. The High Court Collegium consists of Chief Justice of the High Court and two senior most High Court Judges.

The Judges are properly equipped to select a Judge and it is not denied that they must consult with all Constitutional and statutory authorities. But the decisions of the Collegiums should prevail. Thus the National Judicial Appointments Commission Act, was correctly nullified in 2015 by the Apex Court²⁶ after applying due consideration of existing precedent(s).

There is an argument that in United States of America, Judges of the Supreme Court are selected by the ruling political party. Then, why not in India? The answer is a considerable portion of the Indian people is till ignorant about their rights as compared to America. Unlike America,

²⁵AIR 1983 SC 1086.

²⁶See<https://main.sci.gov.in> (Visited 13/2/2023).Supreme Court v Union of India on 16th Oct,2015 (Writ Petition No. 13 of 2015).

the **doctrine of waiver**²⁷ (Related to the fundamental rights of the Indian Constitution) is not applicable in India.

Conclusion: -Judges are expected to comply not only with the legal norms but also with the existing moral norms in the society. Judges must invoke complete trust from common man as there should be a confidence from the litigants that judges are not biased by the external influence. The Chief Justice of the Constitutional Courts should command more respect than the Prime Minister of a Country.

²⁷The doctrine of waiver of rights is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the State.

THE SUPREME COURT AND THE CONSTITUTIONAL THRESHOLD: TESTING THE DEMOCRATIC QUOTIENT OF JUDICIAL REVIEW AND JUDICIAL ACTIVISM

-Shivang Tripathi and Neha Singh

Abstract

The framers of the Indian Constitution envisioned a harmonious intersectional relationship among democracy, judicial review, and constitutional supremacy. To smoothen the democratic processes, judicial review acts as a revitalizer. The contemporary debates alleging that the doctrine of judicial review is anti-democratic are far from being true. Though judicial review and judicial activism are often portrayed as distinct concepts, they are two sides of the same coin. Even though the government is elected on the basis of majority, the Constitution of India, in itself, can never become majoritarian. Therefore, judicial review is merely a constitutional safeguard against arbitrary transgressions of the foundational *grundnorm* by the legislature and executive. This chapter shall provide an intersectional analysis of the conceptual intricacies of democracy and judicial review on the cusp of constitutional supremacy. Additionally, the contours of Article 142 will be examined in light of contemporary developments in the politico-legal sphere, with special emphasis on the role of judicial review in questions encompassing federal principles, legislative and parliamentary procedures, and fundamental rights. Lastly, it shall critique the judicial interventions against the backdrop of allegations pertaining to judicial despotism.

The authors intend to follow a blend of doctrinal and analytical approaches, gauging through the text of the Indian Constitution, judicial discourse, and the Constituent Assembly debates as primary sources and scholarly contributions, and textbooks as secondary sources. Analytical tools will trace the consistency graph of the Supreme Court with respect to its exercise of judicial review post-independence.

Adopting the aforementioned approach, the chapter vehemently defends the role of the Supreme Court as the custodian and interpreter of the Constitution of India.

Keywords: Judicial Despotism, Judicial Review, Constitutional Supremacy, Democracy, Rule of law

Introduction

As Professor Wade rightly points out, judicial review is particularly “a critical protector of the rule of law”, as a tool to secure public control of the way in which public authorities

behave.¹ At its heart, constitutionalism is about constrained government on the basis of a higher law, ordinarily a codified Constitution that is a pre-eminent legal norm.² It takes all three branches of government, each acting within the powers the Constitution gives them.³ In this framework, the judiciary would act as a constitutional sentinel, interpreting powers conferred to each organ of the State and its limits⁴

Judicial review, as a derivative concept of the higher law, is a constitutional safeguard that prohibits from exceeding constitutional limits by any enactment or executive action. This is the constitutional analogy to the doctrine of *ultra vires*. While the authority to void unconstitutional laws is sometimes referred to as the power of “judicial supremacy”, it is the supremacy of the constitution which is being asserted, rather than of the power of the court.⁵ The development of judicial review has reached a stage where it is a fundamental principle underpinning administrative law that no public body, whether to be found in statute or in prerogative, is exempt from the prospect of judicial review.⁶ Judicial power under the constitution involves not only the examination of public power but also its exercise, extent and character. As de Smith observes, even discretionary powers previously considered inarbitrable are today subject to challenge on the grounds of legality and reasonableness.⁷ On this note, Wade emphasises an archaic yet fundamental concept of constitutionalism, namely that “in a democratic society subject to the rule of law no one has uncontrolled, unreviewable power”.⁸ No power, however high, can avoid the scrutiny and discipline of the constitution and of the courts.⁹

Indian Constitution seems more like that of United States than that of United Kingdom. Parliamentary sovereignty still remains absolute in UK as no court can set aside an Act of Parliament.¹⁰ By contrast, the Indian Constitution deliberately limits the power of Parliament

¹Sandra Day O'Connor, “Reflections on Preclusion of Judicial Review in England and the Reflections on Preclusion of Judicial Review in England and the United States” 27 *William & Mary Law Review* William & Mary Law Review 643 (1986) available at

<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2124&context=wmlr> last visited on May 13, 2025).

²Waluchow Wil and Dimitrios Kyritsis, “Constitutionalism”, *The Stanford Encyclopedia of Philosophy* (Summer 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.) available at <https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/> (last visited on May 13, 2025).

³Terence Corrigan, “Securing Constitutionalism and Civil Liberties in Africa: An Analysis of Evidence from the APRN”, *South African Institute of International Affairs* 20(2016) available at <https://www.jstor.org/stable/resrep25994.8> (last visited on May 13, 2025).

⁴ *Id.*

⁵ *Supra* note 2.

⁶ Manish Tiwari and Rekha Saxena, *The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism*, In Nicholas Aroney (ed.) and John Kincaid (ed.) *Courts in Federal Countries: Federalists or Unitarists?*, 223 (University of Toronto Press, Toronto, 2017) available at <http://www.jstor.org/stable/10.3138/j.ctt1whm97c.12> (last visited on May 13, 2025).

⁷ Galligan, D. J. “Judicial Review and the Textbook Writers.” 2 *Oxford Journal of Legal Studies* 257 (1982) available at <http://www.jstor.org/stable/764281> (last visited on May 13 2025).

⁸ *Id.*

⁹ *Supra* note 6.

¹⁰Jai Ganesh, “Balancing Power: A comparative Analysis of Judicial Review in India and United Kingdom”, 7 *International Journal of Law Management and Humanities* 2397(2024) available at <https://doi.org/10.1000/IJLMH.117685> (last visited on May 13, 2025).

in two key ways: through the federal segregation of powers, and through the shielding of fundamental rights from arbitrariness.¹¹

In this constitutional framework, the judiciary, not only has privileged position in protecting fundamental rights but is also the constitutional umpire in inter-governmental disputes in federal architecture of the polity. Judicial review gives courts the authority to review and, if need be, nullify legislative acts that violate constitutional principles.¹² This is not some implied authority but is one expressly granted by the Constitution. Articles 13, 32, 226, 131-136, 143, 145, 246, and 372 collectively define and entrench this power.¹³ It may be mentioned that, “the State shall not make any law which takes away or abridges the rights conferred by this Part (Part III), and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

Articles 32 coupled with the expansive domain of Art. 226 authorize the SC and HCs with the power to exercise writ jurisdiction to safeguard and uphold fundamental rights, placing judiciary as sentinel of constitutional freedoms. Further, Article 251 and 254 emphasize the monopoly of the Union’s legislative field and the role that the judiciary has to play in order to maintain the harmony of legislation in a federal set-up.

Legal thinkers like Dr. M.P. Jain opine that judicial review is part and parcel of our constitutional package.¹⁴ Indian courts are not just referees but also live interpreters of the Constitution, whose duty it is to strike down laws if they are found to violate it.¹⁵ As jealous guardians (“sentinels on the qui vive”) they see to it that the Constitution does not suffer at the hands of transient majoritarian views.¹⁶

Therefore, judicial review is the bulwark of Indian constitutionalism, preserving the separation of powers doctrine. Its connection to democracy is frequently mischaracterised as a struggle between electoral legitimacy and judicial legitimacy. But Indian democracy is based not on majoritarianism but on constitutionalism, with the judiciary as its arbiter and protector. Also not included in the list but implicit in the text is judicial review, which has been part of the Constitution as well, by extending certain basic characteristics within the grasp of constitution, thus placed it beyond parliament’s exclusive control domain.¹⁷

¹¹ *Id.* 0402.

¹² *Keshavanada Bharti v. State of Kerala* (1973) 4 SCC 225

¹³ Ritika Kanwar, “Models of Judicial Review in US viz a viz India: Analysis Paving a Path Towards Filing Legislative Lacunas”, *Manupatra Article*, July 6, 2022, available at <https://articles.manupatra.com/article-details/Models-of-Judicial-Review-in-US-viz-a-viz-India-Analysis-Paving-a-Path-Towards-Filling-Legislative-Lacunas> (last visited on May 13, 2025).

¹⁴ M.P. Jain, *Indian Constitutional Law* 16 (Lexis Nexis 2018).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Supra* note 12

Critics who call judicial review “juristocracy” say that it subverts the authority of elected officials.¹⁸ But this view ignores the central function of the judiciary to protect basic liberties and constitutional values. Courts do not act on their own but rather depict complaints of citizens, and mediate the proper balance between state power and individual freedom.¹⁹ Concerns about judicial activism, especially in economic and socio-economic issues are valid, but they have to be seen in the context of transformative decisions that the constitution envisaged.²⁰

It has been often reaffirmed that sovereignty vests in Constitutional foundation, and not just in Parliament.²¹ Judicial review, therefore, is not a sign of judicial supremacy but a constitutional duty.²² Arguments that seek to diminish this function ignore the Constitution’s deliberate separation of powers among the Union, States, and governmental branches to prevent centralization and abuse.²³

The Tamil Nadu Governor case²⁴ only reasserts this balance most cogently. The Supreme Court ruled that prolonged withholding of assent to state legislations under Article 200 was unconstitutional and a departure from federal norms.²⁵ It cited that a Governor, who is not an elected official and does not represent the people, cannot stand against the will of an elected state legislature. This ruling is consistent with previous decisions like that in the matter²⁶ concerning the governor’s constitutional obligation warranting aid and advice of ministers²⁷, and the Bommai precedent²⁸ regarding the misuse of Article 356.²⁹

The second theory is that judicial review serves to enshrine what has been called “constitutional morality”, commitment to the spirit of the Constitution as opposed to the whims of current political majorities. In the case of Navtej Singh Johar³⁰, the Court applied

¹⁸ Vikram A. Narayan, and Jahnavi Sindhu. “A Case for Judicial Review of Legislative Process in India?” 53 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 358 (2020) available at <https://www.jstor.org/stable/27284023> (last visited on May 13, 2025).

¹⁹ *Bandhua Mukti Morcha V. Union of India*, AIR 1984 SC 802, *State of Rajasthan v. Union of India*, AIR 1977 SC 1361, *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, *K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161.

²⁰ *Supra* note 12, *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789, *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.*, AIR 1986 SC 180, *Unni Krishnan, J.P. v. State of Andhra Pradesh*, AIR 1993 SC 2178 *Vishaka & Ors. v. State of Rajasthan & Ors.*, AIR 1997 SC 3011, *N. Godavarman Thirumulpad v. Union of India & Ors.*, AIR 1997 SC 1228, *State of Tamil Nadu v. Governor of Tamil Nadu and Others* 2025 INSC 481; W.P. (C) No. 1239 of 2023.

²¹ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299

²² *Id.*

²³ Yijun Wang, “Judicial Adaptability: Research on Judicial Activism and the Principle of Separation of Power”, 3 *International Journal of Social Science and Public Administration* 38, 41 (2024). Available at 10.62051/ijsspa.v3n3.05, accessed on 14th May, 2025.

²⁴ *State of Tamil Nadu v. Governor of Tamil Nadu and Others* 2025 INSC 481; W.P. (C) No. 1239 of 2023.

²⁵ *Id.* at 364.

²⁶ *Shamsher Singh v. State of Punjab*, 1974 AIR 2192

²⁷ *Supra* note 24 at 395.

²⁸ *S.R. Bommai v. Union of India* AIR 1994 SC 1918

²⁹ *Supra* note 24 at 52.

³⁰ *Navtej Singh Johar & Ors. v. Union of India thr. Secretary, Ministry of Law and Justice*, AIR 2018 SC 4321

the said basic structure test to decriminalise homosexuality, thereby illustrating how constitutional values function as a lodestar in judicial interpretation.

Charges that judicial review is undemocratic are belied by the actual behaviour of judges in numerous instances. The court has consistently stood by executive decisions on crucial matters of national interest demonetization (2016), the National Register of Citizens (2019), or the Rafale aircraft deal (2018). The same was true even in the politically sensitive national security cases such as the Pegasus surveillance allegations (2021), where the Court exercised caution and adhered to its commitment to institutional equipoise.³¹

Article 142, which is frequently sensationalized as a “nuclear missile,” is actually exercised prudently and purposefully. Its sporadic invocation as in the Ayodhya judgment³² and *Supreme Court Bar Association v. Union of India*³³ underlines the fact that judiciary has been very strategic in meting out complete justice.³⁴

Checks-Balance doctrine in constitutional structure grants judicial review as a corrective mechanism to rein in institutional excesses. Far from undermining the efficacy of democracy, it enhances constitutional governance by preventing any one arm of government from wielding absolute power. At bottom, judicial review is a mechanism of stability, one that keeps our Constitution flexible and vibrant, and that protects the rights and dignity of all citizens.

Democratic Quotient of Judicial Review in India

The perennial contest between democracy and judicial supremacy is often mistakenly seen as a zero-sum battle. It may seem to undercut the popular will to say that an unelected judiciary of men can strike down laws adopted by elected officials. In India, democracy is settled not only on elections but on constitutionalism too, the judiciary being its sentinel.³⁵ Also, an opposing school of thinkers label it as a type of “juristocracy,” or rule by judges, as if it allowed judges to make political decisions unconstrained by law, overriding the will of legislation or the will of the people. But such criticisms overlook the judicial wing’s intrinsic action whilst maintaining constitutional functions and also whilst shielding fundamental rights and justice, particularly when laws or executive orders threaten the constitutional fabric.³⁶

A further critique has been the judiciary’s expansive interpretation of fundamental rights, especially in the socio-economic sphere, which critics view as judicial intrusion into areas

³¹ Faizan Mustafa, “Is India Witnessing Judicial Despotism?” *The Hindu* Apr. 24, 2025.

³² *M. Siddiq (D) Thr. Lrs. v. Mahant Suresh Das*, AIR 2020 SC 302

³³ *Supreme Court Bar Association v. Union of India* AIR 1998 SC 1895.

³⁴ *Id.*

³⁵ *Supra* note 14 at 5.

³⁶ George I. Lovell and Scott E. Lemieux, “Assessing Juristocracy: Are Judges Rulers or Agents”, 65 *Maryland Law Review* 100(2006) available at <http://digitalcommons.law.umaryland.edu/mlr/vol65/iss1/9> (last visited on May 14, 2025).

that have historically been legislative or executive in nature.³⁷ This activism, however, must be seen in the view of transformative objectives of the Constitution as well the courts' mandate to promote justice, liberty and equality for all.³⁸ In multiple precedents, the SC has reiterated that country's sovereignty does not vest in any part of the State, but lies with the constitution, underscoring that judicial review is not an invention of the judiciary but is designed by the Constitution.³⁹

Those who are inclined to see judicial review as undemocratic frequently adopt an "organic" model of the Constitution, which favors a seamless operation of the constitutional order and a minimum of judicial interruptions. Advocates of this approach claim that the executive and the legislature ought to determine the direction of constitutionalism, and not be tied down with regular oversight from the judiciary.⁴⁰ Yet, this vision fails to sufficiently acknowledge the Constitution's aspirational goal and the manner in which it actively engages the real world.⁴¹

The Vice President of India, for instance, had only recently said that the Supreme Court should not become a "super parliament", and should not seek to control the "how" and "what" of governance.⁴² He further infamously called Article 142 a "nuclear missile", while casting aspersions on the Court's increasingly interventionist stance in governance.⁴³

But the dynamic of constitutional governance requires that the legislature or executive be made into a means/tools for realizing constitutional ends, rather than act as an end in itself. Over-centralization of power is antithetical to the tenets of the Constitution.⁴⁴ If the government were meant to reflect such a consolidated dogma, the Constitution could have avoided distributing government in separate and interconnected branches.⁴⁵ This segregated branching of powers amongst Central and State, and further amongst three constitutional organs, has been enshrined by the framers in their constitution in no uncertain terms, with the avowed purpose to avoid the concentration of powers in one wing of the State.⁴⁶

Indeed the basic idea of a written constitution entailing limited powers necessarily mandates some mechanism for constitutional adjudication, and without an authoritative neutral interpretive mechanism for the constitution, especially in a time of institutionalized conflict

³⁷Ran Hirsch, *Towards Jursitocracy: The Origins and Consequences of New Constitutionalism* 14-15 (Cambridge: Harvard University Press, 2007).

³⁸*Supra* note 14.

³⁹*Supra* note 20.

⁴⁰Allan C. Hutchinson, "A 'Hard core' Case against Judicial Review" 121 *Harvard Law Review Forum* 57 (2008) available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2036&context=scholarly_works (last visited on May 14, 2025).

⁴¹*Supra* note 32.

⁴²Anjishnu Das and Ajoy Sinha Karpuram, "Art 142: Dubbed 'nuclear missile' by V-P Dhankhar deployed by SC in cases from Ayodhya to Bhopal to Visakh" *The Indian Express* Apr. 24, 2025.

⁴³*Id.*

⁴⁴*Govt. of NCT of Delhi vs Union Of India* AIR ONLINE 2018 SC 1029.

⁴⁵*Id.*

⁴⁶The Constitution of India, art 50, 74 and 245.

or claims of governmental excess, the document designed to secure order may well serve to promote disorder.⁴⁷

As explained by Alexander Hamilton, it is not the judiciary that, through interpretation of the Constitution, is supreme to the legislature, but rather the popular sovereignty, as expressed in the Constitution, that is superior to both branches.⁴⁸ Whenever a statute and the constitution come into conflict, it is the former that must yield and the higher law prevail, since it is the articulation of the wishes of the people, and the Judges are therefore under duty to make their decision in consonance with the fundamental law, rather than with an act of the Legislature which may not conform to constitutional principles.⁴⁹

As Justice Frankfurter understood, the course of constitutional history has imposed some duties more firmly than others upon the Supreme Court, and these are duties from which the Court cannot escape without discrediting its own institutional capacity.⁵⁰

Quite recently, in a matter⁵¹, Tamil Nadu Government moved a complaint under Article 131 alleging the inaction of Governor R.N. Ravi, who withheld assent or failed to provide assent to certain legislative bills. The essence lied in interpretation of the term “as soon as possible” in Article 200.⁵² The Supreme Court has read Article 200 to mean that there is a constitutional duty on the Governor to act within reasonable time. The Court found that indefinite postponement of giving or withholding assent to Bills obstructs the federal balance, and destroys the legislative supremacy of the States.⁵³ The Governor cannot assume the role of a super-constitutional authority which defies the will held by State’s legislative body.⁵⁴ It highlighted the principle of accountability as well. The university system was part of the state institutions and as such the state government popularly elected, was managing the state institutions. Hence not acting on state’s advice, the Governor was effectively thwarting the popular mandate, in a democratic regime, and the Court also stated the Governor was a non-elected official unable to unilaterally undermine the state government’s due democratic process.⁵⁵

The doctrine of constitutional morality, which the courts have referred to often in its recent rulings, requires all institutions to function in the spirit of the Constitution. What it does is to

⁴⁷ Yaniz Roznai, *Unconstitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (2014) (The London School of Economics and Political Science) available at https://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf (last visited on May 13, 2025)

⁴⁸ Alexander Hamilton, James Madison *et. al.* *Federalist No. 10*, In *The Federalist Papers* 49-54(Palgrave Macmillan, New York 2009) available at https://link.springer.com/chapter/10.1057/9780230102019_47 (last visited on May 14, 2025).

⁴⁹ *Id.*

⁵⁰ *Rochin v. California*, 342 U.S. 165 (1952).

⁵¹ *Supra* note 24.

⁵² *Id.* at 391.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 404

take the Constitution above transitory political majorities.⁵⁶ In a matter⁵⁷, SC reiterated that federalism and democratic accountability are imperatives under constitutional structure. In the aforementioned matters, idea that federal structure cannot be disturbed at the whims and fancies of the Union Government or its agents found standing.

*Shamsher Singh v. State of Punjab*⁵⁸ is of immense significance as it paved way for the landmark judicial discourse on the constructive role of judicial review and constitutional morality. In another matter⁵⁹, it was ruled that Governor is a formal executive and can in no case be compared with the President of India or a local titular head in a state, and it also reaffirmed that Governor is not an independent player in the political process of the country, rather an agent of the Government of Union of India and he is required to “aid and advice” of council of minister. Thereby, the Court effectively made the executive domain in the state subject to the democratic forces in the form of the representatives of the people. The *Shamsher Singh* principle was important in preventing the governor from becoming an agent of the union government, especially when the state government was opposed to the political ideology of the Centre.⁶⁰

Notably, the principle of constitutional morality is not only doctrinal abstraction but is integral to active engagement and function of Courts in shielding from subversion the constitutional principles from political machinations and self-serving populism.⁶¹ It seems to it that the Constitution’s values, equality, justice, the rule of law, are maintained even when they come under political pressure or chase after popular majoritarian passions. In this regard, the process of judicial review is not only a matter of procedure but the most direct and solemn expression of judiciary’s moral commitment towards the constitutional goals.⁶²

Critics of the judicial review process opine that the judiciary oversteps its bounds when it assumes control, particularly with respect to overturning government decisions or policies. They argue that this type of judicial intervention risks infringing the powers of the elected government and undermines democracy.⁶³ Indeed, the Court has on many counts, and in many well-documented instances, supported the government in its decisions, illustrating its mode of constitutional interpretation rather than judicial intervention. These cases

⁵⁶ Nakul Nayak, “Constitutional Morality: An Indian Framework”, 71 *The American Journal of Comparative Law* 354 (2023) available at <https://academic.oup.com/ajcl/article-abstract/71/2/354/7326760?redirectedFrom=fulltext> (last visited on May 14, 2025).

⁵⁷ *The Government of Nct Of Delhi v. Union Of India* (2023) 9 SCC 1

⁵⁸ *Supra* note 26.

⁵⁹ *State of Rajasthan v. Union of India*, 1977 AIR 1361

⁶⁰ *Id.*

⁶¹ P. R. Chowdhury, “Judicial Activism and Human Rights in India: A Critical Appraisal”, 15 *The International Journal of Human Rights* 1055 (2010) available at <https://doi.org/10.1080/13642987.2010.482912> (last visited on May 14, 2025).

⁶² *Id.*

⁶³ Lawrence Alexander, “What is the Problem of Judicial Review?”, *Australian Journal of Legal Philosophy* 1 (2006) available at SSRN: <https://ssrn.com/abstract=802807> (last visited on May 14, 2025).

demonstrate the Courts general willingness not to take a position that diminishes democracy or disrespects the separation of powers.⁶⁴

Also, Article 142 is prone to misinterpretation and labelling, as judicial supremacy. But those descriptions gloss over the cautious and prudent way the Court has used that extraordinary authority. Although Article 142's discretionary domain for securing "justice" is well founded, jurisprudence indicates that this provision has been sparingly used. The *Ayodhya judgment*⁶⁵ was one of the most high-profile occasions where the Court used Article 142 judiciously seizing the historic opportunity in this bitter and long battle over the Ram Janmabhoomi-Babri Masjid, ensuring social harmony and justice.⁶⁶ Such invocation of Article 142 demonstrated the Court's desire to ensure that justice was administered in a manner that took into account the intricacies of historical, religious, and socio-political sensitivities.

Instead of demonstrating judicial overreach, the Court's invocation of Article 142 is an example of a differentiated use of judicial power that is sensitive to context and problem, and reiterates the Court's nature as a constitutional institution that accommodates the legitimate claims of legality, justice and social good, and therefore, the proposition that Article 142 is a 'nuclear missile' ignores the dosed and situational application of this provision. It is not used to legislate, and is not used to bypass the legislative process, but to make sure that extraordinary circumstances that could lead to injustice as a result of the rigid application of the law are addressed.⁶⁷ The self-imposed restrictions of the Supreme Court as regards in application of its extraordinary power have been restated in a matter⁶⁸, wherein the Supreme Court insisted that such powers need to be exercised judiciously.

The Indian Constitution follows a scheme of "checks and balances" as opposed to rigid "separation of powers".⁶⁹ Thus the branches can interact and interpenetrate, and any power can be questioned by at least one of the other branches. The judiciary, in this model, serves as a protector of the Constitution, making certain that the other branches do not transgress constitutional boundaries.⁷⁰ This is also apparent in the form of judicial review. In a matter⁷¹ Court asserted that it can neither struck at the foundation of Constitution nor can breach the foundational tenets visualized by the framers of constitution, thereby ensuring the safeguarding of rule of law. Democracy was declared as part of the basic structure and no other organ including the executive could violate principles of democracy.⁷² This case underscored the fact that the judicial review is an instrument in safeguarding the integrity of the constitution keeping a vigil on arbitrariness.

⁶⁴Shruti Bedi, *The Power of Judicial Review: Judicial Chutzpah or Judicial Desideratum*, In S. Khurshid (ed.), S. Luthra (ed.), et. al. *Judicial Review: Process, Powers, and Problems (Essays in Honour of Upendra Baxi)* 277 (Cambridge University Press, Cambridge, 2020).

⁶⁵ *Supra* note 32.

⁶⁶ *Id* at 12.

⁶⁷ *Supra* note 14.

⁶⁸ *Supra* note 33.

⁶⁹ *Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549.

⁷⁰ *Id*.

⁷¹ *Supra* note 21.

⁷² *Id*.

India's democracy, like any other constitutional democracy, is not just a government by the majority. The Indian Constitution ensures not only democratic rule but justice, liberty, equality and fraternity as well.⁷³ Central to this understanding, notion of democracy in terms of the structure of constitution, shields and upholds the principles of fundamental right, and constitutional principles must be maintained even if it runs contrary to the will of the many.⁷⁴ In this system the Constitution serves as a buffer which forbids a majority from translating its will into the opposite of all that is held dear and sacred by the framers.⁷⁵

Notably though, apex court's participative model of judicial review has proved to be a middle ground, one having the merits of giving due respect to the constitutional text and the counter-majoritarian import established via precedents, while also, acknowledging the value of deference towards distinct governmental functionaries. Disproving anti-democratic image, judiciary is deferential and has a history of stepping in as a last resort, respecting the segregation in terms of potential of such branches, and hence it does not intervene unless absolutely necessary to uphold constitutional values. Despite popular belief, the Court is not and has never been hostile toward democracy, it has repeatedly deferred towards the elected branches of governance, intervening as a backstop to protect unalienable, constitutional values.

Conclusion

Judicial review in India has long been attacked as undemocratic, especially when courts set aside laws enacted by elected legislatures or scrutinizes executive decisions.⁷⁶ It delivers upon the judiciary's promises as the guardian of the Constitution. Although the Parliament acts as the embodiment of popular sovereignty, it is constrained by the constitutional structure which determines what legislation or policy may sustain.⁷⁷ This is not an affront to democracy, rather it is its most profound affirmation. It is the soul of the Constitution, which will guide the legislative and executive actions to ensure they adhere to the basic tenets of constitutional functioning.⁷⁸ Instead of looking at it as an obstacle, democratic participants need to think of the judicial review process as a constitutional conversation and as a check that is required to ensure separation of powers.⁷⁹ Indian constitutional courts have shown patience in support of fundamental rights and the federal structure, and their activism is both needed and democratic. The Supreme Court judgment in the Tamil Nadu Governor case⁸⁰ must be read as a reassertion of federalism and judicial accountability.

Furthermore, judicial review was a deliberately carved mechanism and not an accidental power, and, therefore, grounded in strong democratic legitimacy.⁸¹ For instance, reflecting

⁷³ *Supra* note 14 at 11.

⁷⁴ *Supra* note 21.

⁷⁵ *Id.* at para 682.

⁷⁶ *Supra* note 38.

⁷⁷ *Supra* note 14.

⁷⁸ *Id.* at 11.

⁷⁹ *Supra* note 23.

⁸⁰ *Supra* note 24.

⁸¹ *Supra* note 13.

upon the constituent assembly debates, Ambedkar strongly advocated for judicial review, as a tool to protect fundamental rights, by calling Article 32 the “soul of the Constitution.”⁸² He visualised judiciary as the ultimate protector of rights, especially for minorities and dissenters in the heterogeneous society of India.⁸³ K.T. Shah took the same stance, with a different reason. His concern was regarding executive arbitrariness and majoritarian overreach, when he cautioned that without court supervision, rights would be meaningless platitudes.⁸⁴

Notably, calling judicial review an instance of judicial despotism, misses out on logical structure behind the functionality of the Indian judiciary. First, the judiciary does not wield judicial review of its own volition. Instead, it intervenes when it is apprised of it by an aggrieved party, highlighting that it follows a rule-bound system, albeit reactive rather than proactive ones. In a catena of cases, the courts have frequently sided with the states. For instance, plea against demonetisation,⁸⁵ implementation of the National Register of Citizens⁸⁶, use of Electronic Voting Machines⁸⁷, the purchase of Rafale fighter planes⁸⁸, the constitutional validity of the abrogation of Article 370⁸⁹, etc.⁹⁰

Also, occasional and sparing usage of judicial review illustrates the caution that judiciary exercises in issuing proscriptions that a legislative law is unconstitutional. Therefore, the characterisation of judicial review as being undemocratic in and of itself or as being absolutist in nature does not survive if one looks at the procedural protections associated with its application, its substantive conduct, or both.

Furthermore, Article 142, which was recently criticized by the Vice President of India as a “nuclear missile,” is not intended to act in a pro-active or absolutist manner.⁹¹ As made clear in the *Supreme Court Bar Association v. Union of India*⁹², it cannot be a substitute for substantive law and its application is for giving complete justice, not for political engineering. Article 142 merely empowers SC’s ability to impart comprehensive and holistic justice in matters with no law or remedy and in cases where the existing laws are insufficient.⁹³ The invocation of Article 142 is subject to the scrupulous condition of subserving the cause of justice and not transgressing the limits of the judgment or impinging upon the democratic functioning. For instance in the Ayodhya judgment⁹⁴, both senses of legal pluralism and power of the court under Article 142 were used by the court to demand

⁸² *A.K Gopalan v. State of Madras*, AIR 1950 SC 27

⁸³ VII, *Constituent Assembly Debate*, 530.

⁸⁴ *Id* at 532.

⁸⁵ *Vivek Narayan Sharma v. Union of India*, (2023) 1 SCC 281

⁸⁶ *Assam Public Works v. Union of India*, AIR ONLINE 2019 SC 2258.

⁸⁷ *Subramanian Swamy v. Election Commission of India*, AIR 2014 SC 18.

⁸⁸ *Manohar Lal Sharma v. Narendra Damodardas Modi*, AIR 2019 SC 1802; *Yashwant Sinha v. Central Bureau of Investigation*, (2019) 6 SCC 1

⁸⁹ *In Re: Article 370 Abrogation Cases (Mohd. Akbar Lone v. Union of India)*, (2024) SCC Online SC 47

⁹⁰ *Supra* note 29.

⁹¹ *Supra* note 31.

⁹² *Supra* note 33.

⁹³ *Prem Chand v. Excise Comm*, AIR 1963 SC 996, p 1002.

⁹⁴ *Supra* note 32.

closure on a longstanding religious-political dispute, embedded in social and political complications.⁹⁵

The persistent value of judicial review can be underscored through its counter-majoritarian check on executive and legislative abuse. Yet its legitimacy is more and more contingent on how transparent, accountable, and accessible the judiciary is perceived by the public it serves.

First and foremost there should be a more transparent and inclusive process of appointments to the judiciary, including a renewed, dynamic discussion around the question of the memorandum of procedure for judicial appointments. The existing collegium system, which is designed to uphold judicial independence, is widely perceived to epitomize opaqueness and elitism. Open and consultative appointments would do much to restore public confidence and the legitimacy of the judiciary in a diverse society.

Second, issues of greater public interest must be fast-tracked and expedited. The credibility of the judicial process is seriously compromised by the habit of sealed covers and judgments delivered after inordinate delays. It is incumbent on the courts to give full, principled reasons that explain the legal foundations for their decisions. This is not only good for legal clarity, but for educating citizens about the subtleties of constitutional interpretation. Distilling complex decisions in citizen-friendly language and advocating for public hearings when helpful would further democratize the availability of judicial insights and promote civic awareness.

Third, although judicial independence is a sine-qua-non, it cannot be at the expense of ethical supervision. Presuming that it is carefully designed to avoid potential misuse and abuse, a statutory judicial accountability device can act as a check on judicial misconduct and impropriety. It must be a process within the constitutional limits, preserving judicial accountability while shielding judges from unwarranted political pressures. These institutional reforms may enhance public perception of the judiciary as an impartial and fair adjudicator.

Fourth, democratic literacy is a critical tool in the hands of citizens who appreciate and respect the process of judicial review. The difference between majoritarian rule and constitutional democracy should be taught in school curriculums and emphasized in public discourse. Legal literacy programs, especially those aimed at the levels of the school, university and community, can help empower and enable people to have a better understanding about rights, as well as the institutional mandate of courts. Furthermore, using media and educational methods to communicate court judgments to the public in a user-friendly manner can help narrow the gap between sophisticated legal thinking and public comprehension.

⁹⁵ Ratna Kapur, “The “Ayodhya” Case: Hindu Majoritarianism and the Right to Religion Liberty”, 29 *Maryland Journal of International Law* 305 (2014) available at https://www.researchgate.net/publication/276353122_The_Ayodhya_Case_Hindu_Majoritarianism_and_the_Right_to_Religious_Liberty (last visited on May 14, 2025).

Lastly, judicial reforms should entail a genuine commitment to holistic court management practices that can ease pendency, particularly in constitutional litigation. The pile-up of cases raises questions as to the timeliness and utility of judicial review. Introduction of technological systems, providing more judges and promoting out-of-court dispute resolution mechanisms has the potential to augment the capacity of the judiciary taken together. Expediting disposals of constitutional cases would enable judicial review to be timely and effective in protecting the rule of law.

AI AND THE RULE OF LAW: A JURISPRUDENTIAL ANALYSIS

Adv. Gauri Vitthal Lokhande

Abstract:

The adoption of technology in law offers several benefits that positively impact the legal profession and the administration of justice. It has replaced traditional approaches with modern methods revolutionizing today's legal landscape. Some of the benefits of legal technology include increased efficiency, improved collaboration, fast process, enhanced access to information, large data storage space, enhanced legal research, cost savings, easy access, increased transparency, data analytics, predictive insights, and improved case management. Technology automates repetitive and time consuming tasks, such as document management, legal research, and scheduling, allowing legal professionals to work more efficiently. This leads to reduce administrative burdens, improved productivity, and the ability to handle larger caseloads. Current law practice can't be imagined without legal technology. Previously, when the legal search engines and databases were unavailable, it would have taken much more time in legal research for case laws. One would have gone to different libraries for research and finally would have found some relevant information is merely a click away. With technological advancement AI machine learning, natural language processing (NLP) have also entered legal field. Artificial Intelligence or AI is the capacity of machines to emulate human intelligent behavior.

Keywords: Artificial Intelligence, technology, law, justice.

Introduction

Artificial intelligence, or AI, is a branch of computer science that focuses on creating machines that can perform tasks that would normally require human intelligence to complete. The field of AI aims to develop software and hardware that can learn, reason, and make decisions like human, with the goal of creating intelligent machines that can solve problems autonomously. From self-driving cars to intelligent personal assistant like Siri and Alexa, AI is already making significant contributions to our lives. AI can perform complex tasks by applying human intellectual characteristics. Machine learning is the mechanism through which a machine or a computer can improvise its performance by analyzing new information and patterns. Algorithm development is one such example of machine learning. Natural language processing deals with human and machine interaction. If computers and human have alike language then it would every convenient for the legal professionals to develop software for assistance.¹

¹ Jain, P., 2018 Artificial Intelligence for sustainable and effective justice delivery in India. OIDA International Journal of sustainable Development, 11(06), PP.63-70.

With development of these AI technologies lawyers can have ease of work but there is a fear that with the advent of AI the employment might be affected. Benefits might come with certain disadvantage.

AI presently Indian judicial system is facing a major problem and that is the huge backlog of the pending cases at all levels of courts to Hon'ble Supreme Court of India. As of late it has been debated that if the early action is not taken, the judicial system would collapse and would be practical meaningless, and not only that, but the worse thing would be is that the common men will loose the faith in the judicial system. Timely justice is necessary. In one of its judgment, the Hon'ble Supreme Court has held that Justice delayed is justice denied.

The Nexus between AI and Indian Legal Mechanisms

Artificial Intelligence has heralded an unprecedented transformation within the legal fraternity, permeating judicial adjudication, legal research, and procedural frameworks. In India, where jurisprudential evolution is anchored in constitutional tenets, the interplay between AI and the legal system raises profound questions concerning adjudicatory autonomy, procedural due process, and ethical jurisprudence. While AI presents opportunities for expediting justice delivery, its unchecked deployment may infringe upon fundamental principles of constitutionalism and rule of law. The legal system in India is an intricate confluence of common law principles, statutory enactments, and constitutional mandates, ensuring procedural equity and substantive justice. The infusion of AI within this legal framework necessitates a meticulous examination of its ramification on judicial independence, access to justice, and the inviolability of fundamental rights. This article critically explores the role of AI in India's legal system, its jurisprudential implications, and the requisites safeguards to ensure its ethical deployment.

1.1.AI in Judicial Adjudication: The judiciary has incrementally incorporated AI-driven tools for case-law analysis, docket management, and predictive adjudication. The Supreme Court of India, through its SUPACE (Supreme Court Portal for Assistance in Court Efficiency initiative, has embraced AI- assisted analytics to enhance judicial efficiency. However, concerns persist regarding the compromise of judicial discretion and stare decisis. AI- powered adjudication, if over-relied upon, risks undermining the interpretative latitude exercised by judges in cases requiring nuanced jurisprudential reasoning.

1.2.AI and Legal Research: Legal practitioners increasingly rely on AI-powered research platforms such as Manupatra, SCC online, and AIR online to streamline case law retrieval, statutory interpretation, and precedent identification.²

² Kalyanakrishnan, , Rahul Shivaram Alex Panikar, Sarayu Natarajan, and Shreya Rao. "Opportunities and challenges for artificial intelligence in India." In proceedings of the 2018 AAAI/AI, Ethics, and Society, pp. 164-170.2018

While expediting research, such automation invites scrutiny of algorithmic curation and the potential dilution of interpretative legal reasoning. The challenge of ensuring non-biased, context-sensitive, and accurate legal precedents remains an evolving concern in AI-assisted legal research.

1.3.Algorithmic Bias and Due Process: AI models, contingent upon historical data sets, are susceptible to inherent biases. The constitutional mandates of Article 14 (Right to Equality) necessitated that AI algorithms used in legal adjudication adhere to principles of fairness and non-discrimination. Any algorithmic opacity contravenes the audi alteram partem hear the other side doctrine, which is a cornerstone of natural justice. Furthermore, bias in AI- generated sentencing recommendations can lead to judicial arbitrariness and selective enforcement, conflicting, with the principles enshrined in Article 21 (Right to Life and Personal Liberty) of the Indian constitution.

1.4.AI and Alternative Dispute Resolution (ADR): AI- driven disputes resolution mechanisms are gaining traction in India, particularly in arbitration and mediation. Platforms leveraging Natural Language Processing (NLP) facilitate automated contract dispute resolution. However, the enforceability of AI- rendered decisions vis-avis the Arbitration and Conciliation Act, 1996 remains an unsettled jurisprudential quandary. The question of whether an AI- driven arbitrator can replace a natural person remains an unresolved issue, necessitating legislative clarity.

1.5.AI and Access to Justice:AI's role in enhancing access to justice is undeniable. Virtual court, AI- powered chatbots for legal aid, and automated legal documentation systems have expanded legal outreach. However, the digital divide remains a persistent impediment, disproportionately affecting litigants from socio- economically weaker sections. Ensuring universal access to AI-driven legal services is imperative for preventing a two-tiered legal system where only the digitally literate benefit from AI advancements.

Artificial Intelligence and Its Impact on Legal Functioning

During the recent COVID-19 crisis, Judges, Advocates, Lawyers, and other staff members of the Court were forced to use virtual software to adhere to the 'NEW NORMAL'. Also, the pandemic taught people to find long-lasting and alternative solutions with the help of available resources. Legal professionals used tools such as Microsoft Reams, Google Docs, Legodesk, and others to work together. The cloude-based platforms and collaboration tools not only allow lawyers to work on documents simultaneously, but also share information in real time, and communicate more effectively. Legal Tech provides legal professionals with instant access to vast databases of legal information faster as well as more accurate legal research. It enables lawyers to find relevant precedents, analyze legal issues, and develop stronger arguments.

Delivering justice in particular instances is one aspect of enforcing the law, but the law, the Court also has a shadow duty in presenting norms to society as a whole. “However, courts and judges handle information immediately of the subject material, parties present the information to the courtroom, modifications occur during the procedure, and the conclusion is likewise information. This information processing isn’t all about complicated customization. Many matters require a basic evaluation without the need for a hearing, as well as some matters are resolved. Default judgment and declaration of inadmissibility are frequently issued. Complex, conflicting matters make up a small percentage of the cases which the judiciary will have to deal with. It can nit be overstated how important the method is. As a result, the requirement for information technology varies depending on the situation.

Supreme court of India published a report titled “ **Subordinate Judiciary- Access to Justice 2016**” asserts capacity constraints are the main reasons for high level of pendency. The report explains the reasons and state that the mounting pendency of cases in subordinate courts in because the subordinate judiciary has been working under a deficiency of courtrooms, judicial officers and one cogent reason is that modernization and computerization have not reached all courts. The outcome t delivery which is not very useful for any society then, is delayed and ineffective justice delivery which is not very useful for any society.

The outcome of a vast percentage of routine instances is predictable. In some circumstances, the court judgment is a document generated by a mainly automated process using data provided by the parties. The judgment document specifies an enforcement title. The court usually accepts digital filing wherein the file party submits data digitally so that it does not have to be manually re-entered. The judicial courts handles ordinary matters inside the criminal justice process, and only those matters that require a decision are presented before a broad array of scenarios here as well, from the simple to the exceedingly complicated.

In all complex cases where the judge or panel must render a decision in order to bring a case to a conclusion, information technology is primarily required in the form of cutting edges systems and make legal sources readily available, as well as a digital court document that can present huge volumes of information in an adequate way Because artificial intelligence is indeed a sort of information technology, it may be used in a variety of situations. At presently, one field that has been recently caught eye on is newfound field of Artificial intelligence to cope up with this conundrum. The Hon’ble Chief Justice of India, Justice S.A Bobde,³ recently proposed to bring in the system of artificial intelligence (AI) which would ease and support the administration of Justice in India. However, the India is to provide aid to the justice delivery system and not to

³ AI can improve judicial systems efficiency-full text of CJI Bobde’s Constitution Day speech’ (The print, 27 November 2019)

ever substitute the judges. This step is being seen as a revolutionary change in the judicial system.⁴

The CJI Constitution Day function organized by the Supreme Court Bar Association (SCBA) on 26th November 2019 and in his speech, he has said,- “We propose to introduce, if possible, a system of AI. There are many things which we need to look at before we introduce ourselves. We do not want to give the impression that this is ever going to substitute the judges.” According to the CJI, machines can not replace humans specifically the knowledge and wisdom of judges. The deployment of the AI system will help reduce pendency and expedite judicial adjunction.

His Excellency, The president of India Shri Ram Nath Kovind was also at the event. He launched the Supreme Court mobile application, Justice Bobde, while talking about the application, asserted that an AI fuelled law translation system will facilitate the quality translation and will further help in improving the efficiency of the Indian Judicial System. Reportedly, the app that was released will translate supreme court judgments in more than 9 regional language. we could say that this is the first step application of SI in Indian Judicial system.

Advanced Technologies utilized by the Supreme Court

The Supreme Court of India, High Courts, and various other law firms, for the past few years, are taking certain essential steps to adapt and embrace the technology for completing their chores easily and quickly. In the matter of *Swapnil Tripathi Vs. Supreme Court of India (2018)*, a nine-judge bench gave significant decisions on concept of access to public information, open justice, and transparency in the judicial process. Also, the main question addressed was, “Whether there should be live streaming of court held that “Live streaming of court proceedings in the public interest. It is important to reemphasize the significance of live-streaming as an extension of the principle of open justice and open courts. However, the process of live-streaming should be subjected to carefully structured guidelines..

Earlier on August 26 2014, the E-committee in discussion with the Supreme Courts discussed essential rules for live streaming of court proceedings as well as addressed the concerns of confidentiality and privacy of litigants and witnesses. It was observed that “Courts must also take the aid of technology to enhance the principles of open courts by moving beyond physical accessibility.” E-committee submitted that so far in the legal landscape, (ICT) Information And Communication Technology is incorporated in the Indian Judiciary. Also, “a single unified case Information system (CIS) has been developed for catering to the diversified requirements of the country in the terms of local procedures, practices, and languages.”

⁴ Justice L.N. Rao. ‘AI and the law’(Online webinar of Shyam Padman Associates, 6 August 2020)

Other platforms for service delivery were also mentioned by the E- committee in their report including E-Courts Portal, Mobile App, SMS Push, SMS Pull, Automated emails, E- Payment, E-filing, Touch Screen Kiosks, and Service Centre. The Indian judiciary has been an early adopter of AI.⁵

Having laid the foundation for e-courts equipped with basic computing hardware through the E-courts mission mode project (E-Courts project), the Indian judiciary in the last two years has taken a quantum leap to fully harness the possibilities that cutting-edge AI technology has to offer. The Hon'ble Chief Justice of India, Justice Bobde has repeatedly emphasized the need to tap in to AI driven technologies to improve institutional efficiency. On 26 November 2019, the national constitution Day, Justice Bobde launched the beta version of a neutral translation tool called SUVAAS, which formally marked the advent of AI within Indian courts. His interest is not alone. Justice L. Nageswara Rao, who heads the Supreme Courts AI Committee, stated last year that AI will be used for administrative purposes and expediting the process of justice.

In theory, AI in a justice system can be directed towards improving administrative efficiency in courts and aiding in decision making processes for lawyers, judges and litigants. Its actual integration will require an understanding of the role AI is actually playing in different judicial systems and addressing key legal and ethical challenges that arises in this regard. There must also be an engagement strategy with the Indian legal community and other stakeholders to ensure their support to this process of technological transformation of the justice system.

The design and deployment require an implementation roadmap to allow for a phase wise execution of proposed tech interventions. These are the themes that are the focus of this strategy paper. It is hoped that this paper will function as a conversation starter for the integration of AI in the Indian justice system and function as a primer for the stakeholders involved, such as judges, judicial officers and litigants. For the former, developing task-specific narrow AI tools should be the first generation of AI innovation. These should potentially ease the general rigor of the registry, and also aid judges in spending lesser time on administrative responsibilities, in lieu of judicial work. Further will provide sophisticated automation for banal and time consuming admin processes.

The spectrum of possible AI can include tools for intelligent analytics and research, and even computational tools and predictive justice in the longer run. These tools can provide comprehensive legal briefs on cases, encapsulating pertinent legal research, identifying crucial points of law and facts, and thereby expediting the judicial process. This can effectively supplement human judgment in adjudication. Furthermore, intelligent tools, like legal bots, can be designed to help potential litigants with better informed decision making concerning their legal rights, and easily and cost-effectively access basic legal services. Before venturing in to the

⁵ Partha P. Chakrabarti and Ameen jauhar, 'Bots in the law,' (outlook India, 1 March 2021)

proposed use cases, it is pertinent to address a vital prerequisite for any prospective AI innovation for the justice system. Current ML and deep-learning techniques are heavily reliant on accessible data. Once such datasets are readily available, AI-driven technologies can be realized for augmenting administrative efficiency and the quality of decision-making.

7.SUVAAS or the Supreme Court Vidhik Anuwad Software, is a neural translation tool which has been trained using machine-learning processes. It has the capability of translating English judgments and daily orders into nine vernacular scripts, and Vice-versa, see the Supreme Court of India's press release for information on SUVAAS. Supreme Court of India, 'Press Release' (25 November 2019)

In India, the preliminary work in the use of AI has already commenced. SUVAAS was the pioneer of such task-specific algorithm, designed by the Supreme Court's AI committee. It relies on natural language processing and an ML process, easing and expediting translation of judicial orders and rulings. Additionally, as was announced last year, the SC AI Committee is also working on a composite new tool named SUPACE Supreme Court portal for Assistance in Court Efficiency which will target different processes like data mining, legal research, projecting case progress, etc. There is also an in-house software being piloted in the Supreme Court to make them paperless.

In addition to providing better information, legal robotics can also improve access to legal services. For a common person, accessing these, or even grappling with a potential legal situation can be a daunting conundrum. Intelligent algorithms or bots can be useful in furnishing basic legal information to potential litigants and readily connecting them with legal aid services or pro-bono lawyers. Basic legal services like drafting and conveyancing, legal analyses and interactive breakdown on laws etc., can be some modes for mainstreaming access to such services, without the trouble of locating and paying for expensive lawyers.

On May 23, 2023, the Supreme Court of India invited Financial Bids, Technical Bids, and EMD for the Design, Development, And implementation of AI tools for transcribing Court Proceedings and arguments. As per the published notice, the meeting for the same was to be conducted on June 12, 2023, where the main focus of discussion was “Design, Development, and implementation of AI solutions, Tools for Transcribing Arguments and Court Proceedings at Supreme Court reopens after summer vacation with a major digital change in the courtrooms with a futuristic LED video wall, state of the art digital video conferencing for communication and collaboration, and free WIFI facility. Earlier in an event, CJI DY Chandrachud indicated the next step of the Indian Judiciary is the use of AI for translating judgements into different regional languages of India. The India was applauded by the Prime Minister of India Narendra Modi terming it as a Laudatory thought.

Constitutional Role of Judges and Separation of Powers

There is also some literature examining how an algorithmic or AI-driven judiciary may fundamentally alter its constitutional role, especially as an institutional check and balance against

executive and legislative overreach. It is a legitimate question whether an algorithmic decision-making tool can accomplish the complex functions that human judges of constitutional courts are tasked to perform. While an AI tool may be capable of authoring judgments, the role of a constitutional judge is more complex, requiring a weighing of law and facts, tempered with reasoned discretion, to balance competing interests often, in cases of legislative ultra vires, or executive overreach, the judiciary may have to resort to innovative thinking to balance the scales.⁶

This ability comes from the bench over the years, wherein she is continuously engaging with the law. This engagement in turn shapes her ability to pay attention to how the law evolves, and be mindful of potentially far reaching harms in a seemingly innocuous legislation, or executive action. For AI, to possess such complex ability would require a far more sophisticated degree of deep learning, and intelligence at parity or superior to human cognition.

This is commonly referred to as General AI 96, which at present, has not appeared in any tangible form of existing AI technology. A complete transference of judicial functions over to AI will certainly face the challenges of how this technology will perform the entire spectrum of roles and obligations that are presently required of human judges.

Indian Judiciary

Since 2021, the Supreme Court has been using an AI-controlled tool designed to process information and make it available to judges for decisions. It does not participate in the decision making process. Another tool that is used by the Supreme Court of India is SUVAS Supreme Court Vidhik Anuvaad Software which translates legal papers from English into vernacular language and vice versa. In the case of *Jaswinder Singh Vs. State of Punjab (27)* the Punjab and Haryana High Court rejected a bail petition due to allegations from the prosecution that the petitioner was involved in a brutal fatal assault. The presiding judge requested input from chatGPT to gain a wider perspective on the granting of bail when cruelty is involved. However, it is important to note that this reference to chat GPT does not express an opinion on the case merits, and the trial court will not consider these comments. The reference was solely intended to provide a broader understanding of bail jurisprudence when cruelty is a factor.

Currently, there are no specific laws in India with regard to regulating AI. Ministry of Electronics and Information Technology (MEITY), is the executive agency for AI-related strategies and had constituted committees to bring in a policy framework for AI.

The Niti Ayog has developed a set of seven responsible AI principles, which include safety and dependability, equality, inclusivity and non-discrimination, privacy and security, transparency,

⁶ Maria Dymitruk, 'Ethical artificial intelligence in judiciary' (February 2019)

accountability and the protection and reinforcement of positive human values. The Supreme Court and High Courts have a constitutional mandate to enforce fundamental rights including the right to privacy.

In India, the primary legislation for data protection is the information Technology Act and its associated rules. Additionally, the Digital Personal Data Protection Bill has been introduced by MEITY, although it is still awaiting formal enactment. If this bill becomes law, individuals will have the ability to inquire about data collected from them by both private and government entities, as well as the methods utilized to process and store it.⁷

5.1. AI in Civil Cases: The use of AI in civil proceedings, however, is particularly challenging in India. India's legal system is complicated and varied, with a vast variety of laws, courts and legal procedures. It is important to carefully weigh the potential benefits and challenges of utilizing AI in this situation. Beyond attorneys and comprehension of the law by using research and analytics technologies that are widely available. The goal of this participation is to develop more informed, pro-governmental citizens.

By assisting judges with their decisions making relieving the strain on attorneys, and improving public access to justice, AI technology has the potential to change the legal system. AI can help with case prediction, document appraisal, contract analysis and legal research. It may assist in resolving disputes by providing mediation and arbitration services.

5.2. Confidentiality and data privacy: AI systems generally rely on large amounts of data to learn and make predictions, such as personal or financial data. AI algorithms that require this type of data to train effectively may create problems for organizations to comply with data protection laws.

SUVAAS or the Supreme Court Vidhik Anuvaad Software, is a neural translation tool which has been trained using machine learning processes. It has the capability of translating English judgments and daily orders into nine vernacular scripts and vice-versa. See the Supreme Court of India's press release for information on SUVAAS. Supreme Court of India, Press Release' (25 November 2019) accessed on 5 November 2023

5.3. Bias in AI systems: Potential bias in AI systems whilst training can reflect in the outcome. The results from AI can simply reflect current social, historical imbalances stemming from race, caste, gender, and ideology producing outcomes that do not reflect true merit.

5.4. Concerns regarding competition: It is possible for AI to operate independently of its coders or programmers through its self-learning capabilities. However, this could potentially result in technological and economic disparities that have yet to be fully examined. Such

⁷ Michaels A.C.(2019), 'AI, legal change and separation of powers,' 88 Review 1083 (2020) and Winter 92(2020) n6.

disparities could lead to the misuse of data and potentially disrupt the framework established by the Competition Act 2000.

5.5. Predict legal outcomes: With AI, legal professionals can access vast quantities of information, combs through previous cases to find relevant points of law and make more accurate predictions about how a particular cases will resolve. This has allowed legal experts to deliver their services more efficiently, resulting in better outcomes for clients.⁸

5.6. Aiding to provide quality justice: Furthermore, AI tools and automation can help reduce the number of human errors within the legal system, making it less prone to mistakes and improving the overall quality of justice delivered.

5.7. Expedite legal proceedings: With its ability to quickly analysis vast amounts of data nd detect patterns, AI could help streamline and expedite legal procedures in India. This could be especially beneficial in a country hat faces a backlog of millions of pending cases and where the legal system can be slow and laborious.

5.8. Unbiased legal system: Additionally, AI can assist in identifying biases and inconsistencies in the legal process, ultimately leading to more fair and just outcomes.

5.9.Simple legal communication for non-specialist: AI powered legal tools now have the potential to streamline workflows and reduce the time needed for legal research and compliance analysis. Meanwhile, natural language processing (NLP) tools using AI can help simplify legal communication especially for non-specialists.

5.10.Acurate analysis of legal data: It also has the potential to revolutionize the legal industry in India. By implementing AI in India's legal frameworks, lawyers and judges could streamline their work, conduct automated legal research, and analysis vast amounts of legal data efficiently within short period. Establishing accountability for technology related errors in the legal field can be a challenging task. The implications of errors made by AI systems shall have huge ramifications affecting the life and liberty of individuals. However, proactive measures can be taken by legislators and industry experts from legal or other fields to set clear lines of responsibility and to ensure accountability when using AI in their practice.

Challenges in AI Implementation within the Indian Legal System

6.1.Absence of a Statutory Framework: India lacks comprehensive legal framework governing AI in the judicial process. The impending Digital India Act seeks to address AI governance, but its implications on legal adjudication remain nebulous There is an urgent need for an Artificial

⁸ David Lat,' How Artificial Intelligence will revolutionize e-discovery.' (Above the law, 25 January 2017)
Eric Nillier,' can AI be a fair Judge in Court ? Wired, 5 March 20190

Intelligence and Law Commission to examine the scope, ethics, and regulatory requirements for AI in the judiciary.

6.2.Data Protection and AI Ethics: The Digital Personal Data Protection Act, 2023 mandates stringent data privacy norms. AI- powered legal tools that process case-sensitive information must align with privacy safeguards to prevent data breaches and undue surveillance. Additionally, concerns regarding data sovereignty and cross- border data flows add another layer of complexity to AI governance in the legal sphere.

12.David Lat,'How Artificial Intelligence Will Revolutionize E-Discovery' (Above The Law, 25 January 2017) Accessed on 14 March 2021 and Ronsin, Lamos & Maitrepierre, (2018), n 5.

6.3.Judicial Accountability: AI-generated recommendations in legal decisions making necessitate mechanisms for judicial accountability. The doctrine of constitutional supremacy underscores that no AI-driven adjudicatory process should override human judicial scrutiny. The ideas of an AI- powered “judge” challenges the very fabric of judicial independence, requiring courts to maintain ultimate oversight over all AI-based legal determinations.

6.4.Lack of AI Literacy Among Legal Professionals: A significant hurdle in AI adoption within India’s legal framework is the lack of AI literacy among judges, lawyers, and court administrators, without proper understanding and training, the judiciary may inadvertently depend on AI in an uncritical manner compromising judicial reasoning and deliberative jurisprudence.

6.5.Ethical Considerations in AI Deployment: The Judicial conduct emphasize integrity, and propriety. AI-driven judicial processes must be designed to uphold these values. The potential for AI bias, lack of transparency in decision-making, and susceptibility to manipulation necessitates rigorous oversight by legal and ethical committees.

The Way Forward Future of AI in Legal System

7.1.Legislative Enactments: A robust legal framework delineating the permissible ambit of AI in legal proceedings is imperative. The legislature must enact an AI and Law Act, establishing regulatory oversight, compliance mechanisms, and accountability parameters for AI usage in Judicial and quasi-judicial bodies.

7.2.Ethical AI Development: AI deployment in legal settings must conform to ethical AI guidelines ensuring impartiality and transparency. An AI Ethics Committee under the aegis of the Supreme Court could function as an oversight body to ensure AI adherence to fundamental constitutional principles.

7.3.Judicial Oversight: AI- assisted adjudication should function as an auxiliary tool rather than a substitutive mechanism, upholding judicial autonomy and constitutional morality. Establishing

an AI-generated recommendations before their implementation would safeguard against potential judicial overreach by automated systems.

7.4.Training and Capacity Building: Mandatory AI training programme for judges, lawyers, and court clerks will enhance informed decision-making regarding AI-assisted legal tools. The National Judicial Academy should incorporate AI jurisprudence as part of its curriculum for judicial officers.⁹

7.5.Public Participation and AI Regulation: Stakeholder consultations, including the Bar Council of India, Supreme Court judges, legal technologists, and civil society organizations, must be conducted before implementing AI regulations. A democratic and participatory AI policy framework will ensure inclusivity and safeguard against unforeseen consequences of AI in legal practice.

Conclusion

The integration of AI within the Indian legal system, while replete with transformative potential, necessitates cautious deployment underscored by constitutional fidelity. The separation of powers doctrine dictates that AI must serve as a facilitative adjunct rather than an adjudicatory must ensure that AI augments rather than supplants judicial functions, preserving the human element essential for justice dispensation. As India strides toward digital jurisprudence, ensuring that AI's role remains constant with principles of natural justice, procedural fairness and constitutional propriety is paramount. Only through thoughtful regulation, ethical AI design, and judicial prudence can AI be harnessed as a tool for augmenting rather than disrupting the legal landscape in India.

It is important to remember that AI is not a replacement for lawyers work, rather it should complement it. While AI can simplify tedious and time consuming tasks, it cannot handle strategic decisions making complex legal analysis and legal counsel. There are two aspects attached to use of AI technology in due diligence. First, that an individual will be more credible than a machine. Machine is created by humans so in case of error an AI system cannot be held liable. Second important aspect to note is that a human can err in performing tasks but a machine does what it is programmed to do, it can carry out tasks more efficiently so chances of error due exhaustion is very minimal. Ultimately, AI cannot in itself perform tasks in isolation, it is made to assist human not replace them. The client company might have an opinion or a preference regarding the lawyers using or not using AI. Some might prefer AI equipped technology as there is less chance of error and increased efficiency, others on the other hand might go for the regular mechanism that does not include AI.

⁹ Daniel Willian GRANDO, 'Artificial Intelligence Applied To the legal Proceedings' (2019) 5 IMODEV

Software failure and lack of proper training of AI can also lead to missing of vital information and it should be noted that a software being made liable for an error is highly questionable. Further, the sensitive confidential information might be exposed due to the threat of cyber attack and viruses. Furthermore, the question of attorney client privilege might be questioned in certain jurisdiction. Firm's option for AI technology must not be willing to invest only on AI technology but also on appropriate human resource to train such software or else it might backfire the purpose for which it was established. AI can certainly be used as a tool of assistance but cannot replace lawyers.

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BEYOND THE BENCH'S CONFINES: MAPPING THE FRONTIERS OF JUDICIAL OVERREACH IN INDIA THROUGH LANDMARK CASES

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Abstract

Judicial Overreach is the trespass of prescribed power exercised by the Judiciary. This paper examines Judicial Overreach and its departure from the separation of powers, particularly in the Indian context. Integrating Judicial Review under Article 13¹, the paper argues that while it is essential for rights protection, its unchecked encroachment on legislative and executive domains is exemplified through cases such as *Kesavananda Bharati*², *Vishaka*³, *NJAC case*⁴ and the *T.N. Governor's case*⁵, which this paper plumbs into. These cases highlight the ever-expanding judicial scope, which undermines legislative and executive functions while capping and evading constitutional accountability. This is particularly important as courts, being unelected, lack the accountability that Legislature and Executive inherently possess. Further, the paper posits that judicial lawmaking should be interstitial, filling gaps rather than creating new law or overturning established policy guided by *stare decisis*. The Judiciary's tendency to stretch legislative interpretation beyond intent must be restricted to rare cases where *praeter legem* or *contra legem* action is present, maintaining "justice according to law". Moreover, the paper advocates for recourse mechanisms such as a narrow interpretation of statutes promoting judicial restraint. Ultimately, it calls for a more precise approach to judicial review, which respects institutional boundaries and maintains accountability to the state.

Keywords: Judicial Overreach, Judicial Review, Separation of Powers, Basic Structure Doctrine, Constitutional Accountability.

INTRODUCTION

India's Constitution is built on a careful balance of power between its three organs namely the Legislature, the Executive, and the Judiciary. This system of checks and balances is designed to ensure that no single institution becomes too powerful. A major test of this balance was brought in by the landmark

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¹The Constitution of India, Article 13.

²*Kesavananda Bharati v. State of Kerala & Anr.*, (1973) 4 SCC 225.

³*Vishaka & Ors. v. State of Rajasthan & Ors.*, (1997) 6 SCC 241.

⁴*Supreme Court Advocates-On-Record Association And Another V. Union Of India* 2015 INSC 787.

⁵*State of Tamil Nadu v. Governor of Tamil Nadu*, 2025 SCC OnLine SC 770.

Kesavananda Bharati case (supra), wherein the Supreme Court decided on how far Parliament's power to amend the Constitution could go. But what if those amendments go so far as to alter the Constitution's authentic character? This gave birth to the Basic Structure Doctrine, that sought to safeguard the Constitutional DNA but such doctrine is far too broad. Thus posing questions on such judicial power that comprises of huge discretion. This case marked a turning point in how the Judiciary viewed its own role. The Judiciary positioned itself as the guardian of the Constitution, responsible for ensuring that no law or amendment, however popular, could violate its core Constitutional principles. This led to a new phase in Indian constitutionalism. Particularly since landmark rulings such as *Vishaka v. State of Rajasthan*, the *NJAC case* has incrementally expanded its powers, largely through the doctrine of Judicial Review. While this power, grounded in Article 13 of the Constitution, is crucial for safeguarding fundamental rights and upholding constitutional supremacy, its increasing breadth generates profound concerns about judicial encroachment into domains traditionally reserved for the legislative and executive branches. Tracing Judicial actions through the cases highlight multiple instances of legislative encroachments, wherein the Judiciary assumes the role of law-making in the pretext of administering justice or safeguarding the Constitution. More recently, the *T.N Governor's case* has prompted a critical inquiry to locate and understand the extend of Judicial powers. This trend not only undermines the distinct functions of other state organs but also elevates serious concerns about constitutional accountability, potentially leading to a **Constitutional crisis**. This paper seeks to trace and examine the tension between legitimate judicial powers and judicial overreach through landmark cases while suggesting alternate recourse to prevent overreach. Additionally, jurisprudential aspects are tapped into to back up the arguments.

1. KESAVANANDA BHARATI V. STATE OF KERALA (1973):

The momentous judgment fundamentally sought to assess the Parliament's power to amend the Constitution. The Parliament, too, has certain limitations on its exercise of power. Such limitations cannot be eliminated, even indirectly, through amending powers⁷. In other words, the Parliament has been conferred limited powers to amend the Constitution under Article 368⁸, and therefore, the Parliament cannot convert this limited power into an unlimited one or destroy the limitations placed on it⁹.

THE BASIC STRUCTURE DOCTRINE AND JUDICIAL REVIEW

⁶*Supra* note 2.

⁷*Supra* note 2 at 321.

⁸*Supra* note 1, art. 368.

⁹*Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 : 1980 SCC OnLine SC 213 at 643.

Through this case, the courts first exercised the power of judicial review¹⁰. Though the power of the Judiciary to review existed before as well, it was never expressly exercised prior to this. Given the multiple attempts made by the Legislature to corrode the foundation of the Constitution and to exercise absolute powers, the Judiciary deemed it necessary to step in and exercise its checks¹¹.

In this case, the Court primarily dealt with two aspects of judicial review enshrined in Art.13¹² of the Indian Constitution. First being its location in the Constitutional Scheme and the second being the limitations of such Judicial Review¹³. The State represents its people and is answerable to them, but this does not allow them to use powers excessively beyond what is required. While the State is **accountable** to its people, Judiciary **protects the will** of the people. To limit State power, the Founding Fathers of the Constitution inserted fundamental rights. The idea was to not make the State the supreme organ, resulting in distribution of powers¹⁴. Further, the Constitution framers bestowed on the Judiciary, the power to issue writs to enforce such rights speedily. They made this very enforcement a fundamental right to protect people against the State¹⁵. This elucidates the significance of Judicial Review that not only aims to balance powers between the organs but also materialises the objectives of the Constitution, embodied in Part III(Fundamental Rights)¹⁶ and several other Articles in the Constitution¹⁷. Ultimately, Judicial Review empowers the Judiciary to act as a guardian of the Constitution, while also exercising checks on legislative or executive actions provided that such judicial power intersects with it¹⁸. For legislative actions, this power is limited only to scrutinising the manner and form in which an amendment is passed¹⁹. Such exercise of power should comply with the doctrine of proportionality to test the validity of a legislation²⁰. Consequently, the outcomes of a law validly made cannot be prevented by it²¹.

¹⁰D.D. Basu, *The Shorter Constitution of India*, Vol. 2 (Prentice Hall 2015) 2232-2234.

¹¹*Supra* note 2 at 325.

¹²*Supra* note 1, art. 13.

¹³*Supra* note 2 at 278. Also referred to *Bribery Commissioner v. Pedrick*, (1965] A.C. 172, 193-94, *Rhode Island v. A. Mitchel Palmet*, 64 L. Ed. 946, *Dhillon v. R. W. Gloss*, 65 L. Ed. 994, *United States v. William H. Sprague & William, Howey*, 75 L. Ed. 640, 644, *Howard Joseph Whitehill*, 19 L. Ed. 2nd 228 and *Hawie v. Smith*, 64 L. Ed. 871.

¹⁴*Supra* note 10, at 2228-2235.

¹⁵*M. Nagaraj v Union of India*, (2006) 8 SCC 212.

¹⁶*Supra* note 1, Pt. III (Fundamental Rights).

¹⁷*M. Nagaraj supra* note 9 at 241-42 (para 31) : AIR 2007 SC 71.

¹⁸*Zee Telefilms Ltd. & Anr. vs Union Of India & Ors.* (2005) 4 SCC 649 (paras 152 and 153).

¹⁹*Supra* note 2 at 865-870.

²⁰*Assn. for Democratic Reforms (Electoral Bond Scheme) v. Union of India*, (2024) 5 SCC 1(para 264)

²¹*Supra* note 2 at 207-208. Also referred to *Nadan v. The King* (1926) A.C. 482.

Accordingly, the Hon'ble Supreme Court laid down the *Basic Structure Doctrine* to limit State's power²². This doctrine represents the core/foundation upon which the Indian Constitution was built. The absence of such crucial elements would cause the Constitution to collapse, per the Court. The elements of this as outlined by the Hon'ble Supreme Court are as follows:

1. Parliamentary democracy
2. Existence of three organs (namely, the Legislature, Executive and Judiciary)
3. Fundamental Rights in Part III
4. Sovereign Democratic Republic (as popularly traced in the Preamble)
5. Justice (social, economic, and political)
6. Liberty (thought, expression, faith, belief, and worship)
7. Equality (status and opportunity)
8. Supremacy of the Constitution
9. Republican and Democratic form of Government
10. Secular character of the Constitution
11. Separation of powers between the Legislature, the Executive, and the Judiciary
12. Federal character of the Constitution
13. The dignity and freedom of individuals
14. Certain Directive Principles in Part IV
15. The provisions connected to the sovereignty of the country and the unity of the country
16. The determination in Article 39(b) & (c)²³ pertaining to the breaking up concentration of wealth and distributing material resources for the common good.

All of these come under the purview of this Basic Structure²⁴. The lack of any of these elements would vaporise the heart of the Constitution. However, this is not a comprehensive list of features that fall in the province of such Basic Structure²⁵. These are merely illustrative and not exhaustive, making it ambiguous and hence dubious.

DETECTING LIMITS OF JUDICIAL ACTIONS BY WAY OF ASSESSING THE RATIONALE AND UNDERLYING OBJECTIVES

At this juncture, it becomes significant to investigate this curious doctrine as it often sparks debates questioning the potential judicial overreach that may be exercised by invoking this doctrine. Examining the objective of the same before adopting any perspectives is essential. The primary objective of the Basic

²² *Supra* note 2 at 480.

²³ The Constitution of India, Art. 39.

²⁴ *Supra* note 2 at 517-518. See also, *S.R. Bommai v. Union of India*, AIR 1994 SC 1918, *Minerva Mills*, *supra* note 9.

²⁵ *Supra* note 2 at 322, 517.

Structure concept is to preserve the fundamental identity and nature of the Constitution. It aims to ensure that the bedrock of the Constitution endures even on subsequent amendments²⁶, ensuring that its core identity survives. The premise of such idea can be found in the dignity and freedom of the individual, which is treated as paramount and cannot be destroyed by amendments²⁷. This architecture serves to preserve the edifice of the Constitution²⁸. Altering a basic feature is akin to rewriting²⁹ the Constitution by creating a widespread affliction instead of merely amending it. Hence, this doctrine safeguards against the abrogation or destruction of the basic framework, precluding changes that would otherwise make the Constitution unidentifiable³⁰. It is undeniable that Judicial Review and the idea of Basic Structure truly aim to uphold the Supremacy of the Constitution. However, this perspective reveals only one side of the intricate reality, inviting a critical analysis of its collateral damages.

The Judiciary is tasked to interpret the existing laws³¹ by actualising based on the object of the underlying law, in furtherance of contemporary societal needs. If a law fails to comply with such needs of benefitting the society subject to certain circumstances, the Judiciary is at power to scrutinise it through judicial review enshrined in Article 13. However, if a law fails to fully address and realise the **urgent** needs of the society³², the Judiciary often departs from the explicit provisions and even precedents, to restore meaning to laws by way of imposing new interpretations or theories aimed to benefit the people at large. This amounts to judicial activism. But such activism is to be resorted to exceptional instances. In presence of a dire need generated in the interest of the marginalised or the nation at large, such deviations are often sought³³. Consequently, such discretionary powers can be misused as acknowledged by the Judiciary itself. The jurisprudential linchpin supporting the expansive powers can be traced in the idea of law projected by the classical Roman jurist Ulpian. According to him, ‘Justice is constant and perpetual will to render to everyone that to which he is entitled.’³⁴In other words, justice is the persistent will to assign what is due to a person. This justice is then administered by the courts through law. Crucially, law is not a static construct but a dynamic regulator for managing human interactions. This adaptability is vital for creating a harmonious society by

²⁶*Janhit Abhiyan v. Union of India* (EWS RESERVATION), (2023) 5 SCC 1(para 370).

²⁷*Supra* note 26.

²⁸*Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1252.

²⁹*Supra* note 26 at 21(para 381-382).

³⁰*Supra* note 2 at 512.

³¹William Blackstone, *Commentaries on the Laws of England*, Book I, Chapter 3, at 69 (1808) (court is not to pronounce a law but to maintain and expand the old one).

³²*Supra* note 26.

³³*Dayaram v. Sudhir Batham*, (2012) 1 SCC 333.

³⁴ Justinian’s *Digest* (or *Pandects*), Book 1, Title 1, Fragment 10, beginning (D.1.1.10.pr.)/ Justinian’s *Corpus Juris Civilis* (adopted from the Roman jurist Ulpian). Quoted in *B.P. Achala Anand v. S. Appi Reddy*, (2005) 3 SCC 313 : 2005 SCC OnLine SC 280 at 318.

settling and preventing disagreements³⁵. This galvanises the judges to consciously mould the law to align with the prevailing needs of the evolving society³⁶. Such an approach reveals the living, positivist facets of law. By recognising law's natural ability to change while adhering to its clear principles, it encourages judges to be innovative. This reinforces that law, as applied by courts, actively transforms into justice³⁷.

In the Indian constitutional framework, provisions such as Articles 136, 32, 142, and 226³⁸ capture this idea of judicial activism³⁹. While judicial activism is often motivated by noble goals, the inherent issue is found in its accountability mechanism. The *ostensible scrutiny* exercised over potential judicial overreach is self-determined, by the Judiciary itself. This implies that the ultimate authority to investigate the validity of a court's expansive exercise of power is the very institution undertaking such action. This ignites serious questions regarding external checks and balances over this enormous power which is often found in the unchecked departure from conventional judicial roles or what is Constitutionally defined.

CRITICAL ANALYSIS OF JUDICIAL ACTIONS DRAWN THROUGH THIS CASE

The primary criticism of the doctrine of Basic Structure is grounded in its lack of explicit constitutional definition or mention. The contours of it are exclusively prescribed and interpreted by the Judiciary. This grants the courts the authority not only to define these fundamental limits but also to serve as the final arbiter of their own decisions concerning the risk of exceeding mandate. This creates a unique situation where the Judiciary lacks the parallel accountability mechanisms it rightly demands from the legislative and executive branches.

Further, lawmaking is primarily the function of the Legislature, which is democratically elected and accountable to the people. Whereas the Judiciary's role is to interpret and apply those laws⁴⁰. It is not wrong to say that judges in

³⁵Justice Markandey Katju: Law in the Scientific Era - The Theory of Dynamic Positivism, at 73; referenced in, *supra* note 34 at 318.

³⁶Dr. Justice Nasim Hasan Shah, Chief Justice of Pakistan quoted in Law as an Instrument of Economic Change in SAARC Region, p. 7, quoted in, *supra* note 34.

³⁷H.L.A. Hart, *The Concept of Law*, 2d ed., Penelope A. Bulloch & Joseph Raz (eds.) (Clarendon Press 1994)(Open texture of law).

³⁸*Supra* note 1, Arts. 32, 136, 142, 226.

³⁹*Supra* note 34 .

⁴⁰ John W. Salmond, *Jurisprudence*, 4th ed. 12-14(Project Gutenberg, 2023).

common law systems inevitably “make” laws through precedents⁴¹, but such lawmaking should be **interstitial**, filling gaps and clarifying ambiguities in existing law rather than a wholesale creation of new legal areas or the overturning of the established legislative policies⁴². The doctrine of *stare decisis* (following precedent)⁴³ provides a framework for the gradual development of law by judges, and deviations from the same should be carefully justified based on significant changes in social values or fundamental injustices in the precedent itself⁴⁴. Likewise, the Justice that is to be realised through the means of Law, **should be** according to law⁴⁵. Situations where judges may consider principles of justice *praeter legem* (besides the written law) or even *contra legem* (against the written law) must be in rare cases of fundamental injustice⁴⁶. While the pursuit of justice is a vital aim of the legal system, **judges should prioritise ascertaining and awarding “justice according to law”** and deviations from written law in furtherance of justice should be exceptional and well-reasoned, not a routine exercise of judicial power⁴⁷. The given deviation is characterised by impunity.

The hue and cry over such unchecked powers is raised by the civil society as well as the political figures. The incumbent Vice-President of India, Mr. Jagdeep Dhankar, questioned the bounds of such Basic Structure which is employed to dismiss vitals actions as seen in the *NJAC case*⁴⁸. Despite the doctrine’s genesis subject to specific historical circumstances, its application today, as highlighted by contemporary criticisms from various political figures, suggests a dynamic where the Judiciary’s expansive interpretation of its powers often leads to an imbalance, positioning it above the elected representatives who have some form of accountability at the least. Given the dynamic format of the society, it may be difficult to codify the idea of Basic Structure, but parallelly if criminal and procedural laws such as BNS⁴⁹ and BNSS⁵⁰ can be codified and defined subject to

⁴¹Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* 442 (Harvard University Press, Cambridge, Massachusetts, Revised Edn., 1974). See in this connection Lon L. Fuller, “Reason and Fiat in Case Law,” 59 Harv. L. Rev. 376 (1946).

⁴²*Supra* note 41, at 327. As Justice Holmes pointed out in *Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205, 221 (1917), judges find themselves under a necessity to legislate, but “they can do so only interstitially”.

⁴³*Supra* note 41 at 32, 425.

⁴⁴*Supra* note 41 at 255. See also Harry W. Jones, ‘The Creative Power and Function of Law in Historical Perspective’, (1963) 17 Vanderbilt Law Review 135, 140, Benjamin N. Cardozo, *The Paradoxes of Legal Science* (New York 1928) 1-3, 143-145.

⁴⁵*Supra* note 40 at 15.

⁴⁶*Supra* note 41 at 350.

⁴⁷*Supra* note 41 at 366.

⁴⁸Citing Basic Structure Doctrine, Vice President Jagdeep Dhankhar asks: Are we a democratic nation?, *The Indian Express*, January 12, 2023. <https://indianexpress.com/article/india/citing-basic-structure-doctrine-vice-president-jagdeep-dhankhar-asks-are-we-a-democratic-nation-8375392/>

⁴⁹The Bharatiya Nyaya Sanhita, 2023, Act No. 45 of 2023.

⁵⁰The Bharatiya Nagarik Suraksha Sanhita, 2023, Act No. 46 of 2023.

subsequent amendments as the need arises, the inaction and unaddressed assertions of the society against the construction of such doctrine is a cause of concern. This is especially weighty in the context of potential concentration of excessive power in an unelected body questioning the **undemocratic nature** through the doctrine.

It is significant that dividing sovereignty is destroying sovereignty⁵¹. However, India's sovereignty is vested solely in the Constitution, and no organ of government can claim it by ostensibly safeguarding it. Moreover, man being a social animal⁵² cannot be entrusted absolute powers⁵³ and hence, the distribution of powers coupled with the system of checks and balances is of paramount importance. The Courts, through this Basic Structure, can effectively **override the will of Parliament**, which represents the will of the people. This can hinder proposals that an elected government may intend to implement for social development or to meet constitutional goals, given that the Parliament cannot foresee what new element might suddenly be classified as an unamendable part of the Basic Structure⁵⁴. Such an evolving and unpredictable nature projects heavy legal **uncertainty** while diluting separation of powers. Even though, such separation is not followed in India in a strict sense⁵⁵, any scrutiny outlined by the other organs or the people is merely addressed citing the 'independence of Judiciary', nothing more. Hence, in the process of upholding Constitutional Supremacy, the concern pertains to the self-defined authority of the Judiciary, independent external checks, risking the sovereignty it so seeks to protect.

2. VISHAKA VS STATE OF RAJASTHAN (1997)⁵⁶:

In this case, through judicial activism, the Hon'ble Supreme Court laid guidelines preventing sexual harassment of working women in India valid until the POSH Act⁵⁷ was in place. These guidelines operated as a law per Article 141⁵⁸. Noting the legislative void, the Court took action by way of creating and setting in place, a temporary preventing sexual harassment in all workplaces⁵⁹. Legislative inaction was cited to justify this encroachment. A proactive Judiciary is nonetheless

⁵¹Jens Bartelson, 'On the Indivisibility of Sovereignty', (2011) 2 (2) Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts.

⁵²Aristotle, *Politics*, Book I, Ch. 2, 1253a.

⁵³Lord Acton, *Historical Essays and Studies*, J.N. Figgis & R.V. Laurence (eds.) (Macmillan and Co. Ltd. 1907) 504.

⁵⁴*Supra* note 10, at 2236.

⁵⁵*Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

⁵⁶*Supra* note 3.

⁵⁷The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Act No. 14 of 2013.

⁵⁸ *Supra* note 1, Art. 141.

⁵⁹*Supra* note 3.

necessary to maintain consistency of law with the progressive society⁶⁰. But through this power Judiciary's actions have increasingly blurred the lines between oversight and overreach⁶¹. Independent of the positive outreach of such a law, it is not to be forgotten that such functions are beyond Judiciary's jurisdiction. The limitations dawned upon it cannot be evaded in the cloak of justice. The institution that allocates justice must also comply by the laws. Jurisprudentially, rights are granted to entities, persons who can in turn fulfil certain duties, per Hohfeld's critical analysis⁶². Just as the Judiciary has rights to exercise its powers and discretion in certain instances, it has a correlative duty to respect the perimeters of its powers and refrain from impinging in matters reserved for the Legislature or Executive.

IMPLICATIONS AND KEY CONCERNS

In the present case, the Judiciary discharged a well-intentioned folly. Morally such proactive measures are positive but principally, flawed. Laying guidelines that have proper enforceability is not merely a departure from the written law but a non-compliance of it. It is noteworthy that Judiciary **lacks expertise** on various matters thereby making its unchecked power hazardous to the public which at large may be affected by it with **no other avenue for relief**. This can in turn ignite distrust amongst the organs and disrupt harmony leading to chaos in the society⁶³. Furthermore, decision made in favour of one community can affect other communities at large. For instance, in *Unni Krishnan J.P. vs State of Andhra Pradesh* (1993)⁶⁴, the Supreme Court, by invoking Articles 141 and 142⁶⁵ of the Constitution, legislated on the fee structure and admission process for private professional colleges. This occurred despite the case originating from a petition under Article 32. The Court's decision became binding across a much broader area than the specific locality in question, seemingly without full awareness of local conditions or specific needs. The local government usually is more acquainted to people's demography, needs residing in that area⁶⁶. This is another such instance of judicial encroachment in legislative domain. The only recourse for challenging such a decision lies with a larger bench which again is the Judiciary itself. For such specific purposes, expert bodies are formed by the Executive/Legislature⁶⁷.

⁶⁰Khyati Nayak & Anu Mishra, "Judicial Restraint and Judicial Overreach: A Never Ending Conflict," in *A Landmark on the Indian Constitution* 241 (Institute of Legal Education, 2023).

⁶¹Ruma Pal, "Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India," (2008) 7 SCC J-9.

⁶²Albert Kocourek, "The Hohfeld System of Fundamental Legal Conceptions," 15 Illinois Law Review 24 (1920).

⁶³*Supra* note 60 at 244.

⁶⁴*Unni Krishnan J.P. vs State of Andhra Pradesh* : 1992 AIR 858.

⁶⁵*Supra* note 1, arts. 141, 142.

⁶⁶Ashok H. Desai, 'Judicial Overreach: A Critique', (2013) 9 SCC Journal.

⁶⁷ *Supra* note 60.

The *Vishaka*⁶⁸ judgment established the Court's authority to implement international law when domestic legislation was deficient⁶⁹. However, in *University of Kerala v. Council of Principals of Colleges*⁷⁰, the Court voiced uneasiness about this precedent, questioning whether the Judiciary could effectively assume the role of an interim Parliament to create law until Parliament acted⁷¹. Furthermore, in *Census Commr. v. R. Krishnamurthy*, (2015)⁷², Justice Dipak Misra emphasised that judges must acknowledge inherent limitations in their adjudicatory power, showcasing self-restraint and caution. He cited Francis Bacon's analogy of "lions under the throne"⁷³ underscoring that judges, while powerful, must operate within the legal mandate, not beyond them. But such advocacy is more rhetoric than reform.

The maxim *Quando aliquid prohibetur ex directo, prohibetur et per obliquum*⁷⁴ (what cannot be done directly cannot also be done indirectly) captures the idea that if something is prohibited directly, everything relating to it is also prohibited. This means that Courts cannot significantly stray from fundamental legal principle. However, this is eluded by way of caping, citing the welfare of the public or the marginalised. An unopposed dominant force can lead to the devastation of the entire ecosystem, parallel to granting a wildfire the "right" to spread freely in a forest. Thus, this judgment, though appreciated for its proactive stance against sexual harassment in work places, persists as a key debate, given the delicate balance between remedial justice and constitutional fidelity, presenting the unlawful intrusion in legislative territory. Gradually, the traditional balance of power is changing. The Judiciary is steadily gaining more authority, which in turn consistently shrinks the power of the other two government branches, leading to a Constitutional crisis.

3. SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION V. UNION OF INDIA (2015):

⁶⁸*Supra* note 3.

⁶⁹*Supra* note 3 at 251 (para 16).

⁷⁰*University of Kerala v. Council of Principals of Colleges, Kerala*, (2009) 16 SCC 712.

⁷¹Avi Tandon & Sunny Shah, "Adjudication by the Indian Supreme Court: Doing Statutory Interpretation or Making Judicial Legislation — A Critique," (2011) PL January 12.

⁷²*Census Commr. v. R. Krishnamurthy*, (2015) 2 SCC 796 : (2015) 1 SCC (L&S) 589 : 2014 SCC OnLine SC 880 at 799.

⁷³Francis Bacon, "Of Judicature," in *The Works of Francis Bacon* 58-59 (Basil Montague ed., A. Hart, late Carey & Hart 1852).

⁷⁴*Queen v. Murugan Ramasamy*, 1962 SCC OnLine SL SC 130, *Rao Shiv Bahadur Singh (II) v. State of Vindhya Pradesh*, (1954) 1 SCC 296.

In the Fourth Judges Case (Supreme Court Advocates-on-Record Association v. Union of India, 2015)⁷⁵, the Supreme Court of India overruled both the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act⁷⁶ by a 4:1 majority. It was a major exercise of judicial review, where the Court scrutinized the compliance of a legislative act, though having been nearly unanimously approved in Parliament and sanctioned by a majority of state legislatures with the basic structure of the Constitution. The Court held that the NJAC breached this doctrine, in particular by jeopardizing the doctrine of separation of powers and judicial independence prescribed by justice S.R. Pandian.⁷⁷

CRITICAL ANALYSIS OF THE SUPREME COURT'S INTERPRETATION OF ARTICLE 200 AND ITS IMPLICATIONS

The basic structure doctrine, as it first appeared in *Kesavananda Bharati v. State of Kerala*⁷⁸, as discussed lays that some basic features of the Constitution which cannot be amended by Parliament. One such feature is Judicial independence which has not been explicitly mentioned in the original judgment but has been recognized by subsequent benches as being part of the basic structure⁷⁹. This was later critiqued by Justice Chelameswar in his dissenting opinion in the fourth judges case. In declaring the NJAC to be unconstitutional, the Court held that the mechanism which it provided, was an intrusion into the exclusive jurisdiction of the judiciary. Appointment of judges, the Court held, was a quintessential judicial function⁸⁰, and executive interference with the process disturbed the fine balance which the Constitution seeks to maintain. The Court reasoned that the judiciary's role was rendered illusory by the fact that it was accompanied by a veto provision: the provision that two members could veto a recommendation.⁸¹ The predominance of the judiciary in number was thus vitiated by this structural deficiency, giving space for the executive to exert disproportionate influence by joining hands with the eminent persons. The NJAC, thus, even with its surface-level semblance of balance, was held to be defective.

⁷⁵*Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

⁷⁶ National Judicial Commission Act, 2014.

⁷⁷*Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441 (S.R. Pandian, J.)

⁷⁸AIR 1962 SC 933.

⁷⁹*Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1; Rehan Abeyratne, 'Upholding Judicial Supremacy in India : The NJAC Judgment in Comparative Perspective' (2017) 49 George Washington International Law Review 569, 570.

⁸⁰*Lok Prahari through its General Secretary S.N. Shukla IAS (Retd.) v. Union of India*, 2021 SCC OnLine SC 333.

⁸¹ 214th Report of the Law Commission of India, 59.

However, this very line of reasoning has been harshly criticized by constitutional attorneys and legal scholars. He had contended that the institutional majority now in the judiciary should have been enough to assert primacy, and that it was unreasonable to strike down the whole mechanism due to the veto provision in the statute rather than the constitutional amendment. According to him, the judgment was a rejection that was tantamount to a “package deal,” merging the two legal documents and going against the will of both the legislature and the states. His critique was not confined to legal interpretation; he went to the extent of terming the decision “the most egregious kidnapping in recent times” of the Constitution, exhibiting a profound unease with the course that the judiciary had pursued in the appointments debate. This controversy reignited abiding suspicions regarding the collegium system, the very system the NJAC was meant to displace. The restoration of this system, a secretive, closed process whereby judges appoint judges⁸² was seen by many as a lost chance for long-overdue change. **Transparency is still an illusion**, accountability is nil, and fears of nepotism, homogeneity, and politicization continues.⁸³ The executive’s occasional practice of selective delay which is popularly described as the “pocket veto” has further strained relations between the two. But the judiciary, having struck down a democratically enacted reform, is not willing to permit any real external check on its appointments wherein the president shall be bound to accept⁸⁴ the recommendations of the collegium and give effect to them.⁸⁵ This raises a fundamental and unresolved question of Indian constitutionalism: how to balance the need for judicial autonomy with the need for accountability.⁸⁶

While the court holds that only through self-regulation can the court be protected from interference, critics say that such an arrangement necessarily leads to insularity. In asserting its superiority, the court appears to insulate itself from the very democratic values that it is trying to preserve. The NJAC judgment is thus a reflection not only of judicial review at its best, but also of judicial overreach. In striking down a constitutional amendment designed to bring greater participation and transparency to appointments, the Court

⁸²R Balaji, ‘Collegium system of appointing judges involves ‘intense politics, says Kiren Rijiju’ (Telegraph India, 6 November 2022) <<https://www.telegraphindia.com/india/collegium-system-of-appointing-supreme-court-and-high-court-judges-involves-intense-politics-kiren-rijiju/cid/1896479>> accessed 15 December 2022.

⁸³D. Ananda, ‘Judges Appointments : Collegium System v. National Judicial Appointments Commission’ (2023) 13(1) The GNLU Journal of Law, Development and Politics.

⁸⁴*In Re: Presidential Reference*, AIR 1999 SC 1.

⁸⁵*In Re : Special Reference 1 of 1998*, (1998) 7 SCC 739.

⁸⁶P. Ishwara Bhat, *Reflections on the Life and Works of Dr. Justice Durga Das Basu* in CONSTITUTIONALISM AND CONSTITUTIONAL PLURALISM: ONE SUPREME LAW MANY COMMUNITIES, CONTEMPORARY ISSUES IN INDIA, SOUTH-EAST ASIA, CHINA, AND EUROPE 1, 33 (2013).

essentially placed itself above both the legislature and the citizenry. In doing so, it converted judicial independence as a practical necessity into an absolute dogma beyond any kind of external examination.

CRITICAL ANALYSIS OF THE NJAC JUDGEMENT AND THE INSULARITY OF THE INDIAN JUDICIARY

This self-insulation is most problematic when considered in relation to the collegium's institutional secrecy and the powers of judicial review. With no institutionalized system of public accountability, whether parliamentary committee oversight, civil society input, or open choice criteria, the judiciary is judge, jury, and gatekeeper of its own membership. Ultimately, this concentration of power threatens to warp the constitutional principle of separation of powers into a pyramid in which the judiciary asserts final and sole voice, even over instruments governing its own power.

Indeed, the distrust of other constitutional actors evident in the *NJAC* judgment cannot be ignored. The Court's observation that civil society was "not evolved enough" to meaningfully contribute to judicial appointments reflects not only a condescending tone but also a deep-rooted institutional scepticism. The judgment implicitly conveyed that neither Parliament, nor the executive, nor the people themselves could be trusted with a voice in the formation of the judiciary. Such a position, while perhaps well-intentioned, is ultimately unsustainable in a democracy committed to participatory governance. To continue resisting accountability under the guise of preserving independence is to adopt a conception of the judiciary that is fundamentally at odds with democratic constitutionalism. The judiciary cannot indefinitely claim to be the only institution capable of impartiality while rejecting every attempt at reform. The absence of a structured and transparent accountability framework leaves the door open to arbitrariness and erodes public trust. In this context, even judicial review, the crown jewel of constitutionalism, begins to appear less as a mechanism of constitutional fidelity and more as a tool of institutional self-preservation. Therefore, the possibility of judicial appointments cannot be based on a strict dualism between absolute independence and executive control. The challenge in this situation is the creation of a model that maintains the insulation of the judiciary against political intervention but has mechanisms of accountability, inclusivity, and transparency.⁸⁷ Whether this balance is possible without a constitutional amendment is doubtful. That the current system, sheltered from

⁸⁷R. Balaji, 'Collegium system of appointing judges involves 'intense politics, says Kiren Rijju' (*Telegraph India*, 6 November 2022) <<https://www.telegraphindia.com/india/collegium-system-of-appointing-supreme-court-and-high-court-judges-involves-intense-politics-kiren-rijju/cid/1896479>>

outside observation and shrouded in procedural secrecy, cannot claim legitimacy on the sheer strength of constitutional doctrine is certain. The legitimacy of any institution however lofty its standing must, after all, be grounded in the confidence it inspires in the democratic community. That confidence is currently precariously situated.

In order to uphold the rule of law, it is imperative that the judiciary maintain its reputation as impartial. The public's trust in the judiciary is essential for objectivity, neutrality, and fairness. One of the main factors contributing to the preservation of the country's social fabric is the public's faith in the legal system, which gives them the courage to seek relief from the courts and follow court orders. However, the judiciary's unwillingness to accept any kind of outside supervision is putting more and more strain on this confidence. The judiciary has frequently adopted a defensive stance in its quest for independence, particularly when it comes to issues of accountability, shielding itself from valid democratic checks. This self-insulation is exemplified in the striking down of the 99th Constitutional Amendment⁸⁸ and the National Judicial Appointments Commission (NJAC)⁸⁹ Act in the *Supreme Court Advocates-on-Record Assn. v. Union of India*⁹⁰. In this decision, the Court invalidated a constitutional and parliamentary effort to bring transparency and external accountability to judicial appointments. It was a textbook instance of judicial overreach: the judiciary interpreted the doctrine of independence to mean complete autonomy, rejecting a constitutional mechanism crafted with broad parliamentary support and presidential assent. This not only ignored the democratic will but also entrenched a judge-controlled appointment system, i.e. the collegium with no external oversight or codified criteria.

The NJAC verdict consolidated the collegium system, despite longstanding concerns regarding its opacity and subjectivity. Critics have repeatedly pointed out that the collegial atmosphere of the judiciary allows for anticipation of judicial predispositions, increasing opportunities for internal manipulation and undermining public confidence. **The doctrine of the 'Master of the Roster,'** which grants the Chief Justice unchecked authority in the allocation of cases, further amplifies this concern. Though developed through conventions and rules, it lacks constitutional sanction and is vulnerable to abuse due to its unregulated and discretionary nature. This institutional arrangement, marked by internal concentration of power, fosters systemic inconsistencies. For instance, the Supreme Court's composition of

⁸⁸Constitution (Ninety-ninth Amendment) Act, 2014.

⁸⁹*Supra* note 76.

⁹⁰*Supra* note 75.

34 judges functioning in small, often fragmented benches results in divergent interpretations of law, causing unpredictability and forum shopping. The Chief Justice's power to constitute benches in sensitive matters, even including judges previously committed to a legal position, demonstrates how unchecked discretion can give rise to intellectual bias and the appearance of partiality. The case of Justice Arun Mishra, who initially questioned a legal precedent, later overruled it in a three-judge bench, and then headed a constitution bench examining the same matter, illustrates how self-regulation can violate the appearance of justice and create reasonable apprehension of bias. The case of Justice Yashwanth Sharma can be referenced to showcase the lack of transparency in the inhouse inquiry conducted by the Judiciary.

THE FALLACY OF ABSOLUTE INDEPENDENCE

The judiciary in general has resisted all legislative attempts to introduce safeguards or procedures to address such concerns. Recusal law in India remains judge-made, arising solely from judicial precedents, resulting in inconsistent and self-serving jurisprudence which was not the. Tests such as 'real likelihood', 'real danger', and 'reasonable suspicion' have coexisted, leading to doctrinal confusion. The *Supreme Court Advocates-on-Record Assn.* case further entrenched the 'real danger' test, which demands clear, tangible evidence of bias. While ostensibly aimed at preserving judicial dignity, this test has had the effect of raising the threshold so high that it shields judges from legitimate challenge, prioritizing institutional protection over litigant rights. Worse still, the current recusal process allows judges to decide for themselves whether to step aside, in clear violation of natural justice. The principle that no one should be a judge in their own cause is compromised, yet courts have consistently justified this approach as necessary to avoid embarrassment and protect judicial independence. In reality, such self-adjudication reflects judicial exceptionalism, privileging the bench's autonomy over democratic values of accountability.

The judiciary has categorically rejected any external body to participate in judicial appointments or oversight. The *NJAC* judgment revealed a deep institutional discomfort with **democratic accountability** and a readiness to invalidate constitutional amendments that attempt to correct structural flaws.⁹¹ Even though the judicial oath commits judges to impartiality, oaths are unenforceable and symbolic; they are insufficient safeguards against the human susceptibilities to influence, prejudice, or institutional loyalty. The absence of a codified and binding standard for judicial conduct, appointments, and recusals means that the judiciary operates without a

⁹¹Sambhav Chhabraa, "Collegium System Through the Lens of the Basic Structure Doctrine", 4 JCLJ 590 (2024).

legislative framework, a vacuum it has deliberately preserved. This amounts to judicial overreach, not only by striking down legislative efforts like the NJAC but by actively maintaining a self-regulatory monopoly over mechanisms that directly impact transparency and fairness.

A major criticism of judicial overreach that chapter seeks to underline is the democratic legitimacy of the judicial decision-making process. Considering that the judiciary makes decisions that have serious consequences both politically and socially, accountability is essential here like it is in any democratic institution. Elected branches of the government are severely subjected to the scrutiny of the enforcement directorate and the people while the judiciary operates completely outside of the realm in order to maintain its independence.

Hence, while public confidence in the judiciary is essential for rule of law, it cannot be built on the back of unchecked power. The *NJAC* judgment, and the resulting entrenchment of the collegium system, exemplifies judicial overreach by transforming judicial independence into judicial supremacy. There is an urgent need for external accountability mechanisms, not only to ensure that justice is done, but also that it is seen to be done, a foundational democratic value that judicial self-regulation alone cannot uphold.

4. STATE OF TAMIL NADU VS GOVERNOR OF TAMILNADU (2025)⁹²:

The core allegation involved in this case was put forward by the Tamil Nadu government regarding the “inaction” of the Governor.⁹³ It was alleged that the Governor’s inaction lead to obstruction of the state’s development. The Supreme Court appeared to sympathise with the state government; however, this ignited the question of how far judicial decision making can intervene in executive discretion. The grievances of the state included the withholding and delaying of assent to 10 bills which extended over three years of period.⁹⁴ The governor’s office held the defence of inaction on legitimate, legally prescribed grounds including reasons such as the bills suffering from repugnancy with Central Laws, lack of proper documentation and transparency. The Supreme Court observed both the sides and declared the governor’s office withholding the assent as illegal and set standards for gubernatorial discretion.

ANALYSIS OF THE ROLE OF JUDICIAL REVIEW IN THE INDIAN CONSTITUTIONAL FRAMEWORK

⁹²*Supra* note 5.

⁹³*Supra* note 4, at para 2(ii).

⁹⁴*Supra* note 4, at para 2(i).

The case underscores the importance of judicial review in the Indian Constitution. The Constituent Assembly went to great lengths to vest the courts with the authority to invalidate law violating fundamental rights. Individuals such as Chimanlal Shah viewed this authority as a *sine qua non* to any Constitution with a chapter on justiciable rights, while *Alladi Krishnaswami Ayyar* called the Supreme Court “the ultimate arbiter” of constitutional meaning.⁹⁵ Nehru also acknowledged that parliament action was subject to “scrutiny of the superior courts” for gross constitutional violations.

This judicial role is firmly established in constitutional provisions like Articles 13(2)⁹⁶, 32⁹⁷, and 245(1)⁹⁸. The judiciary defined its role in the first few decades of the post-constitutional era, with the nullification by the Patna High Court of a law controlling zamindari estates shortly after the Constitution came into force.⁹⁹ Judicial review is a bedrock of India’s constitutional system.¹⁰⁰

The drafters of the Constitution clearly believed in the presence of courts to invalidate legislation that violates fundamental rights. They envisioned the Supreme Court as the final arbiter of the Constitution. In addition, Jawaharlal Nehru acknowledged that Parliament’s authority was subject to judicial review in the event of constitutional overreach.¹⁰¹ This is reflected in provisions like Article 13(2), forbidding legislation that violates fundamental rights; Article 245(1), limiting legislative powers to the bounds of the Constitution; and Article 32, granting the people the right to appeal for redress against the violation of fundamental rights.

CRITICAL ANALYSIS OF THE SUPREME COURT’S INTERPRETATION OF ARTICLE 200 AND ITS IMPLICATIONS

Critics of recent court rulings believe that the Supreme Court exceeded its interpretative powers. Specifically, they cite the Court’s interpretation of Article 200¹⁰² to encompass time limits for gubernatorial assent, the rejection of the pocket veto, and the determination that once repassed by the

⁹⁵In *Re : Directions in the matter of demolition of structures* 2024 SCC OnLine SC 3291.

⁹⁶*Supra* note 1.

⁹⁷*Supra* note 38.

⁹⁸*Supra* note 1, art. 245.

⁹⁹Nitu Mittal and Tarang Aggarwal, “Judicial Activism in India”, 1 IJLPP 86 (2014-15).

¹⁰⁰Tanvi Goyal, “Judicial Review of Ordinary Laws and Constitutional Amendments: A Comparative study”, 6 GLS LJ 59 (2023).

¹⁰¹Alice Jacob, Nehru and the Judiciary, 19 Journal of the Indian Law Institute 169 (1977).

¹⁰²*Supra* note 1, art. 200.

legislature, the Governor has to assent and not send it to the President.¹⁰³ These actions are perceived as judicial amendments to the Constitution, avoiding the previously existing amendment process and intruding into legislative jurisdiction.

One of the major grievances is the so called **“usurpation of legislative functions.”** The Court’s imposition of certain temporal limits on the Governor’s assent is interpreted as a de facto amendment of Article 200, a constitutionally mandated function of Parliament under Article 368¹⁰⁴. The act is considered an inadmissible encroachment of judicial power beyond the parameters set by the Constitution. Further, the judgment is alleged to “undermine separation of powers” by suggesting that the President may be required to seek judicial advice under Article 143¹⁰⁵. Such encroachment of executive autonomy and upsetting of the balance intended by Articles 74¹⁰⁶, 200, and 201¹⁰⁷ are claimed to be the consequence. Further, the judgment has been criticized on grounds of “violation of constitutional procedures”, in that such a major constitutional issue should have been settled by a Constitution Bench under Article 145(3)¹⁰⁸, and not by a two judge bench.¹⁰⁹ Another particularly **notable** aspect of the judgment was the Court’s inclusion of the President of India in its directions despite there being no prayer or legal argument before the Court seeking relief against the President under Article 201. By directing that the Governor could not refer the repassed bills to the President and must grant assent instead, the Court effectively curtailed the President’s role in the legislative process without any adversarial submissions on that point raising concerns about procedural propriety.

In addition, the Court’s failure to consult states before delivering a verdict that affects all of them is an **“absence of federal consultation”** and a breach of the federal ethos.¹¹⁰ The recourse to Article 142 in this specific case has also been faulted, as it is considered an improper use of a provision for “complete justice” to “avoid amendments” and alter the nature of Article 200 which is a step the judiciary is not constitutionally authorized to take. Judges, unlike legislators, are not directly responsible to the people, and the exercise of quasi-legislative power without democratic mandate raises basic questions about checks and balances being effective. As such, this decision is seen by

¹⁰³Kailash Nath Goyal, “Can the President Assent to A State Act Which Has Previously Received the Governor’s Assent?”, 8 JILI 637 (1966).

¹⁰⁴*Supra* note 8.

¹⁰⁵*Supra* note 1, art. 143.

¹⁰⁶*Supra* note 1, art. 74.

¹⁰⁷*Supra* note 1, art. 201.

¹⁰⁸*Supra* note 1, art. 145.

¹⁰⁹Dormaan Jamshid Dalal, “Special Leave under Article 136 of the Constitution under Article 136 of the Constitution and Keeping the Question of Law Open”, 2020 SCC OnLine Blog OpEd 125.

¹¹⁰Khushi Nagratha, “The Essence of Federalism in India”, 2 JCLJ 789 (2022).

some as further adding to “judicial supremacy,” a threat Dr. B.R. Ambedkar strongly warned against. Legal analysts have cautioned that this decision may be a watershed in India’s federal model, noting that judicial orders that impose executive action may create institutional tension, as in the assertion: **“Courts must not run governments.”**¹¹¹

But the order passed by the Court can be called a proper exercise of judicial review in the context of ensuring constitutional accountability. No constitutional authority, however high, is above judicial review. The judiciary has always held the belief that powers must be exercised within constitutional norms. The use of Article 142 in the case at hand can be seen as a means of ensuring the constitutional mechanism and preventing deliberate obstruction or inaction. In this context, the Court’s use of Article 142 to extend sanction in the case of Tamil Nadu is not an exercise of judicial overreach but a promotion of constitutional accountability in cases where other branches had not acted.

The Court established clear guidelines of gubernatorial behavior, requiring Governors to act on bills within a reasonable time and ruling out indefinite adjournment. It emphasized that the office of the Governor is not a Centre’s political appendage but a constitutional office¹¹² that must operate within the limits of federalism and ensure democratic accountability. The ruling reiterates that the Governor’s role is to facilitate the smooth working of elected governments and not to obstruct them. With this controversial move, the Supreme Court further deemed all ten Bills to have received assent, citing the lack of bona fides on the part of the Governor. It reasoned that while ordinarily the Governor may be entitled to certain discretion under Article 200, in the case of it not being exercised in good faith and within a reasonable time period, the judiciary shall not remain powerless and must intervene. This is a judicial fiat that is justified under extraordinary circumstances, however, it is not immune to concerns regarding the doctrine of division.

The ruling also clarified that withholding assent to a bill reserved for the President is susceptible to judicial review. The Courts have jurisdiction over whether such withholding was mala fide, arbitrary, or on extraneous considerations. While giving the concession that there may be some political choices where the judiciary has to show restraint, the Court held that constitutional questions such as the constitutionality of a bill still remained in the field of action of the judiciary. It is also argued that the Court did not overstep its jurisdiction but led the proceedings to their natural conclusion, appealing to the

¹¹¹*Supra* note 4.

¹¹²Dalip Singh, “The Role of The Governor Under The Constitution And The Working of Coalition Governments” 29 *Indian Journal of Political Science* 100 (1968).

principle *ubi jus ibi remedium*¹¹³ (where one's right is violated, the law provides a remedy). The Judiciary's temptation to micromanage governance also goes against *salus populi suprema lex esto* (the welfare of the people) which is best served when each branch performs its distinct duty. The reason employed to adopt judicial review and exercise discretion is not outrightly wrong but the actions following such reasoning is disputable. Even more troubling, is the complete absence of an alternate recourse.

CONCLUSION AND SUGGESTIONS

Judicial Review is employed by courts citing grounds that may not be inherently flawed, but the actions that succeed such powers often exceed constitutional mandate. The external checks forecasted on the Legislature and Executive is exercised by the Judiciary. However, the Judiciary dismisses the parallel accountability it owes to the other organs. No organ of the government can be left with unchecked powers. The discretionary powers of Judiciary inevitably have perimeters that must be abided by. Noting that Judiciary is an unelected body, that lacks expertise on various matters, determines its own composition, it is not appropriate for it to determine its own powers and limitations, especially without any sanctions. The scope of judicial discretion may be narrowed down by way of modifying the existing statutes and provisions so that far departures are avoided. Notably Articles 141 and 142, may be more explicitly delineated to understand the overall province of such powers. Further, the unamendable elements of the Constitution can be codified. Simultaneously, finer guidelines may be chalked out for *Suo Motto* cases and other discretionary powers. Furthermore, an independent oversight body can be instituted, composing of eminent legal scholars and experienced public administrators, to hold judges accountable for their actions, supported by effective sanctions to ensure judicial adherence to their constitutionally defined roles. Ultimately, Judicial intervention should be portioned and consequently, must be subjected to accountability.

¹¹³*Shiv Shankar Dal Mills v. State of Haryana*, (1980) 2 SCC 437.

SECULARISM AND RELIGIOUS AUTONOMY IN ISLAM: THROUGH THE JUDICIAL PEN

-Abdul Sakib Majid & Dr. Renu Chaudhary

Abstract

This chapter explores the intricate balance between judicial review and the autonomy of religious institutions in India, with a particular focus on those governed by Islamic principles. It examines the tension between the constitutional mandate for secularism and the inherent pluralism of India's religious fabric. The chapter delves into the judiciary's role in mediating conflicts arising from state intervention and the self-regulatory rights of Islamic institutions under Articles 25 and 26 of the Indian Constitution.

Judicial review is positioned as both a tool for safeguarding religious autonomy and a mechanism for ensuring adherence to constitutional morality. The chapter analyzes the impact of statutes like the Unified Waqf Management, Empowerment, Efficiency and Development Act, 1995 and understanding approach of the court under *In re: Waqf (Amendment) Act, 2025*, W.P.(C) No. 269/2025. Furthermore, the governance of Islamic institutions through landmark cases such as *Mohd. Hanif Qureshi v. State of Bihar*, addressing the regulation of religious practices, and *Shayara Bano v. Union of India* (Triple Talaq case), which underscores the judiciary's evolving approach towards reforms within Islamic law.

Emphasizing jurisdictional and regional variations, the chapter explores how Indian courts navigate complex issues like gender equality, minority rights, and religious independence. By interrogating institutional practices and judicial trends, it aims to contribute to the discourse on reconciling the autonomy of religious institutions with the overarching principles of justice and secularism in India's diverse legal landscape.

Key Words: Judicial Review, Islamic Institutions, Religious Autonomy, Constitutional Morality, Indian Judiciary.

INTRODUCTION

India's constitution is drafted in a special way to support both secularism and a very diverse religious background. Indian secularism is different from a separation model because the State connects with all faiths equally without favouring them. Both persons and religious groups are granted freedom of religion and conscience by the Constitution (Article 25)¹, but their practises must respect the requirements of public order, morality and health (Article 26)². Also, Directive Principles (e.g. Article 48)³ and constitutional morality require the government to take care of social welfare (for instance, by protecting cattle, updating personal laws and promoting fairness between genders). Indian law has always tried to ensure that Muslims' religious freedom is respected, but without forgetting the country's core secular and human rights. In this chapter, we look at how the courts have managed that balance by interpreting Articles 25 and 26, examining statutes such as the Waqf Acts and handling key court cases. As a result, it merges different theories of legal pluralism and constitutionalism and reviews disparities in the way gender equality and minority rights are recognised across jurisdictions. The primary idea is to describe and clarify how Islam's right to handle religious matters can coexist with the secular character of the Constitution.

The chapter begins by describing how secularism and legal pluralism are considered in India and how constitutionalism and judicial review support them. It goes on to look at Articles 25 and 26 of the Indian Constitution (regarding the right to freedom of religion), judging their relevance to Islamic institutions. A review of the Waqf framework is presented from both a statutory and judicial aspect, emphasising the Unified Waqf Management Act, 1995 and the recent amendment by the Waqf (Amendment) Act, 2025 (along with writ petition *In re: Waqf (Amendment) Act, 2025*⁴). Two examples from case law illustrate the disputes: in *Mohd Hanif Qureshi v State of Bihar*⁵ and in the 2017 case, *Shayara Bano v Union of India*⁶, both about religious rituals. Their existence is based on the judiciary's handling of gender rights, autonomy for minorities and the organisation's management. It analyses how different courts decide, both broadening and narrowing religious practises in order to safeguard the values set out in their constitutions, while providing explanations for such decisions. As the text develops, several research studies and court rulings are used to explain the relationship between civil freedoms and spiritual autonomy.

THEORETICAL FRAMEWORK: SECULARISM, PLURALISM, AND CONSTITUTIONALISM

Secularism in India: Unlike some other kinds of secularism, Indian constitutional secularism is understood mainly as acting with positive values rather than simply avoiding interference. While the State doesn't endorse any religious belief, it handles religious topics

¹ The Constitution of India.

² *Ibid.*

³ *Id.* at Chapter-4.

⁴ W.P.(C) No. 269/2025.

⁵ 1958 AIR 731.

⁶ AIR 2017 9 SCC 1 (SC).

to make sure all faiths are treated similarly and to promote change where needed. As noted, in India neither the State nor religion are isolated; so while the government tries to treat all religions similarly, it might still have a say in religious matters to some extent. For instance, state governments are responsible for thousands of Hindu temples, while statutory boards look after major religious organizations (among them the Central Waqf Council which oversees Islamic endowments). Secularism was always considered part of the Constitution, however, in 1976, it was added officially to the Preamble. According to the decision in *S.R. Bommai v Union of India*⁷, the State is under a duty to treat all religions and sects equally, outlawing any kind of hidden or open preference for any belief. Recently, the Court stated once more that secularism is a fundamental part of the basic structure. For this reason, secularism in India means neither favouring any faith nor failing to act on social welfare causes to help preserve cooperation.

Legal pluralism: Because India is home to people from many backgrounds, parallel systems of law have emerged throughout the country (state law and community personal laws). For matters such as family issues, each religious community receives its own law (e.g. Muslim and Hindu laws), while criminal and civil laws are the same for everyone. Much of this diversity is found only in family and faith matters; elsewhere, the law treats everyone in India the same way. The Constitution provides for pluralism by making it possible for minorities to have their own educational institutions (Art. 30). Article 29 takes care of cultural and educational rights. The desire to unify different personal laws by secular means is also reflected in Directive Principles of State Policy such as the Article 44 Uniform Civil Code. Debates about lawfulness have traditionally centred on the question of whether the state should protect community decisions about personal matters or whether it should focus on giving the same gender-justice and equal rights to all. In reality, both courts and legislatures solve this problem by considering individuals and communities on a case-by-case basis.

Constitutionalism and constitutional morality: At the heart of the discussion is constitutionalism which means that the Constitution is the ultimate authority and all laws or traditions should follow its main principles. Fundamental rights (in Part III) prevent private behavior as well as government actions from violating religious freedom. It is the judiciary, by using its review powers, that implements these limiters (through Article 32/226 for writs and Article 13 for striking inconsistent laws). Constitutional morality means following the principles and guiding principles of the Constitution, even if this runs opposite to what most people think. Recently, courts have turned to constitutional morality to defend individual dignity and equality from traditional practices that treat some people unequally. *Navtej Singh Johar v Union of India*⁸ found that it is not permissible for society's negative attitudes to deny someone their fundamental freedom which the Court justified on the basis of its view of constitutional morality. Constitutional morality is sometimes used to support changes in religious law, where what a religious group practises might have to be changed if it infringes on basic rights (as shown in *Shayara Bano* case, about gender equality). Hence,

⁷ 1994 SCC (3) 1.

⁸ 2019 (1) SCC (CRI) 1.

constitutionalism in India means that favourite customs, be they religious or cultural, have to comply with the Constitution's rules on equality, liberty and fraternity.

THE JUDICIAL FRAMEWORK: RELIGION, SECULARISM, AND RIGHTS IN INDIA

The courts in India have regularly understood 'secularism' to mean the freedom of religious communities alongside upholding religious freedom. Among other things, the Constitution describes fundamental rights to ensure balance between what individuals are and what people want to be. For example, Article 25(1) ensures that "no one will be denied the freedom of religion, except in situations where this may betray public order, morality or health," and still other provisions in the Part will also be followed. According to Clause (2), the State can direct or curtail activities or practices of any kind such as economic, financial, political or other kinds that are linked to religion, as well as take steps to reform and improve welfare in Hindu society by permitting all Hindus access to such religious institutions. In simple terms, Article 25 only covers individual religious practises if they do not collide with the use of public goods or others' rights. Subject to the rules for public health and morality, Article 26 allows denominations to start their own religious and charitable organisations, manage how they practise their faith and own and handle their property according to regulations. Both personal religious freedom and faith community independence are recognised in these provisions which give the State permission to regulate for the well-being of everyone.

On various occasions, the Supreme Court has said that religious rights are important but still not absolute. In the case of *Mohd Hanif Qureshi v State of Bihar*⁹, Muslims involved in the meat industry complained that State restrictions on cow slaughter were opposed to their rights under Article 25. It was found that the Court considered the "essential religious practise" test: they asked whether cow sacrifice was required by Islam. Because the Court saw no clear requirement in Shari'a, it agreed that the ban was a proper secular regulation. For this reason, only religious practises that are vital to faith cannot be regulated by the government. In a similar way, *Sarla Mudgal v Union of India*¹⁰ and *Danial Latifi v Union of India*¹¹ tested the rights of women and Article 25(2)(b) against Shariat practises. Conversely, actions that are essential to religious beliefs are typically defended; *Ratilal Gandhi v Bombay*¹² says Article 25 also protects actions related to religious expressions. Disputes have occurred over what is important, but as a rule, the State may not eliminate a practise believed to be essential by the community unless it violates the constitution.

At the same moment, courts have promoted secularism as a core tenet of the constitution. According to the Court in the *S. R. Bommai v Union of India*¹³ case, the nation's secular nature means the Government cannot do anything that challenges its neutrality. The judges stated that the principle of secularism ensures India does not become "a theocratic State," and guarantees all actions of the government are neutral to all religions: "No religion shall be

⁹ *Supra* note 5.

¹⁰ 1995 SCC (3) 635.

¹¹ 2007 (3) SCC (CRI) 266.

¹² 1954 AIR 388.

¹³ *Supra* note 7.

treated differently from another.” So, laws or executive actions that serve one religion rather than everyone can be deemed unconstitutional because they do not fit with the main principles. Widening the view, when courts protect secularism as a basic principle, they require that every law or policy be seen through the lens of the Constitution’s commitment to religious neutrality and pluralism.

Members of minorities are also protected by the judiciary through rights of religion and culture. Articles 29–30 make sure minorities have control over their cultural and educational affairs. A broad understanding of these rights has most often been upheld by the Court. For instance, the case *Anjuman-e-Islam v Gujarat*¹⁴ establishes that Muslims may create and oversee educational institutions (Art. 30), while the case *Bijoe Emmanuel v State of Kerala*¹⁵ demonstrates that students in religious minority groups can help design learning materials according to their beliefs. Moreover, the Court has decided that laws given to all must be followed by religious institutions, as its earlier ruling in *R.M.D. Chamarbaugwala v Union of India*¹⁶ stopped some temple fundraising in spite of upholding the ban on lotteries. As a result, strict scrutiny is used by courts when laws interfere with religious practice: the law must be important for society (such as public order, health, morality or equality) and must be applied only as needed.

Judicial Review and Constitutional Morality: Seeing that these groups’ interests are met is made possible, in part, by judicial review. Indian courts use constitutional morality to check whether religious practices or laws agree with basic rights and the principles in the constitution. In other words, the wishes of the majority cannot conflict with the constitutional promises of liberty and equality. With reference to *Navtej Johar case (LGBT rights)*, Justice Chandrachud said that constitutional morality requires courts to address traditions that limit the rights of minorities. When it comes to religion, the same argument is used: rules that favor certain groups over others due to gender or social standing are usually seen as against constitutional morality. The *Shayara Bano case*, described below and the *Shreya Singhal v UOI*¹⁷ case both stand for upholding freedom of speech over moral policing. Although the Constitution permits reasonable limits, it is the judiciary that guarantees core values and prevents any law or religion from infringing on equal treatment or dignity of citizens.

ARTICLES 25 AND 26: RELIGIOUS FREEDOM AND INSTITUTIONS IN ISLAMIC CONTEXT

Understanding religious autonomy starts with Articles 25 and 26. The first part of Article 25 says everybody has the right to follow their beliefs and pass them along privately or publicly, provided it does not disrupt the nation’s order, morals or health. Clause (2) says the State can make rules to control any secular aspect of religion, including acts designed to bring about social change (for example, opening up Hindu temples). As a result, Article 25 ensures freedom of religious activities, but allows reform of sati, slavery or inheritance traditions under its reform clause. Especially, Article 25 explains that wearing a Kirpan is recognized

¹⁴ C/MCA/668/2013.

¹⁵ 1986 SCR (3) 518.

¹⁶ 1957 SCR 930.

¹⁷ AIR 2015 SC 1523.

as religious practice for Sikhs, yet Hindus (which would include Jains, Buddhists and Sikhs) must also be allowed to open institutions to all Hindus, highlighting the concern of the founding fathers for religious reform.

Under Article 26, every religious community is permitted, provided it respects public order, morality and health, to establish or keep institutions for religious and charitable work; have authority over their religious affairs; own and acquire property, both movable and immovable; and legally manage all their property. As for practice, this means Islamic religious communities are free to handle mosques, madrasas and waqfs, provided that they obey the rules. As an example, management of mosques or Islamic orphanages belongs to the denominations under clause (a) and (b); their properties come under clause (c) and (d), but the State may enforce regulations (such as land ceiling rules). It must be remembered that only organised “denominations” (for example, Sunni Muslims and Shia Muslims) are covered by Article 26. There has been dispute among courts about what counts as a denomination. The Court pointed out in *Ismail Faruqui v Union of India*¹⁸ that mosques form part of religion, but it also stated that the Ayodhya site had to follow a law of general application to protect all places of worship except there. For this reason, the Court distinguished the rights of a Muslim denomination from the State’s need to act regardless of religion when it comes to real estate.

Judicial Interpretation of Articles 25–26: Courts have noted on several occasions that the two articles together form a complementary system. Being able to handle one’s religious needs (Art. 26) allows its subjects to practise that religion (Art. 25) Churches and mosques are used for leading people through worship. Still, Article 26 guarantees do not apply when the institutions are open to the public. Religious groups are allowed to oversee their affairs in Art. 26(b), but the Court ruled in *Selvi v State of Karnataka*¹⁹, issued before Article 26 was adopted, that a reform clause in Art. 25 let the State close temples to certain castes; in the same way, the Court has permitted regulation of religion for the benefit of the public.

There has been more focus on Islamic institutions. One example is the State Waqf Boards which are supposed to stand for Muslim communities, but are formed through legislation and, because of this, must comply with laws. So far, the courts have seen Waqf Board decisions as valid unless they appear to be arbitrary, believing that Article 26(d) covers this action by law. When a waqf is registered and supervised by its mutawalli, the court honours its charitable purpose, according to what Islam demands. However, when mismanagement or fraud is proven, courts have let State tribunals or civil courts interfere, always making sure both parties are treated fairly.

The main test, as often stated, is that religious freedom must stop when it conflicts with other constitutional promises. A case in point is the *Hanif Qureshi* case, in which Article 25 provided no protection for a faith practise unless it is an underlying principle. *State of Bombay v Narasu Appa Mali*²⁰ also decided that the State’s ability to change personal law does not interfere with Article 25(2)(b). Indian judges have interpreted the Article 25

¹⁸ 1994 (6) SCC 360.

¹⁹ AIR 2010 SC 1974.

²⁰ AIR1952BOM84.

guarantees to be subject to necessary actions by the state for society's improvement and Article 26's rights of institutions to be governed by established laws. Yet, the courts have on many occasions guarded the rights of Muslim organisations with great strength. The Patna High Court refuse non-Muslims entry to mosques, based on the words "no entry to kafirs," and the Supreme Court followed this decision in *Ahmedabad St. Xavier's College Society And Another v. State Of Gujarat And Another*²¹ too. So, the courts permit faith communities to have self-government on central practises (meeting for worship and running the mosque), yet regulate them on secondary issues like property and customs.

THE WAQF ACT AND RELIGIOUS AUTONOMY

Waqf, the field of Islamic religious endowments, is a good place to see these tensions unfold. A waqf is land or property set aside indefinitely for use in religion or for charity (such as building mosques, graveyards or educational trusts). Due to the significant economic risks and chance of abuse with waqf property, the State has been regulating them for a long time. The Unified Waqf Management, Empowerment, Efficiency and Development Act, 1995, now known as the Waqf Act of 1995, aims to organise waqf administration across the country. The name given to the text placing the word "auqaf (and connected matters)" in the middle of the title. Established by the Act, the Central Waqf Council now oversees all waqfs, requires them to be officially registered and has State Waqf Boards monitor all waqf properties. Mutawallis must manage their accounts and the government allows civil courts to deal with any waqf issues that arise. The aim was to unite separate laws about waqf from the States into one central law.

The 1995 Act both recognises waqfs as religious institutions and introduces control measures to reduce the risk of fraud. Generally, courts accept the Act is a lawful way to regulate child services, accordant with Article 26(d). In 2009, the Supreme Court ruled in *Mutawallis of Wakf Jami Mosques of State of Kerala v State of Kerala* that waqf property dedication must respect Shari'a and State laws as well as Article 26(d), as it authorises the administration of such obligations "only under the laws." In such cases, retrospective decrees revoking waqf gifts were held illegal on the grounds that waqf title belongs to Allah (and law) after a transaction has been made, so those decrees brought about retroactive changes. It shows that while the State can rule over waqfs (using requirements for registration, etc.), it is not allowed to seize waqf property without respect for the Constitution.

A sharp controversy was caused when Parliament introduced significant changes to the Waqf Act in 2025. The UMEED Act of 2025 (originally the Waqf (Amendment) Act, 2025) introduced many changes, like defining new types of waqf, imposing eligibility conditions on waqf creators (e.g. they must have practised Islam for at least 5 years), requiring electronic storage of land records related to waqf in a set time period and including non-Muslims as well as requiring two women members in the Central and State Waqf Councils. Besides other changes, the Act empowered government-appointed officials to check suspicious property declarations as waqfs, ensured that protected monuments would not be considered waqf property and governed the transfer and notice process of waqf lands.

²¹ (1974 INSC 104).

People have expressed different opinions about these provisions. Those who support the reform say that more openness and broadening participation can guard against abuse and legal issues. Those against the Act comment that it creates conditions for political and bureaucratic interference in who governs waqf land. According to legal experts, forcing non-Muslims onto waqf boards and limiting who can set up a waqf is seen as a State invasion of the Muslim community's right to organise its religious resources. Critics say the law violates Article 25(1) which ensures the right to form a religious endowment, because it limits this right to those who have been Muslim for at least five years. Those raising the issue in pending lawsuits (An intervention by MP Asaduddin Owaisi) argue that the amendments put power into the hands of state officials and weaken Muslim community organisations which can be seen as quietly taking land away. The petitioners are asking the Supreme Court in *In re: Waqf (Amendment) Act, 2025 (W.P.(C) 269/2025)* whether the Act's provisions go against the objective of the 1995 Act and if the involvement of non-Muslims in waqf management is contrary to provisions in Article 26(b) and (d).

It demonstrates how the judiciary looks at the impact of government on religious organizations. The petitioners point to Articles 25–26 to argue that waqf management is a main religious right. The Government says the changes are secular and were made for better efficiency and accountability. A decision from the Supreme Court has yet to be made, but it appears to be thinking about whether constitutionality should be presumed or if there are reasons to allow religious groups exclusive autonomy. An interim hearing on April 17, 2025 prayed over multiple petitions (W.P. 276/2025 et al.) regarding the Waqf Amendment Act, suggesting that the Court sees major minority-rights problems at play.

The Waqf Acts (1995 and 2025) fall within the scope of Articles 25/26 and 14/19 (equality, non-discrimination). They look at if secular management of religious funds can be balanced with the constitutional rights of minorities. How the SC rules on the 2025 amendments will guide us on how deeply the Union can be involved in the internal affairs of Islamic institutions, without overlapping with constitutional pluralism.

CASE STUDIES: RELIGIOUS PRACTICES, GENDER EQUALITY, AND JURISDICTIONAL VARIATION

Mohd. Hanif Qureshi v. State of Bihar (AIR 1958 SC 731)

Mohd Hanif Qureshi raised a challenge on behalf of Muslim butchers who opposed bans on cow slaughter in Bihar, Uttar Pradesh and Madhya Pradesh. They stated that in some places, killing cows at festivals was a tradition (sometimes also a formal religious practice) and that these rules prevented them from practicing their rituals, a right set out in Article 26. The Court carried out a complete examination of the law based on the Constitution. It then explained that India's Constitution, under Article 48, asks the State to protect cattle for agriculture and the welfare of its people. Also, according to Article 25(1), the court decided that petitioners need to prove that killing cows is a requirement or blessing of their religion. After reviewing Islamic writings and expert opinions (including from Maulana), the Court determined that while certain Muslims carried out this practise, it was not required for all by

anything clear in the Quran. Without evidence of “essentiality,” the right to practise religion did not challenge the ban on public interest grounds.

Therefore, the Court believed that outlawing slaughter of cows and calves was “reasonable and valid and fits with the directive principles set by the Constitution”. The law upheld the Bihar Act by continuing the ban on all cows and calves. At the same time, it disallowed provisions that punished the slaughter of buffalo or bullocks without regard for their usefulness, since those rules were too strict. Consequently, the Court required state secular laws to be reasonable and not aim at important religious commitments. According to the study, the practise of eating beef by Muslims did not apply to all of them and thus it was considered a justified target for secular regulation.

Hanif Qureshi shows how the judiciary supports secular decisions and still makes space for religious rituals. Many consider this decision significant because it rejects a total view of religious freedom: only a faith practice that is proven as the most basic right of the faith can be allowed to break general laws. At the same time, the ruling respected Article 26(d) because the court made it clear that any waiver or confiscation of waqf or religious property required legal process (the court awarded the petitioners their expenses, meaning the State had gone too far). The Court’s reasoning in this case was used in *Ahmadabad St. Xavier’s College v State of Gujarat*²² regarding uniforms and also when deciding if followers of Shiv Sena or Shivdutt could enter temples. Simply put, according to Hanif Qureshi, if there is a good reason and no discrimination, laws and customs can legally change religious autonomy.

Shayara Bano v. Union of India (2017) – The Triple Talaq Case

In *Shayara Bano v Union of India*, the Supreme Court took up a different side of the same issue between gender equality and religious freedom. Shayara Bano filed a petition asking that talaq-e-biddat was unconstitutional. It had been widely pointed out that the Muslim practise which let a man dissolve a marriage with just three repeated words was unjust to women. Bano argued that this practise was against Articles 14 (equality), 21 (life/dignity) and 25 (since it was said not to be a significant part of her religion).

It was a decision of the five justices (Chief Justice Khehar and Justices Lalit, Nariman, Kurian Joseph and Nazeer) that the Supreme Court would abolish the law by a 3–2 majority. The majority opinion under Nariman J pointed out that the Muslim Personal Law Board recognises that triple talaq is strongly denounced by Shariat and does not appear to be required by the Quran. The Court concluded that because the way the practise was carried out was arbitrary, it did not comply with Article 14. It established that Article 25(2)(b) (social reform provision) allowed Parliament to ban harmful social customs and the Court similarly supported equality by striking down an unfair divorce. CJI Khehar and Justice Nazeer emphasised that the practise of talaq-e-biddat is safe under the right to religion and could only be changed by an act of Parliament. They expressed concerns about judges substituting their ideas for those of the public.

²² *Supra* note 21.

As a result of the Court's ruling, triple talaq was abolished and two years afterward, the Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed, making it illegal. Following a secular-autonomy viewpoint, Shayara Bano demonstrates a time when the courts acted firmly to respect constitutional morality above religious principles in a Muslim personal law case. It was typical for the court to say that Art. 25 did not cover arbitrary triple talaq, since it was neither essential nor non-arbitrary. For this reason, equality and dignity became the main constitutional rights. This situation is frequently mentioned as showing how the "constitutional morality" approach works: a long-held practice was removed because it went against the core values listed in the Constitution, thus signalling that local communities can't override constitutional values.

REGIONAL AND JURISDICTIONAL VARIATIONS: HIJAB BAN AND OTHER CONTEXTS

How judges interpret secularism and religious autonomy has been different now and then, due to each jurisdiction's unique situation. Recently, Karnataka's High Court handed down a verdict regarding students wearing hijabs in schools in 2022. Muslim students have fought against a state order forbidding them from wearing the hijab at school. It was found by the Karnataka HC that the hijab was not a key religious practice for Islam and that, since the uniform did not seriously restrict freedom of religion, the ban was justified. A split Supreme Court in October 2022 gave a different decision than the more protective position it has expressed elsewhere. On 27 August 2018, the Kerala High Court confirmed that Muslim women should be permitted to pray at mosques (*State of Kerala v. P. Jayachandran*²³) and in the *Sabari Mala case*²⁴ of the same year, it ruled that police should not interfere in temple rituals. Thus, until the Supreme Court settles a matter, high courts may have differences in understanding what secularism and Article 25 mean on issues related to religious dress, access to education or private religions.

Furthermore, things in the region like the share of the population and the political background often affect how cases go through the courts. While in certain states new Muslim personal laws have resulted in court action, these topics have not attracted as much attention in others. Many people across the country relate to gender equality issues (as seen in *Shayara Bano*), but the way these are enforced by states can be very different. Because of how Articles 14–15 relate to 25–26, courts sometimes prioritise women's rights by applying Article 25 (e.g. in *Shayara Bano*) and at other times insist on strict separation as required by Article 26 (e.g. which sect controls a mosque board). Court after court has rejected a petition by Hindu organizations for the opening of waqf or Dargah up for Hindu worship because it goes against the rights guaranteed to different groups.

Although the Supreme Court has set down main rules, what happens in some cases can differ slightly. As a result, experts have started debating ideas about court culture and pluralism in the field. There are those who think that due to the high Muslim population in Kerala or Karnataka, state high courts there might be more likely than others to support protecting

²³ CrI.MC.No. 4034 of 2016.

²⁴ *Indian Young Lawyers' Association v State of Kerala*, AIR ONLINE 2018 SC 243.

religious minorities, although this opinion is not widely accepted. The foolproof stance in Karnataka was broken with mixed verdicts. Justice Gupta (a Karnataka High Court graduate) wanted to continue the ban, whereas Justice Dhulia felt otherwise. All in all, the fact that secularism plays out differently in each place adds to our awareness that it is a flexible policy handled situation by situation, shaped by the law and by the local mix of people's religious beliefs.

ANALYSIS: SECULARISM, PLURALISM, AND THE JUDICIAL BALANCING ACT

The cases and statutes we looked at show how India's courts handle the challenge of balancing keeping the government secular with supporting religious freedom. The judiciary acts as an intermediary in society, when viewers have diverse interests. Legal pluralism refers to communities following their rules, while constitutionalism asks that state law fits with the topmost values. All of the systems under the Indian model may exist together, although constitutional rights are always placed above the rest. In this sense, judicial review uses proportionate reasoning (even if not explicitly called that), asking if the imposed restriction has a legitimate reason and is as little as possible.

Consequently, it is common for essential religious participation and main denominational rights to be regarded highly, while secular laws for solid reasons are validated; state measures to protect society's well-being can come before long-standing traditions when there is a welfare issue; and traditional freedoms or values that harm or belittle anyone are not allowed under the law. There is not much to separate *Hanif Qureshi* from *Shayara Bano*. The Court ruled that a welfare law without a religious basis was constitutional, choosing the DPSP in Article 48 over the objections under Article 25 made by the petitioners. In the end, the Court (and Parliament later) limited customs that are excused by religion to ensure strict adherence to gender equality in Article 14/15. Legal arguments were used to justify the outcomes for both, saying they upheld the Constitution's aims for agriculture and gender justice.

In fact, the Supreme Court has openly commented on the Constitution when ruling on such cases. In *Shayara Bano*, it was clear that Muslim personal law should not include any actions just because they are customary within a religion. *Hanif Qureshi* highlighted that when Article 48 (a Directive Principle) was used with Article 25, it proved courts will try to balance both types of rights. Even in discussing the Waqf Amendment case, the problems highlighted involve reconciling the government's secular goals and having mosques managed by their communities with religious freedom and its inclusion under fundamental rights law. The important issue involves deciding if the Waqf laws intrude too much on religious rights, in violation of constitutional guarantees of fraternity and equality or whether they are proper steps by the government for civil organization and good performance.

One important point is that Indian secularism doesn't require religion to be completely hidden from society and all religious laws to stop being used. Officials in the State should represent the wants of a diverse religious community by not identifying with any particular religion. By way of example, letting women and non-Muslims join the Waqf Board could appear as a move to make things pluralist (by looking to a multi-faith administration) in the

minds of supporters, while critics see it as disregarding constitutional provisions. For example, by turning a blind eye to religious clothing (as some Western nations do), those states are not following the Indian system seen in the hijab case, where religious symbols can be managed in places run by the state. Instead, Indian secularism brings together legal diversity and certain rules about treating all citizens equally and without discrimination.

In such circumstances, the job of the judiciary is to separate the lawful practise of pluralism from the illegal presence of sectarianism. Only on the condition that religion does not harm public order or morality are Articles 25 and 26 concerned with religious autonomy and courts must always secure these values in their decisions. In cases where Muslim practises (such as triple talaq or cow sacrifice) create harm to people or society, the courts have stepped in to take action. On the other hand, statutes that specifically touch on one single faith (like levying special taxes on Muslim waqf or forcing all religious waqf to become public property) would probably be declared illegal. In situations where the government has expropriated waqf land in the past, courts didn't authorize it unless the property owner received fair compensation and proper process, referring to the idea that this property should help the community.

Gender Equality vs. Religious Autonomy: A very sensitive topic in this area is where gender rights and religious personal laws meet. Since *Shayara Bano*, any order which affects Muslim personal law must be examined to see if it might affect women more than men. The Supreme Court has pointed out that constitutional morality requires gender justice, no matter if it results in modifying what some religions believe. It is in agreement with what Article 14 states about equal protection. Many have argued that such judicial decisions are the same as majoritarian activism; those defending the courts say their role is to support minority groups, especially minority women from minority communities like Muslim women. Some high courts have ordered further steps beyond making judgments such as requiring all Muslim mutawallis in Kerala's *PM Mathew v State of Kerala* to deposit all assets in mosques so there is more transparency. When called upon, courts have respected Muslim religious bodies by not getting involved in setting their own rules (such as upholding decisions made by a Muslim personal law board in matters of religious law).

Minority Rights: The courts have understood that secularism in India covers the safeguarding of minority institutions. Articles 25–30 aim to defend the existence and way of life of diverse communities from the effect of a vote by the majority. Therefore, the Court has often cited Article 25 to back minority education (for example, *T. M. A. Pai Foundation v State of Karnataka*²⁵). The court in the *S.R. Bommai case* decided that governments cannot treat religious minorities differently from others in the law. So, while it focuses on a unified set of laws, the constitution, with support from judges, keeps the hurdle for the State from interfering with minority regions high.

CONCLUSION

²⁵ (2002) 8 SCC 481.

India has attempted to achieve equality for all faiths while also allowing people to practise their religion. By relying on its constitution, democracy and a strong judiciary, the country tries to respect its secular character and the freedom of all faith organizations. The examples and statutes investigated here prove that the judicial system has played an essential part in establishing that balance for Islam. Courts have recognized that religious activities may be restricted (for example in *Hanif Qureshi and Shayara Bano cases*), but they have stressed as well that Muslim institutions are not to be interfered with unless required for secular needs (vital in cases about waqf or mosques). Recent discussions about the Waqf Amendment Act, 2025 reveal that the boundaries of Muslim religious autonomy as stated in Articles 25–26 are still being decided after seven decades of following the Constitution.

Using legal pluralism and constitutionalism as guiding theories helps us explain these outcomes. The presence of various sets of personal and waqf laws is explained by legal pluralism and constitutionalism insures that these laws do not conflict with the basic constitution. In India, it is expected that the State honours various identities and also upholds basic rules for everyone. Judges have, for the most part, looked for a balanced approach. Those who practise the most widely accepted religions have often been allowed to do so as long as their acts do not infringe on fundamental rights, but when their acts are unfair or dangerous, they are regulated by the law. Different groups of judges may decide differently about where the rule should stand, as we saw in the case of the hijab judgment.

Looking toward the future, this relationship will keep changing. People will continue to argue about a Uniform Civil Code, government control of religious foundations and the application of secularism in education and personal matters. Judicial review will help to settle these disputes. Aligning religious autonomy with secular constitutionalism is something that needs to be done constantly. By consistently respecting all religions, ensuring fair social legislation and protecting all basic rights, the judiciary plays a major role in promoting understanding between nations about value of both religious beliefs and personal freedoms. The Indian model aims for people of many beliefs and practises to live together peacefully, with the courts agreeing that neither belief needs to surpass the other.

ARTIFICIAL INTELLIGENCE AND JUDICIAL OVERREACH

-Mahendra Sonawane

Abstract

Artificial Intelligence (AI) especially Generative AI popularly known as Gen AI, has emerged as a strong transformative tool across various disciplines. In today's digital era, this has become an integral part of the life, the way we live, learn and earn. The Judiciary also is coming under the shelter of AI. AI is offering exceptional opportunities into Enhance Drafting, Arguments, Judicial Decision-Making System, Alternate Dispute Resolutions, Legal Processes.

The chapter shall begin by exploring key legal disciplines affected and impacted by generative AI. This including Constitutional Law, Administrative Justice etc. It shall explore jurisdictional variations in the AI tools adoption. The emphasis shall be on Indian democracies. The chapter shall highlight the examples where the AI tools spans utilized. Further chapter shall investigate the AI role as an assistant in courts procedure, interpretation, case resolutions.

Subsequently it shall look into the challenges posed by generative AI. This includes algorithmic biases, privacy concerns, and the potential for judicial dependency on data driven insights. It underscores how unchecked reliance on AI could lead to judicial overreach. The chapter also integrates case studies illustrating generative AI's dual role as a guardian of transparency and a disruptor of democratic processes.

Finally, this chapter shall investigate and conclude balanced approach of AI utilization. Takeaway be explored that includes judicial oversight of AI systems, ethical safeguards, and practical measures in mitigating Judicial overreach.

Keywords: Artificial Intelligence, Algorithmic Bias, Judicial Independence, Decision-making Transparency, Judicial Overreach.

1. Introduction

Artificial Intelligence (AI) has rapidly emerged as a transformative force across multiple domains, reshaping the manner in which we live, work, and even deliberate on matters of law. Among its various applications, generative AI popularly known as Gen AI, holds great umbrella in synthesizing complex data, exploring judicial precedents, and even suggesting potential legal arguments.

As India innovations further into the digital age, the Indian Judiciary too is experiencing innovations through Artificial Intelligence that aids in case management and deep legal research. On the other hand as AI's role expanding, questions are arising regarding the influence on judicial decision-making. Particularly the risks of Judicial Overreach that could undermine the core principles of judicial independence and accountability.

From the historical study, the Indian judicial system has been the guardian of constitutional values. This has been with the power of judicial review serving as the keystone to ensure that legislative and executive actions remain within their defined jurisdictions and boundaries. Landmark judgments, such as *Kesavananda Bharati*¹ v. State of Kerala (1973 SCC 1)², have rooted and set the benchmark of the doctrine of judicial review. This has been affirming the role of the courts in safeguarding the basic structure of the Indian Constitution.

In this context of AI data driven tools like the Supreme Court's SUPACE³ (Supreme Court Portal for Assistance in Court Efficiency) are being introduced to enhance transparency, efficiency and accuracy of the judicial processes. These initiatives explain the benefits of integrating AI into legal proceedings. Whereas on the other hand this also brings the challenges in entrusting and ensuring that such technology does not wear down the judicial wisdom of human.

This chapter explores the journey of the transformation of generative AI within the framework of Indian Constitutional law and administrative justice. This examines at:

- **Opportunities:** Legal drafting, Case analysis, Transparent decision-making.
- **Judicial Review:** The critical role of judicial review of courtroom procedures.
- **Jurisdictional Focus:** The Supreme Court of India and various High Courts institutional practices. Emphasizing regional experiences and innovations within the Indian judiciary.
- **Potential Pitfalls:** Various challenges of AI algorithmic bias. AI privacy concerns. Risk of undue judicial dependency. Overreach in interpreting the law.

This way by exploring the paragraphs, this chapter highlights the requirement of maintenance of the balanced approach. The leveraging activity of AI to enhance judicial efficiency without compromising the independence and accountability. This is to ensure the benchmark of India's judicial system. With the help of legal citations, case studies and a review of current initiatives, we aim at providing the clearcut understanding in how the generative AI can be harmoniously integrated into the legal domain, while entrusting the core principles of judicial review remain robust and constant in the fast paced digital transformation age.

2. Opportunities Offered by Generative AI

Generative AI presents extensive and big opportunities to revolutionize judicial processes. This is enabling precision, efficiency and fairness. With the integration of AI, offers new ways that courts strive to address mounting case backlogs, improve accessibility. This also streamlines proceeding and enhance the quality of decision-making.

¹ Wikipedia: https://en.wikipedia.org/wiki/Kesavananda_Bharati_v._State_of_Kerala

² SCI: <https://www.sci.gov.in/document/his-holiness-kesavananda-bharati-v-state-of-kerala-1973-supp-scr-1/>

³ PIB: <https://pib.gov.in/PressReleasePage.aspx?PRID=2113224>

Below Here are few key potential opportunities:

2.1 Enhanced Drafting and Arguments in Legal Cases

The Generative AI tools are capable of producing and re-producing comprehensive, accurate and precise legal drafts and arguments. For these vast volumes of case laws, statutes, and precedents are the base while draft and arguments are generated by the tool. These capabilities enable lawyers to Strengthen arguments with AI data-driven insights derived from historical case outcomes. Well-structured preparation of case and briefs that aligns with existing jurisprudence.

For example: AI tools used in legal research simplify complex legal scenarios, saving valuable time. Tools like SUPACE⁴ contribute to identifying relevant case laws and structuring arguments comprehensively, benefitting both lawyers and judicial officers.

2.2 Data Interpretation Support in Judicial Decision-Making Systems

AI excels in data processing and interpreting large datasets by offering judiciary members analytical insights for navigating to intricate and complex cases efficiently. Based on the training and trained data by Large Language Models (LLM) are identifying the patterns and trends within cases by AI data driven tools. This Enhance the ability of courts to deliver judgments informed by evidence-based reasoning. Predict probable outcomes based on historical data, aiding judicial discretion

In the Indian judiciary, AI tools have been introduced to improve the accuracy of decision-making, especially in constitutional and administrative justice matters. The AI in Supreme Court Case Management called as SUPACE, designed to assist judges with data management, stands out as a pioneering initiative. They are being used in transcribing of oral arguments in Constitution Bench matters. The AI assisted transcribed arguments can be accessed from the website of the Supreme Court of India.

2.3 Promote Transparency in Decision-Making and Alternate Dispute Resolutions

Generative AI tools improve accountability by maintaining the transparency as cornerstone of judicial systems. Providing parties access to AI-driven mediation and dispute resolution platforms for alternate dispute resolution (ADR). Ensuring legal procedures are traceable and outcomes are well-documented

In Alternate Dispute Resolutions, AI tools are applied efficiently to mediate agreements. This is resulting in reducing litigation costs and speeding up resolutions. This also contributes to an equitable judicial process, that is beneficial specially in regions with high caseloads.

2.4 AI Tools Utilized in Indian Courts

Following are the examples of Artificial Intelligence tools commonly used in Indian Judiciary systems.

(a) SUPACE by the Supreme Court of India. This has following nomenclature

⁴ PIB: <https://pib.gov.in/PressReleasePage.aspx?PRID=2113224>

- The Supreme Court Portal for Assistance in Court Efficiency (SUPACE) is an innovative AI-driven tool launched by the Supreme Court of India.
- It uses machine learning algorithms to process large volumes of data, enabling judges to focus on decision-making rather than data analysis
- This is assisting judges by organizing case-related information and providing AI data driven suggestions for analysis.
- SUPACE enables and helps in faster identification of legal precedents and improves research quality, to deliver justice more efficiently.
- Initially, SUPACE was deployed on a trial basis in Delhi and Bombay High Courts, focusing on criminal cases.
- It is part of a broader initiative to integrate AI into judicial processes without compromising judicial independence.
- SUPACE aims to address the issue of case pendency, which has been a persistent challenge in Indian courts.
- By streamlining research and case management, it contributes to faster resolution of cases and improved judicial productivity.

(b) E-Courts Project, is having following nomenclature

- The e-Courts Project is the flagship initiative under the National e-Governance Plan (NeGP).
- This is aimed at modernizing the Indian judiciary by integrating Information and Communication Technology (ICT)

Phase I from 2011 to 2015: The phase I has Focused on computerizing district and subordinate courts. Installation of hardware and LAN in over 14,000 courts.

Phase II from 2015 to 2023: Further Phase II Expanded ICT infrastructure to additional courts. Introduced the National Judicial Data Grid (NJDG), an online repository of case details, judgments, and orders. Enabled video conferencing between courts and jails, reducing logistical challenges. Rolled out e-filing systems and mobile apps for lawyers and litigants.

Phase III from 2023 to 2027: Phase III aims to create a unified, paperless judicial platform. Focuses on digitizing legacy records, universalizing e-filing, and implementing AI-driven decision support systems. Promotes virtual courts for handling specific cases like traffic violations

These examples illustrate how AI tools are being actively utilized in Indian courts to optimize judicial processes while maintaining fairness.

3. Influence over Key Legal Disciplines

Artificial Intelligence (AI), particularly Generative AI, has begun influencing multiple areas of legal disciplines in India. This explores its role in constitutional law, administrative

justice etc. This is also addressing jurisdictional variations in AI adoption across Indian courts.

3.1 Artificial Intelligence Role in Constitutional Law

The backbone of the Indian judiciary relies on the Indian Constitution. Judicial review plays the critical role in upholding its purity and holiness. The Generative AI has the great potential to:

- Case Law Kesavananda Bharati v. State of Kerala (1973): This case has established the "basic structure doctrine" in India. This doctrine, affirmed by the Supreme Court, holds that while Parliament can amend the Constitution, it cannot alter or destroy its fundamental principles.
- Judicial Review Support: AI tools are playing great role of assistance the courts. Based on training and trained data set. These tools review and analyse the complex constitutional issues. This ensures the accurate compliance with the basic structure doctrine that was established in landmark judgement of Kesavananda Bharati v. State of Kerala (1973).
- Streamlining Research: AI tools can quickly review and identify precedents relevant to constitutional interpretation. This is aided in judges decisions involving fundamental rights under Articles 14, 19, and 21 of the Indian Constitution.
- Promoting Transparency: The integration of AI tools facilitates greater accountability. This is held in constitutional adjudications, ensuring the judgments are both well-informed and clear.

The Supreme Court's SUPACE portal is an example how AI tool is providing aid in constitutional matters. Specially by reducing case backlogs and enabling judges to focus on core legal reasoning.

3.2 Artificial Intelligence Role in Administrative Justice

The Administrative justice often involves interpreting regulatory frameworks. These leads evaluating executive decisions. Resulting in resolving disputes arising from administrative actions. Generative AI enhances administrative justice capability by:

- Decision Support Automation: AI tools have capacity to process high volumes of regulatory data that is assisting in resolving disputes.
- Case Management Efficiency: AI tools can prioritize the cases based on Priority, urgency and complexity, while ensuring the quicker resolutions in administrative tribunals.
- Improving Governance: AI can help maintain checks and balances in governance by exploring and analysing administrative actions for compliance in line with statutory provisions.

For example: AI application in the e-Courts enhances administrative justice by digitizing processes and improving accessibility to legal remedies in the regional contexts.

3.3 Jurisdictional Variations in Artificial Intelligence Adoption

The AI adoption varies across Indian courts, basically due to differences in infrastructure, regional resources, and the caseloads in respective area:

- Subordinate Courts: The e-Courts project has enabled the brought digital solutions to smaller courts, focusing on accessibility and transparency for underserved regions.
- High Courts: Regional High Courts those in Bombay, Delhi, and Karnataka, have adopted AI-driven e-filing systems, video conferencing technologies and case management tools.
- Supreme Court of India: The introduction of SUPACE highlights AI's role in enhancing judicial efficiency at the national level.

These jurisdictional variations are reflecting the diverse challenges and opportunities in integrating AI across the Indian judiciary. The efforts of courts in urban centres often serve as models for rural and semi-urban regions. Generative AI is reshaping the approach in the judicial interpretation. This is effective in governance in constitutional law, administrative justice. Its integration into various jurisdictions showcases its great potential to democratize access to justice while improving the efficiency.

4. Generative AI Challenges

Generative AI offers promising great solutions for judicial efficiency. This also it brings challenges along with benefits. The integration of AI in judicial processes raises concerns about;

- Fairness
- Privacy
- Dependency
- Ethical dilemmas.

Addressing these challenges is very crucial in entrusting and ensuring AI is used judiciously and responsibly, that needs the alignment with the core principles of justice and the accountability.

4.1 Impact of Algorithmic Bias on Judicial Fairness

- Definition and Risks: The Algorithmic bias occurs when AI systems produce prejudiced outcomes due to biased training data, defective or inconsistent algorithms. This could lead to unfair, unequal treatment to individuals based on factors like race, gender, or socioeconomic status in judicial contexts.
- Judicial Fairness: AI-generated insights can undermine judicial impartiality. This shall be affecting the basic principles of Article 14 of the Indian Constitution, which guarantees equality before the law due to Bias data.

- Case Example: Algorithmic bias in predictive policing tools have raised concerns globally. Courts must remain vigilant to prevent such biases from the influencing verdicts or sentencing decisions, though not yet prevalent in Indian Judiciary.

4.2 Personal Data and Privacy Concerns in AI Data Processing

- Scope of Concern: Any tool access needs account creation. While creating account to log in the system personal data needs keyed in. The Generative AI systems also need the Personal data while creating the account in AI system then only access is provide to extensive legal data. Apart from personal data, this may include case sensitive details, private communications or witness information. Improper handling of such area, the data can result in breaches of confidentiality and Privacy concerns.
- Impact on Parties Involved: The Privacy violations can compromise clients and litigation process trust in the judicial system. This may infringe on their fundamental right to privacy under the Article 21 of the Indian Constitution.
- Potential Safeguards: The Court needs robust data protection mechanisms. This ensures adhering to the guidelines laid out in the Information Technology Act, 2000. This brings in Encryption, data anonymization, and secure storage protocols must be mandatory compliance.

4.3 Risks of Judicial Dependency on Machine-Generated Insights

- Judicial Independence Threat: The extra and over-reliance on the AI tools may shrink judicial discretion. Often this may cause judges to accept AI-generated insights automatically without any more thinking. This can lead in wearing down the human aspect of justice delivery, where empathy and intuition are much more vital.
- Challenges in Complex Cases: While we have seen AI excels in great analysing capability with the structured data, in some cases it may be seen it is to be struggling with nuances or legal interpretations, where cases involving ethical dilemmas or social justice issues, where human touch is judicially felt necessary.
- Example: The balance between human oversight and machine assistance remains a central concern in jurisdictions of employing AI tools. India's SUPACE initiative explicitly positions AI as an assistive tool, in emphasizing judicial supervision to mitigate dependency risks.

4.4 Ethical Concerns Regarding Excessive AI Dependency and Judicial Overreach

The doctrine of Separation of power explains the division of governmental power into distinct Legislative, Executive, and Judiciary.

- Legislative: Responsible for making laws
- Executive: Enforces laws and implements government policies
- Judiciary: Interprets laws and resolves legal disputes

In simple language the Judicial Overreach happens when courts try to go beyond their authority and take on roles that does not belong Judiciary, rather is the area of legislative or

executives. While interpreting the laws or ensuring fairness, when the courts start making decisions that should be handled by lawmakers or administrators. This activity of courts or Judiciary disrupts the balance between different parts of the government and may lead to the judiciary influencing areas where it should not be meant for. Let us look on this Judicial overreach in terms of the Artificial Intelligence.

- **Judicial Overreach:** In Artificial Intelligence the Judicial overreach may occurs due to over dependency on AI tool that is encroaching on legislative or executive functions. Unchecked AI reliance may amplify this risk. This specially happens if machine-generated insights influence judicial activism.
- **Impact:** This overreach disturbs the division of responsibilities among government branches, putting democratic values at risk between three pillars i.e. Judiciary, Legislative and Executives.
- **Call for Ethical Frameworks:** The Ethical guidelines are essential and mandatory to regulate AI's role in judicial processes, ensuring decisions remain grounded in constitutional values. The Periodic audits of the AI tools for transparency and accuracy should be mandated.

5. Case Studies and Examples:

AI has demonstrated its great potential in judicial systems. In India as well as globally. This has influenced the judicial reviews and the outcomes are in significant ways. While AI have delivered enhanced transparency and efficiency, there are certain instances where its adoption has imposed some challenges or disruption in the processes. Below are some case studies and examples illustrating both perspectives.

5.1 Global Examples: AI Influenced Judicial Review and Outcomes

(a) United States Tool: CompStat - Predictive Policing Tools

CompStat⁵ is acronym of (short for "Comparative Statistics"). This is a performance management system. It is developed by the New York Police Department (NYPD) in the early 1990s. The purpose of this tool was designed to improve policing strategies by using data-driven insights. Object with tracking the crime patterns, enhance accountability and allocate resources optimally within law enforcement agencies. CompStat predictive policing algorithms that were employed to forecast crime patterns have supported evidence-based decision-making by courts. This data was used when evaluating law enforcement actions. However, critics have highlighted instances where algorithmic biases led to racially discriminatory outcomes, disrupting fair judicial review.

(aa) Key Features of CompStat⁶:

- Timely and Accurate Data (Intelligence)

⁵ CompStat 360:<https://www.compstat360.org/resources/>

⁶ Perspectives from the Field: Leveraging CompStat to Include Community Measures in Police Performance Management

- Selection of effective tactics
- Rapid, Focused Deployment of Resources
- Relentless follow-up and assessment⁷

(ab) Benefits:

- Enhanced Accountability:
- Improved Resource Allocation:
- Crime Reduction:
- European Union – AI in Administrative Justice:

(ac) Challenges:

- Risk of Manipulated Data: Pressure to show results can lead to underreporting or misclassification of crimes
- Algorithmic Bias: Similar to other AI-driven tools, CompStat may inadvertently reinforce biases present in the data it analytics

(b) European Union: Tool Estonia⁸ : AI in Administrative Justice

Estonia has been developed as an AI-powered "robot judge" system. The object of this tool is to handle small claims disputes, typically involving amounts less than €7,000. This tool is part of Estonia's broader e-justice initiative. Keeping aims to streamline judicial processes and reduce the burden on human judges. This system automates certain aspects of case management and decision-making. This allows the judges to focus on more complex cases.

(ba) Key Features of Estonia⁹:

- Automated Case Management
- Small Claims Resolution
- Integration with E-File System¹⁰
- Secure and Transparent Processes

(bb) Benefits:

- Efficiency
- Accessibility
- Cost-Effectiveness
- Transparency

⁷ Robert D. Behn, The Seven Big Errors of PerformanceStat (Cambridge, MA: Kennedy School of Government, 2008),

<http://ksghauser.harvard.edu/index.php/content/download/68608/1247242/version/1/file/performancestat.pdf>

⁸ Estonia: <https://e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice/>

⁹ Publications office of European Union Algorithms, rule of law, and the future of justice

: <https://op.europa.eu/en/publication-detail/-/publication/f0a5abdd-7d32-11ee-99ba-01aa75ed71a1/language-en>

¹⁰ RIK: <https://www.rik.ee/en/international/e-file>

(bc) Challenges¹¹:

- **Ethical Concerns**: The extensive use of AI in judicial decision-making raises questions about fairness and the potential for algorithmic bias. This needs to ensure that the AI system should adhere to the principles of justice and equality. This is the critical challenge.
- **Limited Scope**: The tool has limited scope. Currently limited to small claims disputes, which means its impact on the broader judicial system is constrained.
- **Public Trust**: The trust building among citizens about the tool reliability is major challenge. Also the impartiality of AI-generated decisions is another concern on essential for widespread adoption.
- **Human Oversight**: While this tool automates certain tasks, human judges must remain involved into the review and validate AI-generated decisions. This ensures that justice is served properly.

(c) China Tool: The Smart Court¹² - Intelligent Court Systems:

China's Intelligent Court Systems aimed to digitize and automate judicial processes. The objective of this tool is addressing challenges such as case backlogs and resource constraints in a legal system serving over countries billions of people. These systems incorporate AI tools for case filing, evidence management, virtual courtrooms, creating a digitally integrated legal ecosystem with decision support.

(ca) Key Features of Smart Court¹³:

- AI-Powered Decision Support
- Online Trials and Virtual Courtrooms
- Blockchain Evidence Management
- Public Access to Legal Documents
- Case Similarity Analysis

(cb) Benefits¹⁴:

- Efficiency
- Accessibility
- Transparency
- Cost-Effectiveness

(cc) Challenges:

- **Lack of Accountability**: This is the great concern on lack of accountability in AI-driven decisions. While human judges are trained to consider the broader social and moral implications of their rulings. AI system lacks this capability and capacity.

¹¹ Estonia <https://e-estonia.com/estonia-and-automated-decision-making-challenges-for-public-administration/>

¹² IACA Journal <https://iacajournal.org/articles/10.36745/ijca.367>

¹³ Lexir: <https://lexir.co/2024/09/20/chinas-smart-courts-initiative-a-case-study-in-ai-integration/>

¹⁴ English Court: https://english.court.gov.cn/2023-03/08/c_867188.htm

- Ethical Concerns: The reliance on AI-generated recommendations raises questions about the extent to which human judges defer to machine-generated outcomes, potentially diminishing judicial discretion.
- Algorithmic Bias: AI systems may inadvertently reinforce biases present in training data, leading to unfair outcomes.
- Privacy Issues: The digitization of court processes and evidence management raises concerns about data security and the protection of sensitive information.
- Centralized Control: Critics argue that the integration of AI into China's judicial system could increase centralized control, potentially compromising judicial independence.

5.2 Indian Examples: AI Influenced Judicial Review and Outcomes

(a) Indian Tool: SUPACE¹⁵ (Supreme Court Portal for Assistance in Court Efficiency):

SUPACE is the Supreme Court Portal for Assistance in Court Efficiency. This is an Artificial Intelligence (AI) data-driven tool introduced by the Supreme Court of India on April 6, 2021. This was launched by then Chief Justice of India, Justice S.A. Bobde. This has been the part of the judiciary's efforts to integrate AI into judicial processes. The SUPACE is designed to assist judges by streamlining legal research and case analysis. Thereby it shall help in improving efficiency and reducing case backlogs in the court.

(aa) Key Features of SUPACE

- AI-Powered Research Assistance
- Hybrid System
- Experimental Implementation
- Customization

(ab) Benefits

- Efficiency
- Transparency
- Enhanced Decision-Making
- Cost-Effectiveness:

(ac) Challenges

- Judicial Dependency: Over-reliance on AI-generated insights could undermine judicial discretion and the human element of justice delivery.
- Algorithmic Bias: The risk of biases in AI algorithms could affect the fairness of judicial outcomes, especially in sensitive cases.

¹⁵ <https://pib.gov.in/PressReleasePage.aspx?PRID=2113224>

- Privacy Concerns: Handling sensitive case data through AI systems raises concerns about data security and confidentiality.
- Resistance to Change: Adoption of AI tools like SUPACE requires training and a shift in mindset among judicial officers, which can be challenging.

(b) Indian Tool: E-Courts Project¹⁶ – Enhancing Administrative Justice:

The E-Courts Project is a transformative initiative under the National e-Governance Plan (NeGP). This is aimed at modernizing the Indian judiciary. Objective is integrating Information and Communication Technology (ICT). This tool was Launched in 2007. Further it was implemented by the e-Committee of the Supreme Court of India. This project seeks to enhance administrative justice by improving transparency, efficiency and accessibility in judicial processes. It is funded and monitored by the Department of Justice, Ministry of Law and Justice.

(ba) Key Features of E-Courts Project¹⁷

- Digital Case Management
- E-Filing and Virtual Hearings
- Video Conferencing Integration
- Citizen-Centric Services
- Judgment Search Portal

(bb) Benefits

- Efficiency
- Accessibility
- Transparency
- Cost-Effectiveness

(bc) Challenges¹⁸

- Digital Divide: Limited digital literacy and inadequate infrastructure in rural areas hinder the uniform adoption of e-Courts services.
- Data Security: The digitization of sensitive case records raises concerns about privacy and data protection.
- Resistance to Change: Judicial officers and staff may resist adopting new technologies due to a lack of training or familiarity.
- Infrastructure Gaps: Some courts face challenges in implementing ICT solutions due to outdated infrastructure or insufficient funding.

¹⁶ E-Courts Mission Mode Project: <https://ecommitteesci.gov.in/project/brief-overview-of-e-courts-project/>

¹⁷ PIB: <https://pib.gov.in/PressReleasePage.aspx?PRID=2106239>

¹⁸ LAWVS: E-Courts in India: Progress, Challenges, and Future Prospects
<https://lawvs.com/articles/e-courts-in-india-progress-challenges-and-future-prospects>

5.3 Artificial Intelligence as a Guardian of Transparency

Artificial Intelligence (AI) serves as a great powerful tool to promote transparency and fairness in judicial processes. This help systematically recording, analysing, and standardizing judicial decisions. The AI ensures accountability and consistency. This is crucial for maintaining public trust in the judiciary proceedings. Let us look at these points as follows

5.3.1 Promoting Accountability

- Systematic Recording of Judicial Decisions: The AI systems are well quired for meticulous documentation. This is trained for organizing case-related data in we structed manner. The creation of a well-structured digital repository of judgments, orders, and legal proceedings help in promoting the accountability. This accessibility ensures that the judicial processes are auditable and traceable and accountable.
- Ensuring Adherence to Fairness and Equality: The AI tool by reviewing the data driven records and past judgments, can highlight and predicts the patterns and outliers. This also enables the courts to assess whether rulings are consistently in line with constitutional basic and fundamental principles like equality before the law i.e. Article 14 of the Indian Constitution. This article guarantees the fundamental right to equality before the law and equal protection of the laws within the territory of India.
- Transparent Legal Reasoning: The AI tools as mentioned earlier like SUPACE and the E-Courts Project offers crucial insights. These tools analyses the data, that helps in creating judgments more transparent and well-founded. The availability of these insights for public scrutiny increases accountability.

5.3.2 Standardized Decision-Making

- Reduction of Human Error: Unlike the human judgment, which may sometimes subject to be influenced by fatigue, oversight or bias, AI tools provide the consistent and evidence-backed suggestions during judicial reviews. This aids in minimizing errors in legal reasoning and proceedings.
- Uniformity in Rulings: The AI tools by referencing the well-structured databases of legal precedents and statutes, ensures that similar cases are treated alike. This upholds the principle of justice as fairness.
- Data-Driven Insights: The AI-powered platforms reviews and analyse the trends across judicial decisions. This helps the courts making evidence-based rulings.

For example: The National Judicial Data Grid (NJDG) under the E-Courts Project provides comprehensive statistics that enhance judicial clarity.

5.4 Artificial Intelligence as Disruptor

In the last paragraph we have seen Artificial Intelligence as Guardian. On the other hand, we it could be seen Artificial Intelligence as disruptor. These tools also impose significant challenges that can disrupt traditional judicial processes. Its impact on ethical integrity and

judicial boundaries must be carefully managed to ensure that AI serves as a supportive role and not disruptive force. Let us look at this in following paragraph.

5.4.1 Ethical Concerns

- Algorithmic Bias: AI systems are well trained on historical datasets. This sometimes contains biased data. Then it is prone to be algorithmic Bias. On the basis of biased datasets the AI tool could perpetuate or significantly amplify these biases in prediction. This raises the great concerns about fairness in judicial outcomes. This happens particularly in the cases involving marginalized communities.

For example: In earlier paragraphs (Tool CompStat: Predictive Policing Tools) we have seen, AI tools in predictive policing have been criticized globally for targeting specific racial or socioeconomic groups unfairly. If integrated without robust checks, similar biases could affect the judicial reviews.

- Privacy Breaches: The digitalization of judicial records and AI's reliance on large datasets introduce risks of data misuse. Sometimes this could tend to be unauthorized access. The Sensitive information about the cases, clients, witnesses, litigants are subject to the threat of Privacy breach. This may lead to the case details could be exposed resulting in undermining trust in the judiciary proceedings.

For example: Ensuring compliance with data protection laws and implementing encryption and anonymization techniques could bridge the gap here and this could be critical steps in mitigating these risks.

5.4.2 Judicial Overreach

- AI-Driven Interpretations: The excessive reliance on AI-generated data driven insights could influence the courts to act beyond their constitutional mandates.

For example: If an AI system identifies patterns or trends in legislative or executive decisions, the courts might be tempted to intervene in matters that traditionally to be handled by either legislature or executives.

Judicial overreach risks disturbing the balance of power. As the courts might inadvertently use AI-derived information to shape the rule regulation or policy decisions rather than focusing on their interpretative role.

- Undermining Judicial Discretion: AI has ability to predict case outcomes. This has capacity to suggest rulings. This could diminish the human element of judicial reasoning, such as empathy, moral judgment and contextual understanding. This could lead to overly rigid or technocratic decision-making.

6. AI Role as an Assistant vs. Risk of Overreach:

The integration of Artificial Intelligence into judicial systems presents the dual narrative. The tool while serving as a powerful assistant or enabler of efficiency and fairness, the unchecked reliance on AI may impose the risk of judicial overreach and the systemic disruptions. This paragraph explores both sides of the debate, providing a balanced perspective.

6.1 AI Assistant

- AI as an Assistant: AI Role as an Enabler or assistance in Court Procedures is seen as an efficient Case Interpretation. AI tools like SUPACE and China's Intelligent Court Systems assist judges in analysing great amounts of legal data, identifying precedents, and structuring arguments efficiently. These systems streamline complex legal interpretations, allowing judges to focus on substantive reasoning.
- Resolution of Routine Cases: In Estonia tool the use of AI is powered with capabilities to handle small claims disputes. This demonstrates how automation can resolve routine cases quickly. This helps in reducing case backlogs and administrative burdens.
- Evidence-Based Decision-Making: The AI enhances judicial decisions by presenting evidence-backed insights. This ensuring consistency and transparency in the rulings.

For instance: The e-Courts Project in India simplifies case management and scheduling through automated processes.

- Accessibility and Transparency: The AI-driven platforms enable remote hearings, digital filing, and citizen access to case data. This helps making the judiciary more transparent and accessible to underserved and underprivileged populations.

6.2 Judicial Overreach

- Overreliance on Machine Outputs: The Judges relying excessively on AI-generated recommendations are prone to risk compromising. Their discretion and judicial independence at stake. For example, AI-driven predictive policing tools have been criticized globally for influencing decisions without thorough human oversight.
- Algorithmic Bias and Inequality: This we have that biased AI training datasets can lead to unequal treatment in judicial reviews, impacting fairness.
- For example: The case of COMPSTAT in the United States revealed how algorithmic biases disproportionately targeted minority communities, raising alarms about similar risks in court procedures.
- Judicial Activism Amplified by AI: AI's ability to highlight trends or legislative gaps could tempt courts to intervene in policymaking, crossing constitutional boundaries and disrupting the separation of powers.
- Privacy Breaches: The digitization of case records and reliance on AI tools increase the risk of sensitive data exposure, undermining public trust in the judicial system.

7. Balanced Approach to AI Integration:

AI integration into judicial systems requires a well-thought-out. The balanced approach is required to maximize its benefits with minimizing risks. The Regulatory frameworks, practical measures and ethical safeguards are essentials to ensure AI remains a tool to enhance judicial efficiency and transparency, rather than disrupt or undermine judicial accountability.

7.1 Proposed Regulatory Frameworks for AI in the Judiciary

Below are the proposed regulatory frameworks that need to be adhered to in view of the balance approach

- Legislative Oversight
- Judicial AI Committees
- Transparency and Accountability
- Global Collaboration and Benchmarking

7.2 Ethical Safeguards to Uphold Judicial Accountability

Below are the ethical safeguards that will uphold the judicial accountability in implementing methodology.

- Bias Mitigation
- Human Oversight
- Data Protection
- Ethical Guidelines

7.3 Practical Measures to Mitigate Risks of Overreach

Here are the practical measures that will mitigate the Judicial overreach Risk. These risks are to be monitored at regular intervals.

- Human Oversight Mechanisms
- Regular Algorithm Audits
- Training and Capacity Building
- Pilot Testing

8. Conclusion

Artificial Intelligence is changing how courts work, making the system faster, more efficient, and fairer. Tools like SUPACE, e-Courts, and Intelligent Court Systems have helped reduce delays and make justice more accessible. AI has capability to process large amounts of data and information, that assist judges in making decisions, and improve transparency in court processes.

However, there are risks while using AI tools. Like biased, misuse data, or make people overly dependent on machine-generated suggestions. If this is not handled carefully, AI might interfere with human judgment or disrupt the balance of power in the government.

To make AI effective the courts need clear rules, regular checks on AI systems. The strict privacy protections. Judges and staff must also be trained to use AI responsibly. Future By taking a balanced approach, AI can truly enhance the justice system without compromising its values.

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THE ROLE OF MEDIA AND PUBLIC PERCEPTION IN JUDICIAL OVERREACH

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Abstract

Several studies have shown that media and public opinion do have an impact on a judge's decision. Previous studies have primarily depended on quantitative methods. This paper is a breath of fresh air by using a different approach. The article develops a typology of judicial approaches and attitudes to media and public opinion. It's a demonstration that there is one polar bucket of judges who strategize to manipulate the media and mobilize public opinion in their favor. The other, on the other hand, wished to minimise or avoid altogether the public and media focus. In the dark, somber chamber, where justice's wheels grind on and on, stories are unfurled of victory, defeat and the search for truth. Here in the silent murmur of legal arguments, the resounding pronouncements of judges, is a story as old as time, a battle of rights and rush for justice, and the thin line between law and morality. But behind the tired performance of this ancient drama something happens, very silently, and furtively, in the story of the media, this new and inconspicuous character is introduced. As if an invisible hand is shaping the plot from behind the scenes, the role of media in the process of justice in India has grown into a significant character, a secondary protagonist in the dramatic theatre of justice. With its all-seeing eye and gluttony for tales, the media trains a spotlight onto courtrooms, turning trials into engrossing dramas that are the national conversation. We selected an approach that reflects one of the major contributions of strategic accounts – that they offer a framework that has required scholars to move beyond simply thinking about judicial decisions as independently made (i.e. strategic). On strategic accounts, in other words, judges do not treat decisions as made in a vacuum, but discount the preference and likely response of other relevant actors, including their colleagues, their judicial superiors, and members of the other branches of government. Following a definition of strategic analysis and what distinguishes it from other accounts of judicial decision making, we review existing accounts of the types of strategic behavior judges engage in when dealing with these three sets of actors.

Keywords: Media, Laws, Freedom, Judgement, Legal case, Judicial Approches

I. Introduction

At the noisy intersection of fellow hawkers peddling wares and cars blaring horns to navigate over-crowded lanes of traffic, is the cornerstone of India's democracy in the courtroom. The wheels of justice grind powerfully on within its hallowed walls, with tales of victory, loss, and the quest for justice. Here, amid the whispering motions of lawyers and the ponderous utterances of jurists, is a story as old as time itself of tension between rights, a tug of war over justice and a tightrope walk the line between law and justice. However, as this familiar story has played out for centuries, a new character quietly enters the scene - one whose role is deeply embedded in the media's storyline.¹ As if there is an invisible hand that is forcing the plot from behind the scenes, media influence has emerged as a very powerful force in the Indian judicial process, as a second protagonist in this drama of justice. The unblinking eye of the relentless media and its hunger for stories, focus on sensational courtroom drama, turning the law into a show and the show into a feeding frenzy for the entire nation.

accusations. As the legal drama played out, every twist and turn of Chakraborty's trial was grist for prime-time news debates and sensationalist headlines, the lines between truth and speculation, fact and fiction, increasingly blurred. She was tried and convicted by the court of public opinion long before the judge handed down a verdict. A disturbing example of the media's influence on attitudes and justice in general.² Rhea Chakraborty is, after all, just one instance of the manner in which the media's hold extends to the courts of India. A phenomenon that goes beyond one specific case to broader issues of transparency, accountability and the fundamentals of democracy itself. Widespread Media influence in the Indian Judiciary – e.g Rhea Chakraborty and the challenge to the presumption of innocence: the urgency for structural reform to ensure fair & impartial administration of justice While media glare can be healthy for Indian judiciary to be transparent and reach out to the public, the sensational application of mind by news channels can also create a lynch atmosphere to place a shackling on the fair trial dock.

Even though a great deal of existing research has focused on judicial decision making, there are limited attempts by scholars to ever approach the judges themselves to ask how judges see any of these things. This paper is about the media and the public opinion's impact on the judiciary. After Epstein the judge-public opinion/media relation is rendered a two-way street. Judges are not only influenced by public opinion and media; they also shape the media and therefore, public opinion. Research on the "public opinion–media–judges" triangle has been conducted predominantly with quantitative methods, and has often concluded, if not by proving so, that media and public opinion impact the judges when they make their judgments (see the next section). But these are, in the end, valuable though limited resources, and they can only speculate how judges internalize, or act in response to, the pressure exerted by media and public opinion. An alternative research strategy appears to be more appropriate to address these questions. This article helps fill this void by investigating the perspectives of elite judges on the impact of certain extralegal elements on their decision-making. This

¹ A. Ghosh, "Judicial Overreach and Media: A Critical Analysis", *Indian Journal of Legal Studies*, Vol. 9, No. 2, 2019, pp. 201–217.

² ShodhKosh: Journal of Visual and Performing Arts, "The Role of Media Influence on the Judicial Process in India: An Analysis", Vol. 291, 2012, pp. 1–15.

article begins by disentangling how judges themselves perceive the impact of public opinion on their decisions. Given the intimate relationship between public opinion and the media, the second part of the analysis meanwhile explores whether and how judges participate in communicating their decisions to the media. To get better insight into judges' views on the mass media and public opinion, the highest-ranking judges of the Czech Constitutional Court ("the Court") were interviewed. The judges break up into camps, having all possible degrees of opinion. We observe that this can lead to tension among the judges of the Court. Besides the media plan of the Court, which aims for clear information to a naturalist journalist, which are those who want to say things as wasting the least words, some judges have their own plans and selected subjects, privileging other public they believe would rather receive their messages.³ The contribution of this study is twofold: first, it adds to the scholarship on the role of public opinion, media and judges; second, it enters the legal literature on judicial independence and judicial politics. Classic legal canon dictates that judges are to remain independent and detached from extralegal forces — including public opinion or political hardball. Nonetheless, this paper demonstrates, some of them do not perceive themselves as mere umpires ensconced behind courthouse walls. They do not mechanically apply rules and are not unaware of the extralegal considerations when they are resolving the cases. Accordingly, this article also will entertain further proof that the judicial process cannot be adequately explained or understood in legalistic terms. The rest of the article is structured as follows. The following section discusses the literature on each of our main variable.; public opinion, media and the judiciary. It takes a look at to what extent public opinion and media are entangled with the courts.⁴ The theoretical background in the literature review also elaborates the previous studies on the other side of the coin, that is how judges approach media and public. The following and final part contains our empirical application on the interviews with Czech Constitutional Court judges. Following this, the paper shifts its lens to the perceptions that elite judges hold of media and public opinion. On the one hand, we narrow down on the degree to which judges confess that they are subject to media influence and public opinion, and on the other hand, the extent to which they attempt to influence the coverage of media on the Court and individual judges. The last part of the section concludes by summarizing our contribution to the ongoing academic discussion.

II. Media influence on Public perception of court cases

The role of the media is crucial as it affects public opinion on legal actions in India, creates narrative, encourages of certain facts, and soften perspective which may have consequences in the administration of justice. For example, while the case of *Manu Sharma v. State (NCT of Delhi)* — popularly known as the Jessica Lal murder case the coverage of and the successful prosecution in the case in the media, including sensationalist depiction of events prior to the murder with visual dramatization and telecast by an electronic channel and the

³ Adithyan S.R., "From Headlines to Judgments: The Effect of Media on Court Decisions", IJLLR, Dec. 31, 2024, available at <https://www.ijllr.com/post/from-headlines-to-judgments-the-effect-of-media-on-court-decisions> (last visited May 22, 2025).

⁴ International Journal for Court Administration, "The Influence of Public Opinion and Media on Judicial Decision Making", 2023, available at <https://iacajournal.org/articles/10.36745/ijca.528> (last visited May 15, 2025).

trial itself, evoked widespread criticism and public outrage. The powerful effect of the media: in the end the constant media scrutiny forced a retrial and the eventual conviction of the suspect. “In the process of educating and informing, you create sensationalism,” says Dantas. It is understood that there is a fine line between covering legal issues and sensational journalism, as the former tends to be overshadowed by the latter. Brought on, in part, by intense competition in the media world and the sensationalism that serves as the lifeblood of ratings and circulation, this can be a corrosive influence on the administration of justice. Sensationalized media coverage undermines public confidence in the court system, distorts the truth, and reinforces harmful stereotypes that run counter to the values of fairness and due process.⁵ In the Indian legal literature, the Supreme Court has reiterated on several occasions the role played by responsible media coverage in ensuring the due process of law and fair trial rights. *Sahara India Real Estate Corporation Ltd. vs SEBI and Ors.* The Court said media’s reporting had to be fair, accurate and balanced in order not to prejudice the administration of justice.⁶

Media’s Impacts on Public Perceptions of Court in India-Leadership, Information and Context in Framing the Rule of Law Media’s impact on public perceptions of courts in India is a complex and multidimensional subject of concern that has significant implications for justice administration.⁷ Media attention can be an informative, educational and empowering force in the public understanding of the legal process, yet it is impeded by the attractiveness of sensationalism, the power of spin and reputation, and the undermining of due process. Therefore, media organizations must be responsible in their reporting, work with fairness and accuracy and play the role of the gate-keeping that bring the “truth and justice within the public domain. It is only by ethical and responsible journalism that the media serve the purpose of being a positive player in the development of public knowledge about the law and the values that a democratic and just society represents.

III. Priorities of the Court, Judges’ rhetoric and public opinion

The judiciary held its ground as the least dangerous branch, even while the expansion of judicial power over past decades has been recorded, for example, in the states that adopted strong courts with judicial review power, allowing them to exercise a constitutional veto over majoritarian politics. In contrast, courts do not have the power of the purse as a constitutional matter – they depend on the other branches to enforce their orders.⁸ The judiciary doesn’t have the clout to bring about policy changes if there is no political will, and that is what is determined by public will, influenced by the media.” Therefore, courts can be empowered with public opinion and any political interference against the courts would be expensive. 10 Public opinion plays a major role in shaping judicial decisions in that courts not only depend on the backing of the political branches to exert their power, but they also depend on the reservoir of public support. The scholarship has established the importance of how high courts’ decision-making process looks for fairness perceptions and the acceptability of

⁵ R. Sharma, "Media Coverage and Judicial Outcomes", *Calcutta Law Journal*, Vol. 67, 2022, pp. 178–195.

⁶ R. Dhavan, "Litigation Explosion in India", *Journal of the Indian Law Institute*, Vol. 26, 1984, pp. 349–377.

⁷ B. Nair, "Media Trials and the Presumption of Innocence", *Kerala Law Times*, Vol. 63, 2019, pp. 312–325.

⁸ S. Banerjee, "Judicial Overreach and Constitutional Morality", *Journal of Constitutional Law*, Vol. 8, 2020, pp. 142–159.

decisions by citizens. While an emerging consensus among academics accepts that there is a simultaneous interplay between media, public sentiment, and upper-level decision-making, we are less certain why this is so and what consequences of the news environment there are on case law. The connection between the media and the public is obvious. The media are the ones who take the news out into the world – they decide what to cover and in what manner and via editorial stance as well. At the same time, the judiciary must construct its legitimacy also on the basis of the support of the population -in particular as a protection from eventual retaliation from the side of the politicians. The paper is limited to judges' awareness of the effect of public opinion and media on their decision-making. It also examines how judges can employ the opportunities which favorable public opinion and media present for judicial empowerment.⁹ The paper explores judges' habits of media consumption and their (non-) strategies of media rationalization. It explores patterns in the responses by elite judges to questions about media and popular opinion attitudes and practices.¹⁰ The paper does not discuss the use of social media by judges, or by courts. Despite increasing importance, the main attention does not focus on the private communication of judges, but on the exchange between the judiciary and public opinion mediated by mass media as an important mediator. The judiciary is supposed to be free and fair. In the Czech Republic, a judge of the Czech Constitutional Court must not to do anything which "degrades the respect and dignity" of the office or "creates a risk of doubt as to the independent and impartial decision-making While there is no mandatory code of conduct that calls for instructions of such nuanced nature, it is normal for Constitutional Court judges to behave relatively cautious when making public pronouncements or granting interviews to the media. At the same time, judges must continue making efforts to keep in touch with the media, the public and society in general; only in that case can they show that the judiciary is open and transparent, and that they themselves and the judiciary are moral and good. You can also read their communication strategically, displaying which cases or policy issues matter more/less than others. This holds that judges need to reach a 'golden mean' regarding their own public profile (including the media). Instead, judges have to maintain their appearance of being the impartial neutral in the courtroom. On the other hand, and from a different perspective, given that the legal trial is a procedure oriented towards the 'production of juridical truth', other human beings who are not participating in the procedure are to be informed in respect of its frame so as to understand it (Barthes, 1991:33).

Strategic analysis of judicial decisions is both older than and newer than other topics in this volume. It dates to the 1950s and the work of a major political scientist, Glendon Schubert. Schubert became well known to political scientists for his use of social psychological theories to explain judicial decisions (Schubert 1965) but he also was among the first to apply rational choice theory to political problems. In a review of the field of public law published in 1958, he listed among the fields of public law a category of "game analysis" and a subcategory "The court cases," which he described, "The judicial process is tailor-made for investigation by the theory of games" (Schubert 1958; p. 1022). Schubert then extended the

⁹ J. Singh, "Judicial Independence and Media Pressure", Punjab University Law Review, Vol. 58, 2020, pp. 99–116.

¹⁰ SSRN, "Analyzing the Effects of Public Opinion on Judicial Decisions in Democratic Institutions", May 22, 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4997171 (last visited May 24, 2025).

game theory to analyse the decisions made by two Supreme Court Justices, Hughes and Roberts, at an important time historically, the New Deal (the Hughes-Roberts game). In this way, he demonstrated that the justices were strategic decision makers; they could achieve their preferences only by taking account of their interdependence. However, the influence of Schubert's study on the analysis of judicial opinions was only marginal. Despite its encouragement of others to consider the connections among judicial decisions (Pritchett 1961, Murphy 1962, 1964 are the primary instances), in the 1960s and 1970s, and into the 1980s most of the scholars nevertheless were followers of social psychological rather than economic models (see Epstein & Knight 2000). At least in part because of the activity in the 1990s of a powerful cadre of law and business school professors that argued that strategic analysis could be applied profitably to a broad range of legal phenomena (e.g., Cohen and Spitzer 1994; Cross and Tiller 1998; Eskridge 1991a,b; Kornhauser 1992a,b; Rodriguez 1994; Stearns 1997) and systematic evidence of strategic judicial decision making (e.g., Boucher and Segal 1995; Epstein and Knight 1998; Spiller and Gely 1992), the tide turned.¹¹ And now in the 2000s: No one could avoid noticing or passing over the virtual tidal wave of empirical and theoretical studies for building strategic accounts of law and legal actors (see, e.g., Lax & Cameron 2007, Maltzman, Staton et al. 2000, Staton & Vanberg 2008). There is very little in the way of journal article or book in the economics and political science of judicial decisions at all, for that matter that does not pay some attention to strategic accounts, and it is just as unusual for syllabi in the field to omit the research at all. Furthermore, building on Schubert's (and Murphy's) ground-breaking research, a number of studies still address decision making of the U.S. Supreme Court, but more and more attention is being paid to the lower U.S. federal courts, state high courts, and the courts of foreign tribunals and the behavior courts.

Instead of examining why it took so long for Schubert's ideas to have an impact (but see Epstein & Knight 2000), the goal of this article is to review the literature that has created the impetus for new research. This could have been done effectively in a variety of ways. Our approach reflects a key insight of the literature on strategic accounts of law and legal institutions: that this body of work has made scholars (and I would add lawyers and judges) focus on the strategic—that is, the interdependent—nature of judicial decisions. Where strategic accounts are involved, that is, judges do not operate in a vacuum, but consider, when making a decision, what the preferences and likely reactions would be of others with whom they must reckon, namely (a) other judges/members of the court, (b) higher court judges, and (c) members of the other branches of government. In the pages that follow, we survey the literature on the different types of strategic behavior that (preference-maximizing) judges undertake when they interact with these parties. But first, let us briefly review what scholars mean by strategic analysis and how it differs from other treatments of judicial decisions.

i. The *Nirbhaya* Case

¹¹ K. Verma, "Media Influence on Judicial Decision-Making", *Lucknow Law Journal*, Vol. 51, 2021, pp. 223–237.

The Nirbhaya incident is seen as a turning point in India's legal history, a horrific account that jolted the nation's conscience and outraged the masses. The savage gang rape and murder of a young woman on a Delhi bus in December. Role of Media in Influencing the Judicial Process in India: An Analysis caught the media attention, leading to widespread outrage and public clamour for justice.¹² With the case playing out in the courtroom, the media went into overdrive, offering what was essentially 24-hour-a-day reportage, sensational headlines and, essentially, speculative analysis of the legal tactics each side took. Although the media were important in helping ensure the murdered victim's family were heard and that the general public momentum behind harsher sentencing for sex offenders grew, there were also very real concerns raised of trial rights and due process wearing away. The unending media spotlight had the effect of pressurising the judiciary since the pace of the trials was notorious and may have imperiled the accused's right to a fair trial.¹³ Also, yellow journalism threatened to influence the outcome of the case and to force upon suspect the audience that he was guilty until proven innocent. The Nirbhaya case - From a legal perspective What the Nirbhaya case also brought to the fore was the fine line between freedom of the press and administration of justice and the importance of the media doing ethical and responsible journalism and to strictly adhere to the tenets of fairness, objectivity and the rule of law.

ii. Media intervention and ethical dilemmas

Legal Terrorism Media trial have posed many ethical and delicate issues that test the fine equilibrium between right to freedom of speech and fair trial. One of these conundrums concerns issues of privacy in legal reporting. The media have a right to cover matters of public interest, such as court cases, but their interference with the private lives of those caught up in legal wrangles can, and often does, amount to unethical invasion into the private sphere of individuals. The Supreme Court of India recognized the fundamental right to privacy in the landmark judgment of *Rajagopal v. State of Tamil Nadu* and emphasized the need for media organisations to be careful and sensitive in reporting issues of privacy. Defamation and the presumption of innocence similarly pose ethical problems to the media: if the media rush to judgement or otherwise sensationalise an issue to influence legal process, its members can be seen to reinforce prejudice and fail to protect reputations.

In *R. Rajagopal v. Jayalalitha*,¹⁴ the Supreme Court reiterated the significance of maintaining the presumption of innocence for an alleged accused until guilt is established, and cautioned the media not to preempt the verdict of courts and pronounce someone guilty even before the legal conclusion of a fair trial. Difficulty in remaining unprejudiced in a sensationalizing media climate is another consideration, as media companies attempt to compete for viewer-/reader- ship by exaggerating reports or playing to public opinions. In *Sahara India Real Estate Corporation Ltd. v. SEBI and Ors*, the Supreme Court reiterated the significance of fair, accurate and balanced reporting by the media, warning about the dangers of sensationalism and factual inaccuracies in legal reporting. Within these ethical challenges

¹² P. Singh, "Judicial Accountability and the Role of Media", Indian Journal of Law and Society, Vol. 10, 2019, pp. 98–113.

¹³ S. Shukla, "Media Trials: A Threat to Judicial Independence?", Indian Bar Review, Vol. 47, 2020, pp. 67–82.

¹⁴ R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

that media are trying to negotiate, they have to maintain their vital position as "keeper of the truth" and "watchdog" in the public square. Preserving the sanctity of the judicial process and protecting the rights of all parties involved, both of which are critical, require responsible, ethical and fair reporting that is dispassionate and respectful of the rule of law.

Judicial Colleagues

In this essay, we analyze the wide variety of actors that judges must placate if they wish to pursue their preferences – most importantly, to render effective decisions that conform to their ideological preferences – and the means that they have discovered to that end. We start with horizontal colleagues (judges working at the same level of court), despite the fact that most U.S. judges do not sit in panels or en banc. For these judges, trial court judges, the preferences and behavior of colleagues serving on the same tier presumably play only a limited role in their decisions (although the preferences and behavior of their superiors may play a significant role).¹⁵ The others all need to have a gossip if they don't want to achieve their aims. Naturally, little of colleague caring will matter for judges' decisions in those contentions occasionally. On a panel court where all three judges are of the view that sex-orientation classifications and only classifications thereof are to receive strict scrutiny, such gamesmanship could hardly serve a purpose, including that of trading off in an effort to cajole the views of the other members of the panel. But when there are value conflicts, judges can behave in a sophisticated manner to ensure the panel's decision gives them as much of their preference as possible, whatever that might be. While this more or less applies to the way in which judges interact with all the other actors we study in this review, it is the specific manifestations of strategic behavior that are likely to differ. With respect to their lateral peers, the literature has identified a number of types of strategic behavior (depending on whether the judges are in the decision to decide -- choosing cases for review -- or the decision on the merits game).

IV. The Double-Edged Sword of Transparency and accountability

In the intricate relations between media and the judiciary, principles of transparency and accountability are important in order to preserve public confidence and to instil respect for the judicial institutions.

The solution to increasing accuracy and impartiality in media coverage of court cases lies in a commitment to factual reporting and probity. The Supreme Court of India, in the matter of *Indian Express Newspapers (Bombay) Pvt. Ltd v. Union of India* has acknowledged the need to have an independent, responsible and free press for ensuring transparency in governance, and has underscored the role of the press as a watchdog to ensure that public institutions and officials are accountable to the people. In order to achieve this, the press should apply ethical reporting standards focusing on accuracy, fairness and balance in legal journalism.

In its guidelines on media ethics, the Press Council of India highlights the importance of journalists verifying facts, providing context and not sensationalising stories that may prejudice legal proceedings.¹⁶ Media literacy campaigns are also necessary to encourage a

¹⁵ N. Desai, "Trial by Media: Legal and Ethical Issues", Bombay Law Reporter, Vol. 122, 2021, pp. 211–225.

¹⁶ S. Chatterjee, "Media Ethics and Judicial Proceedings", Indian Journal of Media Law, Vol. 5, 2017, pp. 89–104.

sound democratic tradition (to stimulate a responsible growth of freedom of opinion and expression) and to contribute to a more reflective and selective use of information by the public. The Supreme Court, in *PUCCL v. Union of India*, underscored the need for media literacy in this regard. Through public education and awareness efforts to build media literacy, citizens can begin to acquire the capacity to intelligently interpret the information they are consuming, question authority, and enforce accountability on the media. In other words, the combination of transparency and accountability in media reporting on the courts is a joint responsibility of media, the regulatory bodies and civil society to ensure that the principle of truth, fairness and justice is maintained in public space. The media should function in no way other than a responsible and trustworthy guardian of democracy and the rule of law, which can only be guaranteed through ethical reporting standards, an informed audience and an atmosphere of openness and honesty.

V. Freedom of Media

The freedom of media is measured by the freedom of speech and expression, guaranteed under Article 19(1)(a) of the Constitution. The interaction between judiciary and media is also determined by the law of contempt. Unlike in the US, the Constitution in India does not provide for the freedom of press independently. There is no greater or lesser right in the media to freedom of speech and expression than the right to the said freedom of every person of India. But several provisions of the Contempt of Courts Act, 1971 such as section 2,3,4, 5 and 7 apply directly to the judiciary-media relationship. There has always been a symbiotic relationship between the Fourth Estate and the judiciary — thanks to newspapers, Supreme Court has registered cases suo motu based on published reports. The Court took serious notice of, for instance, a report in a prominent daily newspaper in 2002 about the large advertisements of Coca-Cola and Pepsi, painted on natural rocks (Next to Nature) along the 56-km stretch of the road from Manali to the Rohtang Pass, so to speak on the way to the Rohtang Peak, and gave directions not only to stop the ruining of the natural small city of rocks by further decorating it with pictures of Trans-national Corporations, but also to wipe off the painted advertisements and imposing huge fines on the companies concerned. Indeed, Judges have been the champions of a free media because they have understood that an open and vibrant media was vital for the functioning of democracy and have repeatedly rejected every effort by State or individual to suppress that freedom. When a writ application was entertained by the Supreme Court under Article 32 and a prohibition by the provincial government with respect to the entry and circulation of the petitioner's journal "Cross Roads" under the Madras Maintenance of Public Order Act, 1949 was struck down in *Romesh Thappar v. State of Madras*, 1950 SCR 594 on the ground that the petitioner's fundamental right under Article 19(1)(a) to freedom of speech and expression included the freedom to disseminate ideas by circulation.¹⁷ Being so in *Bennett Coleman And Co. vs Union Of India*, 1973 SCR (2) 757 imposition of prohibition in import of newsprint, imposition fixing limit of pages for newspapers and imposition of regulation on advertisement of newspapers have been held to be violative of Article 19(1)(a), by the Supreme Court. Vide *Ajay Goswami v. Union of India*, (2007) 2 SCC 99: AIR 2007

¹⁷ S. Kumar, "Media Sensationalism and Judicial Fairness", Delhi Law Review, Vol. 42, 2021, pp. 145–162.

SUPREME COURT 493 when it was prayed that the Court may lay down certain guidelines to ensure that the minors should not have access of such jigsaw in the entertainment section of a couple of national newspapers, the Court dismissed the petition by observing: "Respondent No.1 is a leading national newspaper, its publication cannot be stymied by us in exercise of the right of freedom of speech and expression in a responsible and a decent manner by the exercise thereof any steps to ban, publish or news pieces or pictures would fetter the independence of the press.

However, in Surya Prakash Khatri v. Madhu Trehan, (2001) SCC OnLine Del 590: (2001) Cri LJ 3476, Court on its own Motion v. Jayashree Khadilkar Pandey, (2003) SCC OnLine Bom 1180 and Court on its own Motion v. Ajay Bansal, (2004) SCC OnLine P&H 143, publications were held to be contumacious of what lay within the first description of "criminal contempt" under Section 2(c) of the 1971 Act being publications which scandalised or lowered the authority of Court. In our country, when any Judge is scandalised in the process of system of administration of justice, we take an iron hand. To stigmatise the Judges while performing their judicial duties breeds lack of confidence in the public on the administration of justice. But, that does not mean there is an over sensitive Judiciary in India. If our citizens don't respect those who are laying down the law they cannot respect the law that is laid out by them.¹⁸

VI. Media Bias and its effect on the their proceedings

Media bias refers to the bias of journalists and news producers within the mass media in the selection of many events and stories that are reported and how they are covered. This bias can take many forms, such as political bias, ideological bias, sensationalism and business interests Within the context of law, media bias may threaten the administration of justice by impacting public opinion, determining the slant of a case, and/or biasing the outcome.

Media bias in legal proceedings can be the result of the media becoming an advocate of a certain political party or partial to one side of a legal dispute to the detriment of another side. This prejudice may compromise the integrity and neutrality of the judiciary by having an effect on public perception, and in turn, affecting the narrative around a case.¹⁹ One form of political bias in media coverage is seen in the coverage in babri masjid demolition case where few of the media houses were blamed for supporting one particular political party and presenting distorted account of the incidents which led to the demolition. Then there's ideological bias, which results from the ideological predispositions of media organizations or individual journalists causing them to report certain things in line with a particular worldview or agenda.²⁰ This bias is implicated in the framing of legal questions, the use of sources and the amount of stress put on particular factors in a case while minimizing others. In high-profile Smart- alec criminal cases (like Salman Khan is a clear example of a hit and run case), the ideological bias in media might result in the accused being given bad press, badmouthed, tried and executed in the court of media long before the legal process is done with.

¹⁸ M. Khosla, "The Indian Supreme Court and Public Opinion", Oxford Handbook of the Indian Constitution, 2016, pp. 431–450.

¹⁹ A. Mehta, "Public Perception and Judicial Legitimacy", Indian Law Journal, Vol. 45, 2018, pp. 56–72.

²⁰ V. Menon, "Judicial Overreach: Myth or Reality?", Indian Law Review, Vol. 11, No. 1, 2018, pp. 33–47.

Another type of bias that exists could be considered sensationalism, where sensationalistic narratives or headlines are favoured over the balanced factual reporting. This predisposition to sensationalise legal process can distort the reality of proceedings, shine a spotlight upon the private affairs of the participants and result in unfair denigration before they have been proven guilty (in the appropriate legal sense). One doesn't have to go far to see this kind of sensationalism as a technique in the media: look no further than the coverage of high-profile celebrity court cases, where the news reports having the most lurid, sex-filled headlines regularly fly off the shelves of the newsstands, to the detriment of the straightforward coverage of the facts. There is a commercial interest to media bias of course: the urge for media organisations to chase stories that gain views, readers or even advertising money — over and above the pursuit of impartial or objective coverage. Such for-profit news practices can lead to sensational and biased court reporting, with ratings and circulation more important than fair and accurate portrayal. There is an obvious case of corporate bias evident in coverage of corporate lawsuits, when media companies that have business relationships with specific corporations will offer their audience biased or one-sided coverage of a legal battle. Media bias has increasingly become a cause of concern for the Indian criminal justice system, as it may affect how the public perceives an incident, affect the narrative presented by the legal process and in turn influence the eventual decision of a case.

i. Confronting Media Bias

There must be an aggressive campaign to insure transparency, accountability and ethical standards by all those in media.²¹ By promoting principles of due process, Impartiality, and fairness in coverage of legal stories, the integrity of the judicial process and the rights of all persons provide in the best possible way.

ii. Trial by media and from media

Trial by media - is the conviction of public opinion of a defendant before, or after, a verdict in a court of law where media plays a dominant role in distorting the court of justice by creating a widespread perception of the defendant's guilt or innocence. It may impact public opinion and even the equity of the process of judging. Media trials is one where the media too starts evaluating and forming opinion against an alleged or the accused even without verdict of the Court.²² Media trials can influence the people, impact judges' decision-making and wrong impressions may trigger hatred and violence against a person. Holding that the freedom of the media, specially of the TV channels cannot be said to be one without restriction and not confined to mere news reporting, the court said, "The freedom of media, being fundamental, be that the freedom of TV of press per se or its program contents, cannot be allowed to super stretch to a point where the news, by outpouring reprobate information (better shown than said) itself begins to clog and cloud the pellucid comprehension of 'facts/news' in the minds of the people and impinges upon free and fair investigation." 'Freedom of speech and expression' Article 19(1)(a) of the Constitution, is described as the 'life and blood of our democracy' qua which it's a subject to reasonable

²¹ Supreme Court of India, Arushi Talwar Case, Rajesh Talwar v. CBI, (2014) 13 SCC 539.

²² P.C. Rao, "Media Trials and Judicial Independence", Indian Law Institute Law Review, Vol. 52, 2010, pp. 123–136.

restrictions under Article 19 (2).²³ There is real danger and serious risk of prejudice if the media is allowed to have unfettered and unbridled freedom to publish photographs of the suspects or the accused prior to creation of the identification parades or if similar publicity is given to the effect that the suspect/accused is guilty, outrightly before the order is passed by the Court to that effect. It is necessary to see that the trial by media does not interfere with free and fair investigation by the investigating agency and most importantly does not affect the rights of defence of the accused in any manner. According to the Supreme Court in *State of Maharashtra v. Rajendra Jawanmal Gandhi*, (1997) 8 SCC 386, the credibility of the media wavers in the objective and unbiased reporting which makes it obligatory that the fixity of the responsibility of the same so that the administration of justice is not affected. A press trial would result in miscarriage of justice. In the case of *Sidhartha Vashist @ Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1 (Jessica Lal murder case), the Supreme court has observed how the serious risk of prejudice can be ensued, if the media is left with uncontrolled and unchecked freedom.²⁴ It cannot be disputed that the right of freedom of speech guaranteed under Article 19(1)(a) of the Constitution, has to be carefully and cautiously used and should not be abused by posing any impediment or obstruction to the administration of justice or interfering with the administration of justice and its consequences or results, in the cases which are sub judice (pending judicial consideration) before the Court. Article 10 and 11 of the 'Universal Declaration of Human Rights(UDHR)', 1948 and Article 14 of the 'International Covenant on Civil and Political Rights(ICCPR)', 1976, to which India is a party, also recognise right to be presumed innocent until proven guilty and right to a fair and public hearing by an independent and impartial tribunal. In the court of public opinion, innocence is not presumed. There is in fact no trial. The newspaper or the television station's editor has opinions on an issue and uses the media that he controls to promote the interests of the people who have taken the side of that issue which the editor is defending. They are not disinterested, and generally not competent in the law. In any case, as SC itself held, what section 2(c) of the Contempt of Courts Act of 1971 aims to achieve is to deal with trial by media as the same frustrates administration of justice! The judiciary's response to media trials came within the purview of the contempt law. In *A.K. Gopalan And Another v. Noordeen*, AIR 1970 SUPREME COURT 1694, the Supreme Court observed that it will be contempt if any news or comments which have a tendency to or are likely to prejudice the parties or their causes or interfere with due course of justice as to be an obstruction to administration of justice.

VII. Effects of Media Trials on the Right to fair trial

That sort of media hype can affect the right to a fair trial, one of the basic requirements of a fair trial [enshrined under Article 21 of the Indian Constitution. Most of the time, media trials — where a case is already decided by the people, courtesy one-sided or biased reporting — lead to a situation in which the defendant has been tried and convicted long before the verdict is to be pronounced. The effects of media influenced trials on defendants'

²³ D. Gupta, "Public Perception and the Judiciary: Challenges and Opportunities", Indian Journal of Public Administration, Vol. 65, 2019, pp. 234–249.

²⁴ Law Commission of India, 200th Report on Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973, August 2006.

constitutional right to a fair and impartial trial in addition to the judiciary duty to intervene to prevent them and maintain the integrity of the judicial process.

Media trials and the judiciary's take on it. The case: In the infamous Jessica Lal murder case, a high-profile media trial and public uproar resulted in the immense pressure on the judicial system that perhaps skewed the perception of a fair trial in itself.²⁵ Also, in *Kishore Samrite v. State of Madhya Pradesh*, the Supreme Court sounded hopelessness over any prejudicial effect of media coverage to the right of free trial and observed that the courts would have to be vigilant against its mischief so as to protect the purity of the legal process.

Media trial & fair trial Whether a private defense is possible when the media is on the rampage is to be only seen by the judiciary," they held. Courts can even restrict the media's ability to report on proceedings, including via gag orders and reporting restrictions, so prejudicial information does not corrupt the trial process. Furthermore, judges can order juries to be sequestered or trials to be moved in order to reduce the non-judicial influence of the media on jurors' neutrality. In the lead decision of *Sahara India Real Estate Corporation Ltd. v. SEBI and Ors*, the Supreme Court stressed that fair and balanced media reporting is vital to maintain the right to a fair trial and warned of the dangers of sensationalism and misreporting relating to legal issues. Balancing media trials with the freedom of the press and right to a fair trial Cast against how media trials can be managed in respect of adherence to the principles of the rule of law, the question to be examined is whether the required changes through legal reform or restraint are feasible. These could include more restrictive protocols for coverage of live legal proceedings, better journalist training in ethical reporting and further coverage regulation by the judiciary. It is only by finding a balance between freedom of the press and the demand for a fair trial, that India can have trials in which defendants receive justice without any bias or improper interference.²⁶

In legal discourse, too, in which this brief participates, social media has transformed how we communicate, discuss, and form views. Its strong presence has already altered the public face of legal issues, offering to both the opportunities and challenges of the administration of justice in India. One of the stakes for social media in legal argumentation is this potential to make legal knowledge more democratic and to allow stakeholders to engage in debates. Twitter, Facebook and Instagram are now virtual stages upon which people debates, post legal news, and tell the world what they think about sensational criminal cases. This opening up of the conversation in legal scholarship can increase transparency, create more public space, and provide a more accountable practice of law. But social media's influence on the legal conversation does have a dark side. One of the main worries is the proliferation of misinformation and fake news, which could shape public perception of legal matters and compromise the integrity of the judiciary. Without such fact-checking or editorial controls, misinformation can spread with great speed on social media, creating rumors, conspiracy theories, and wild claims.

All the same, social media can be used as a conduit for hate speech, harassment, and online vigilantes with such ease that it poses a real threat to the delivery of justice in Cases like the Palghar lynching incident where fake news spread through messages on social media led to

²⁵ Supreme Court of India, *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*, (1988) 4 SCC 592.

²⁶ Supreme Court of India, *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1.

the lynching of innocent people underline the dangers of entirely unregulated online discourse to incite hatred and violence.

Legally, the advent of social media has also brought important issues regarding privacy, libel and free speech to the forefront. Cases of online defamation, cyberbullying and regulation of social media content have come before Indian courts, which have tried to tread the line between rights of individuals and freedom of expression. In *Shreya Singhal v. Union of India*, the Supreme Court invalidated Section 66A of the Information Technology Act, then used to suppress internet speech, in a forceful declaration recognizing the centrality of free speech values in the digital age.²⁷

To date, social media's influence on public perception and its impact on legal processes have given rise to demands for increased regulation and monitoring of online discussion. Indian politicians have suggested numerous steps to control social media platforms, from drafting new intermediary liability rules to framing content moderation guidelines.²⁸ Yet finding the perfect balance between policing destructive content and upholding freedom of expression is a sensitive topic, and threatens to be abused by censorship and the encroachment of government.

Social media has a lot of potential to positively influence legal discourse in India, by providing space for more transparency, public engagement and reform in the legal system. Its influence is not without its attack vectors, such as the dissemination of fake news, online bullying, and intrusions into privacy and free speech. As social media continues to evolve, policymakers, legal officers and civil society need to work together to explore how it can be used for good and how excesses of social media can be minimised for the greater public good in the administration of justice.

VIII. Media: The formidable player in judiciary- public relationship

The Fourth Branch or Fourth Estate, also referred as mass media, plays a few critical roles in government policy-making or judicial decision-making. They inform citizens so that they can be effective participants and : also serve as a public forum for debate about the issues that matter most. Importantly, media are instrumental to promote information about the judiciary's work, and can therefore enhance its legitimacy. Judiciary could hardly operate effectively without the confidence the public placed in the system. Media is one of the strong exogenous agents for monitoring of judicial accountability. By taking interest and asking professional questions media can raise the pressure to keep judges accountable and therefore improve the legitimacy of courts. Not only that, media can also influence, persuade, ridicule, entertain or horrify.²⁹ Public attention is one of the ways that people know what to think about; News coverage helps determine what issues people think are important, and accordingly has the power to not only tell people what to think but where to focus their attention. Framing by the media can shape how much importance the brain gives certain ideas. It does that, then, in the way that it shapes opinions: "emphasizing particular considerations" so as "to accord them greater apparent relevance to the issue than they might

²⁷ S. Chandrasekharan, "Media and Judiciary: The Delicate Balance", *Journal of Indian Law and Society*, Vol. 7, 2016, pp. 45–58.

²⁸ Supreme Court of India, *State of Maharashtra v. Rajendra Jawanmal Gandhi*, (1997) 8 SCC 386.

²⁹ Supreme Court of India, *Rhea Chakraborty v. State of Bihar*, 2020 SCC OnLine SC 654.

appear to have under an alternative frame". When mass media associates two or more factors in coverage, the public will come to connect these factors. We all know that the media influence public opinion much. The media has a critical position in such a task, for the distribution of the public's attention as well as the transmission of state activities are primarily regulated by the media. Citizens do not oversee those institutions themselves, they delegate this responsibility to the media. That is to say, people's perceptions of various events can be very hijacked by what the media chooses to cover and not cover when it comes to the courts, whether - including case coverage, but also the substance and the tone. Beyond that, the media can also highlight process elements that increase or decrease perceptions of fairness in the pre-decision phase.³⁰ This could have a significant impact on the public acceptability of decision. Moreover, several scholars have shown that there are situations in which the media might be able to affect public perceptions of future court rulings. The public persuasion aspect of a specific court decision may also, or alternatively, be attributed to media context of the matter, (public) framing (they employ), media language and air tone, information they cover, etc. This signals one of the most important reasons for having a look at the reciprocal relation between the judiciary and the media: If the judges fail to decide the media system, negative consequences could befall on the media covering the judicial performance, and as a result, on the reputation of the judiciary as well. Media act as a strong bridge between the political establishment and the mass population. Accounting for the media's creation of the relationship between public opinion and the judiciary There are already two reasons to ask for a reasonable media-oriented theory of the courts and the general public.³¹ Ultimately, the role of the press in shaping public perceptions about the judiciary, and the men and women who make it up, is vitally important. But that creates a bit of a conundrum for judges. They have to listen to and have respect for "popular" views to win public trust, but they also must not be taken in by them. Otherwise, they would risk tarnishing their own name or the reputation of the judiciary as a body. If we seek to deepen our understanding of the media and public opinion effects on judicial decision-making, we need to take into consideration the pivotal role of judges and their own engagement in the shaping of the public opinion, which they may participate in through their encounters with the media. Decisions from the top level courts have been getting longer, more complex and hence more difficult for the general public to understand. The justices should thus explain to the public in straightforward and understandable language, at least the essential substance and background of their decisions, such as constitutional values that underlie their decisions. Courts cannot argue that the calibre of media reporting of judicial work is the media's concern and not also that of both courts and the public. As significant as this is, the personal attitudes of judges on the media, public opinion and the courts are little researched.

IX. Transnational Perceptions of The Media and the Judiciary

Comparative analysis of the relationship between media and the judiciary offers lessons in the problems, best practices and policy prescription for the legal system of India. A crucial premise of comparative scopes on media and the courts is that the role of a free and

³⁰ Supreme Court of India, Unnao Rape Case, CBI v. Kuldeep Singh Sengar, (2020) 4 SCC 727.

³¹ Alochana Journal, "Balancing Act: Media Influence and Judicial Integrity", Vol. 13, Issue 5, 2024, pp. 86–98.

independent press as a guardian of democratic values and public accountability is widely accepted. For example, the U.S., Canada and the U.K. all have strong legal protections specifically for freedom of speech and the press, either through constitutional texts and articles (U.S. and Canada) or judge-made law (U.K.). In landmark rulings such as *New York Times Co. v. United States in the US* and *R. v. National Post (2010)* in Canada, courts have recognised the critical role of the media in holding government to account and in promoting a vigorous exchange of ideas in the public sphere.

International perspectives meanwhile stress the importance of balanced and responsible media coverage which respects the rights of parties to legal proceedings. In the UK, this is performed by the Press Complaints Commission (replaced by the Independent Press Standards Organisation) in a self-regulatory manner as well as in the courts with regard to breaches of privacy, accuracy and fairness. The Australian Press Council operates a code of practice as a means of handling complaints of media misbehaviour; it requires that a presumption of innocence be maintained and that ethical journalism is practiced.

And of more general interest, cross-jurisdictional views on the implications of emerging technologies and social media platforms in legal matters. As things stand, several countries like Germany and France have enacted laws to curtail the spread of online hate speech and fake news, and at the same time safeguard free speech. Analogously, in India, the Supreme Court has confronted the AL/ML content challenges in cases like *Facebook Inc. v. Union of India (2020)* where allegations related to propagation of fake news and hate speech on social media platforms were pleaded during the pendency of the dispute.³²

International views Some have drawn analogies to the development of media and the judiciary in other countries, emphasizing the need to balance freedom of expression with protecting individual rights and the fair and just conduct of the law. From other countries we can learn and develop the policy and regulation that will ensure transparency, accountability and ethical reporting in India's legal system. India can promote a climate of responsible journalism and protect the integrity of the judiciary while guaranteeing the rights of everyone participating in a legal process.³³

X. New Media and Shifting Legal Landscape

This is something that is subjective in nature because with the advancement in the technology and the ever-changing media dimensions, new media involves digital video including the likes of music streaming platforms, OTT(over - the - top) apps, news apps, blogs, vlogs, podcast etc. All of these have shifted the way information – especially an individual or group's opinions and beliefs – is generated and delivered for public consumption. Such platforms present opportunities, but also a need for tight regulation, protection against abuse and for legal systems to adapt to etc [sic] to ubiquitous media and the privacy, data protection, misinformation and regulatory issues that flow from these.³⁴ In *Just Rights For Children Alliance v. S. Harish, 2024 INSC 716*, the Supreme Court ruled that a mere compliance with the provisions of Section 79 of the IT Act would not absolve an

³² Supreme Court of India, *Romila Thapar v. Union of India*, (2018) 10 SCC 753.

³³ Supreme Court of India, *Nirbhaya Case, Mukesh & Anr. v. State for NCT of Delhi & Ors.*, (2017) 6 SCC 1.

³⁴ L. Bhandari, "The Impact of Media on Judicial Proceedings", *NUJS Law Review*, Vol. 13, 2020, pp. 201–225.

intermediary from liability for the offences under the POCSO (Protection of Children from Sexual Offences Act, 2012), unless the said intermediary complied strictly with the provisions of that Act and the Rules specifically under it. Therefore, it is the duty of the intermediaries to notify such an information to the authorities as provided under Section 19 of POCSO that is the SJPU or the local police.

XI. Studied public opinion, courts and media

Research has largely been focused on the US Supreme Court even if quite a number of papers have addressed international courts and leading European courts (e.g., the German Constitutional Court). A number of analyses revealed that the public's support for a court is also contingent on the process by which cases are decided. Over time, public opposition to a particular decision of the court dissipates as the authority of the court "has the power to pull at least some of the disagreeing public toward its decisions." This research agenda runs in both directions. Courts not only shape public opinion, but judges often behave differently on certain issues than they would otherwise in response to public opinion. The parliamentary opposition's chances of success before the German Constitutional Court are far greater when cases are accompanied by public opinion. Another aspect has been investigated by Ura and Wohlfarth. They argue that congressional support for the US Supreme Court increases as public approval of Congress increases. All of the above studies were quantitative in design. There are few qualitative interview-based studies on the interactions between public opinion, media and the judiciary, and they are broadly consistent with the large quantitative literature. Supreme Court of Canada judges have, for instance, unanimously rejected whether public opinion directly affects their rulings. At the same time, however, they conceded that public opinion is, in some instances, a measure of society's values. Canadian judges were arguably vulnerable to the charge of judicial activism, and reluctant to stray too far from majoritarian sentiment for fear of undermining the Court's legitimacy.³⁵ Several Canadian judges warned of the dangers of judges becoming captive to public opinion, and others pointed out that the Court does not make law but applies law made by the elected legislatures. From these results, we deduce that the approach to the case by and of the individual justices depends on how they perceive the court's mission and consequently, their own role in the court. Justices of the Canadian Supreme Court were concerned about the media portrayal of its work, and the Court initiated several initiatives to increase the standard of media reporting. Increased accessibility of the Court to the media and the public were expected to enhance the legitimacy of the Court.³⁶ There is also a trend in judicial writing towards moving from impersonal language into an author-centred style, becoming at the same time more detailed for the media and the public. And there we see the courts working with the media in a proactive way to make sure that the public gets reliable information.

XII. Policy implications and recommendations

³⁵ T. Jacob, "Media, Public Opinion, and Judicial Decisions: An Empirical Analysis", *Indian Journal of Empirical Legal Studies*, Vol. 3, 2022, pp. 67–85.

³⁶ Supreme Court of India, *Sahara India Real Estate Corp. Ltd. v. SEBI*, (2012) 10 SCC 603.

Given the intricate interactions between media intervention and the legal procedure, policy reforms should be made to face the difficulty of media influences and simultaneously protect the judicial integrity. Recommendations for legal reform should focus on measures to increase level of transparency, encourage higher quality coverage, and the promotion of functional media-judicial relations. Here is a possible reform – the establishment of a system of regulation to control the media reporting of legal proceedings, based on both ethical and fair principles.³⁷ The Supreme Court of India, in *Sahara India Real Estate Corporation Ltd. v. SEBI and Ors*, stressed the importance of self-regulation in the media domain, asking the media industry to codify its conduct and establish a grievance redressal mechanism. Further, means to encourage more measured and established relations between media and the judiciary might include supporting media literacy campaigns to educate the public about its role in justice, and promoting skills of discernment.

In *Hussainara Khatoon v. Home Secretary, State of Bihar*, the Supreme Court emphasized the significance of public awareness and involvement in the administration of justice and the importance of informed citizenry to demand public institutions be held to account, and underscored the role of media education in upholding democratic values and responsible use of freedom of speech and expression. If these policy recommendations are adopted, authorities will move in the direction of a regulatory framework which provides for transparency, accountability and fairness and bring about the proper regulation of the media in the reporting of legal proceedings, building confidence in the judiciary of the land, enhancing media literacy and the responsible practice of freedom of speech and expression for all stakeholders.

XIII. Conclusion

In the vast scheme of India's judicial system, it's difficult to deny the media's influence. From the hall of justice, to the living room of millions, the media has enormous power to influence public opinion and thus the course of justice. But that being said, great power and great responsibility. It's ethically incumbent on media organizations not to let ignorance and prejudice determine whom they validate and who they do not. Although, as we already know, it is an important institution from the Czech judiciary, its judges don't have a common plan in a media communication and in cooperation with public opinion. Close-door interviews with the elite judges reveal a clear contrast in the judges' perception of public opinion and the media.

The findings of this case study also indicate that judges could be classified in two opposing groups, who may be more open and pro-media in the one hand. On the other end are more traditionalist judges who disavow any media relationship.³⁸ The perception of each individual Judge with regard to the independence of Judges vis-à-vis the media also obviously differs. In turn, this tension may result in challenges both within the operation of the work of the Constitutional Court and in its relationships with the public, the media, politicians or other communities where citizens' trust in the justice may be affected. It is

³⁷ M. Sridhar Acharyulu, "Judicial Censorship and the Freedom of Press", Indian Constitutional Law Review, Vol. 4, 2021, pp. 101–115.

³⁸ Supreme Court of India, R.K. Anand v. Delhi High Court, (2009) 8 SCC 106.

because it must still be possible (even according to Sullivan and Feldbrin) for judges, at a minimum, to state in comprehensive terms the principles and the reasoning involved in their cases, so that bare intelligibility can still be maintained about how they are doing their work and as a result, a reservoir of public support can be built. This is particularly critical in a moment of increasing illiberal threats to the role of courts, for one response by populist leaders to erode resistance against court-packing and institutional changes that are aimed at neutering high courts is to pose as victims of partisan and politicized judicial institutions.

The evidence also suggests that judges are well aware of the media role in public perceptions of the Constitutional Court and that this may be influencing their strategic behavior on this issue. Some judges referred to their presentations of judicial decision-making as a conscious and continuous strategy, while others (although still those working with the media) viewed cooperation as distasteful but necessary. With regard to the media's potential to affect judicial independence, one clue comes from the results concerning the judges' answers about the consumption of media, particularly about news on the judgments written by the judges. While other judges in their initial responses took to say they did not care about the media and read little of it, just one said he did not follow the news about the cases they decided when answering the companion question. While this does not in itself evidence a wish to pander, it certainly suggests that they do care what was said about their cases in the press and on what basis. It is also reinforced by the judges' statements on the embrace of the judicial rulings by the public. In short, judges who would serve people cannot live apart from society. Keeping an efficient judiciary open and transparent can enhance its public legitimacy and help it maintain not just public support but also a reserve of public goodwill. These factors can also insulate the judicial organs from interferences of the other branches of the state.

And loose-cannon judges who can communicate how they think can have a powerful ability to seem above the fray. Hence, media attention will help the judiciary in becoming more independent. It's important that the media respect legal prohibitions on the publication of anything likely to prejudice the outcome of proceedings, but that those restrictions won't be a licence to traduce witnesses, and to tell lies other than in court. "The clear upshot is the only way to preserve the appropriate tension between media scrutiny and the dignity of the courts, and to maintain the judiciary's integrity, is to hold fast to these principles and to keep the blindfold firmly in place". Justice Louis Brandeis noted, sunlight can be the best of disinfectants. One that, with transparency and accountability and a common will to continue to abide by the rule of law, leverages the influence media can exert to shed light on the path to justice for everyone.

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Global Trends in Judicial Overreach

-Solanki Manishaben Hirallal

Abstract:

This chapter critically examines the global phenomena of judicial overreach via the lenses of constitutional law and judicial review, contextualizing the discussion within current legal and political contexts. It looks into how courts in several jurisdictions—India, the United States, the United Kingdom, Kenya, South Africa, and the European Union—have occasionally exceeded their mandate in the name of activism or broad constitutional interpretation. The text combines judicial review by tracing its theoretical underpinnings, doctrinal growth, and bounds, using important case laws like *Kesavananda Bharati*, *Marbury v. Madison*, and *David Ndii v. Attorney General*. The chapter also discusses regional experiences with judicial overreach, focusing on India's Basic Structure Doctrine, Kenya's recent constitutional battle, and the European Court of Human Rights' application of the Margin of Appreciation. It examines case studies, statutes, and institutional practices to identify contradictions between judicial independence and democratic legitimacy. Additional considerations include the weakening of the separation of powers, more judicial intervention in policy decisions, and the potential ramifications for governance. The chapter argues for doctrinal codification, judicial restraint, and increased transparency, as well as reforms including oversight commissions and capacity training. The chapter gives a scientific, comparative, and solution-oriented perspective on restoring balance between the judiciary and other departments of government, drawing on credible sources such as official websites, statutes, and court rulings.

Keywords: judicial review, judicial overreach, constitutionalism, separation of powers, comparative jurisprudence.

1. Introduction

The judiciary, as the guardian of constitutional governance, is charged with the vital task of interpreting laws and upholding justice. Judicial overreach occurs when judges meddle with executive or legislative activities beyond their constitutional authority.¹ Judicial review is a basic tenet in democratic regimes to avoid abuse of power and defend rights. However, its growth beyond valid interpretive limitations has led to global debates over the judiciary's role in governance.² The term "judicial overreach" varies by country but typically refers to court activities that go beyond legal interpretation and into legislative or executive domains.³ This notion has gained global importance in recent years, as constitutional courts and supreme courts in a number of democracies have taken on assertive roles in areas ranging from public

¹ M.P. Jain, *Indian Constitutional Law*, 8th edn. (LexisNexis, Gurgaon, 2018) p. 1491.

² Upendra Baxi, *The Indian Supreme Court and Politics in Fifty Years of the Supreme Court of India* (Oxford University Press, 2000) p. 65.

³ G. Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press, New Delhi, 1999) p. 239.

policy and political affairs to the enforcement of social rights. Assertiveness in courts might stem from public expectations, institutional gaps, or political instability, putting them in a powerful but contentious position.⁴ This chapter discusses judicial overreach as a comparative constitutional phenomena, focusing on India, the United States, Brazil, South Africa, and the United Kingdom. With an emphasis on the judicial review processes that have developed within each jurisdiction, it examines the nature and ramifications of judicial intervention. This paper examines how courts reconcile constitutional interpretation and institutional restraint, drawing on landmark judgments, statutes, and official data.⁵ India's judiciary has taken a proactive approach to fundamental rights, particularly after the emergency phase. This has led to the development of theories such as the basic framework.⁶ This has frequently resulted in confusion between activism and overreach. Landmark cases, such as *Kesavananda Bharati v. State of Kerala*,⁷ established constraints on constitutional revisions. Later, the NJAC ruling disallowed parliamentary efforts to reform judicial appointments, leading to charges of judicial self-preservation.⁸ Globally, similar patterns can be seen. In the US, the Supreme Court has exercised significant interpretation powers under the Constitution, most notably in *Bush v. Gore*, which altered the outcome of the 2000 Presidential election.⁹ In Brazil, the Supreme Federal Court has stepped into governance during corruption crises, while the South African Constitutional Court has played a revolutionary role by upholding socio-economic rights such as health and housing.¹⁰ In the United Kingdom, post-Brexit jurisprudence, such as the *Miller v. Prime Minister* case, illustrates judicial engagement with executive powers in politically charged contexts.¹¹ The chapter discusses institutional safeguards and transparency methods, including India's National Judicial Data Grid (NJDG), which offers empirical data on judicial pendency, disposal, and performance.¹² These technologies indicate increased efforts to ensure accountability, even within traditionally autonomous judicial systems. Another essential goal of this chapter is to contextualize the public's opinion of judicial overreach. In an era of constant media coverage and increased civic engagement, judicial decisions—particularly those affecting public morality, religious practices, or economic policies—are subject to immediate and frequently divisive criticism. This increasing interplay between the judiciary and the public poses critical concerns about institutional legitimacy, democratic accountability, and the rule of law. By critically assessing these global tendencies, the chapter demonstrates that judicial overreach is more than just a misuse of power; it is a sign of deeper democratic conflicts. Whether motivated by political inertia, constitutional

⁴ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) pp. 15–20.

⁵ S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002) p. 43.

⁶ *Ibid.*, p. 45.

⁷ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

⁸ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

⁹ *Bush v. Gore*, 531 US 98 (2000).

¹⁰ *Minister of Health v. Treatment Action Campaign*, (2002) 5 SA 721 (CC).

¹¹ *R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland*, [2019] UKSC 41.

¹² National Judicial Data Grid, Government of India, available at <https://njdg.ecourts.gov.in/njdgnew/>

ambiguity, or popular demand, judges are at the vanguard of creating democratic debate. The report advocates for a rethinking of judicial activism to ensure that constitutional guardianship does not morph into governance.

2. Theoretical foundations: judicial review, activism, and overreach

The legitimacy of constitutional courts is premised on the core principle of judicial review, which authorizes them to interpret, strike down, or uphold laws and executive action that are consistent with the Constitution.¹³ However, the interpretive ability is not limitless. The theoretical issue is about how far judges can go without violating the notion of separation of powers, which is a cornerstone of constitutional democracy.¹⁴

2.1. Judicial Review as a Constitutional Mechanism

In *Marbury v. Madison* (1803), Chief Justice John Marshall argued that American courts had the authority to overturn laws that violate the Constitution.¹⁵ This precedent established the foundation for modern constitutional systems, allowing courts to protect rights while upholding the primacy of constitutional principles. Articles 13, 32, 131, 136, 142, and 226 of the Indian Constitution expressly grant this power.¹⁶ Indian courts have extended their powers, especially with the rise of Public Interest Litigation (PIL) in the post-Emergency era.¹⁷ Judicial review has been criticized for allowing unelected judges to influence public policy and political results, despite its role in ensuring checks and balances.¹⁸ This issue becomes more problematic when courts begin to legislate, administer, or make choices normally reserved for elected officials.

2.2. Judicial Activism: Between Vigilance and Excess

Judicial activism refers to instances in which courts take a proactive role in enforcing rights, reading new interpretations into existing laws, or filling legislative gaps. While activity is typically perceived as desirable, especially in settings of executive inertia or legislative gridlock, it provides the potential for judicial overreach when courts step beyond constitutional boundaries.¹⁹ In India, activism gained prominence in the 1980s and 1990s, when courts handled environmental petitions, prisoner rights issues, and Article 21 lawsuits involving bonded labor and education. In *M.C. Mehta v. Union of India*²⁰ and *Unni Krishnan v. State of Andhra Pradesh*²¹, the Supreme Court expanded the scope of basic rights and

¹³ Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) p. 132.

¹⁴ Montesquieu, *The Spirit of the Laws* (1748), Book XI.

¹⁵ *Marbury v. Madison*, 5 US 137 (1803).

¹⁶ The Constitution of India, 1950, Arts. 13, 32, 131, 136, 142, 226.

¹⁷ S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002) p. 44.

¹⁸ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) pp. 15–20.

¹⁹ Baxi, Upendra, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Tripathi, Bombay, 1985) p. 187.

²⁰ *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

²¹ *Unni Krishnan v. State of A.P.*, (1993) 1 SCC 645.

established implementation frameworks, potentially fulfilling legislative responsibilities. The distinction between judicial innovation and institutional excess is becoming increasingly hazy, especially when courts dictate government policy, oversee administrative operations, or form committees.

2.3. Define Judicial Overreach

Judicial overreach refers to activities that trespass on executive or legislative powers, such as issuing policymaking directions or adjudicating topics best left to other branches of government.²² While there is no consistent definition for defining overreach, it frequently manifests in:

Invalidating laws that lack constitutional validity.

Mandatory policies without enabling legislation.

Oversight of executive processes through continued mandamus.

Appointing authorities or experts to supervise the administration.

Exploring issues of morality, faith, or economic policy.

The Supreme Court Advocates-on-Record Assn. v. Union of India²³ case challenged the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) for overreach. Critics contended that the judiciary annulled a democratically passed reform with near-unanimous parliamentary and state-level support, protecting its own autonomy above constitutional principles.²⁴ Across the globe, similar tendencies are found. In Brazil, the Supreme Federal Court (STF) has intervened in corruption cases, occasionally sanctioning the arrest of sitting congressmen and ministers.²⁵ In South Africa, the Constitutional Court has actively promoted state responsibility in socioeconomic concerns. While lauded as transformational constitutionalism, it frequently breaches judicial boundaries.²⁶ In the UK, the Supreme Court in Miller II deemed Prime Minister Boris Johnson's prorogation of Parliament unconstitutional, bringing judicial scrutiny into the domain of executive privilege.²⁷

2.4. Constitutional Design and Institutional Authority

The scope of judicial review and the likelihood of overreach are governed by constitutional design. In India, the written and supreme structure of the Constitution enables powerful review systems. In the UK, parliamentary sovereignty limits judicial action, but judicial activism has increased since the Human Rights Act, 1998.²⁸ In the United States, judicial influence is based on a strong constitutional interpretation heritage, particularly through substantive due process and equal protection concepts. The absence of proper institutional safeguards frequently fosters overreach. For example, closed judicial appointment processes,

²² T.R. Andhyarujina, *Judicial Overreach: A Critique* (LexisNexis, New Delhi, 2011) p. 8.

²³ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.

²⁴ Law Commission of India, Report No. 121, *Judicial Appointments*, 1987, available at <https://lawcommissionofindia.nic.in/reports/121rpt.pdf>

²⁵ . Supreme Federal Court of Brazil, *Institutional Role*, available at <https://www.stf.jus.br>.

²⁶ Minister of Health v. Treatment Action Campaign, (2002) 5 SA 721 (CC).

²⁷ Miller v. Prime Minister, [2019] UKSC 41.

²⁸ Human Rights Act, 1998 (UK).

such as India's Collegium, diminish external accountability while boosting the judiciary's immunity to criticism. Inadequate judicial performance audits, delayed judgment publication, and opaque review procedures exacerbate the issue.²⁹ India's National Judicial Data Grid (NJDG) and Supreme Court's e-Committee efforts aim to enhance openness by allowing public access to case status, disposition, and timelines.³⁰ However, jurisprudential overreach persists when courts depend on moral reasoning, popular sentiment, or personal judgment rather than constitutional text.

2.5. The Balance of Power: A Fragile Equation

The division of powers is not absolute; rather, it is functional and often changeable, particularly in parliamentary democracies. Judicial intervention is required when other organs fail to act, particularly in matters involving civil liberties or constitutional infractions. However, frequent and ongoing judicial invasion can cause institutional imbalance, damage public trust, and lead to punitive legislative action. Thus, the challenge is not to stop judicial activism, but to keep it from devolving into overreach. As Justice R.F. Nariman pointed out, "Judicial review is the soul of the Constitution, but judicial governance is not its intent."³¹

3. Judicial Overreach in India: Evolution, Trends, and Case Law

India's constitutional structure has given the judiciary a critical role in upholding the rule of law and delivering justice. However, in carrying out this responsibility, the Indian judiciary—particularly the Supreme Court—has been accused of judicial overreach. This section examines how overreach has developed in India, focusing on key decisions, structural trends, and institutional challenges. It aims to discern between constitutional activism and actions that cross the line of governance or law.

3.1. Historical Background and Rise of Judicial Activism

In the initial post-Independence period, Indian courts typically followed a conservative interpretative approach, emphasizing parliamentary sovereignty in socioeconomic policymaking. However, following the Emergency (1975-77), the judicial environment witnessed a transition, particularly under the leadership of Chief Justices P.N. Bhagwati and V.R Krishna Iyer. Courts began to interpret Part III and Part IV of the Constitution based on social justice, resulting in the birth of *Public Interest Litigation (PIL)*.³² PIL jurisprudence shifted significantly with decisions such as *S.P. Gupta v. Union of India*³³ and *People's Union for Democratic Rights v. Union of India*.³⁴ The judiciary modified the locus standi norm, granted epistolary jurisdiction, and personally interfered in cases involving bonded labor, jail reform, environmental contamination, and even urban housing. While these interventions

²⁹ Vidhi Centre for Legal Policy, *Judging the Judges*, 2023 Report, available at <https://vidhilegalpolicy.in>.

³⁰ National Judicial Data Grid, Government of India, available at <https://njdg.ecourts.gov.in/njdgnew/>.

³¹ Justice R.F. Nariman, Address at the Indian Law Institute, Delhi, Aug. 2019 (unpublished transcript).

³² S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002) p. 42.

³³ *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

³⁴ *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.

addressed governance inadequacies, they also reframed the judiciary's role in public administration.

3.2. Case Studies on Judicial Overreach

Over the last three decades, various Supreme Court and High Court decisions have been chastised for intruding into legislative or executive territory. The following examples demonstrate these concerns:

A. Vishaka v. State of Rajasthan (1997)

To address workplace sexual harassment, the Supreme Court established the Vishaka Guidelines (Articles 14, 15, 19, and 21).³⁵ While the decision was lauded as progressive, detractors contended that the Court legislated from the bench by establishing a full legal framework.

B. Supreme Court Advocates-on-Record Association v. Union of India (2015)

In this decision, the Court knocked down the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act, therefore restoring the Collegium system for judicial appointments.³⁶ The decision was criticized for being institutionally self-serving, as it undermined a constitutional procedure supported by Parliament and 20 state legislatures.³⁷

C. National Anthem Order (2016)

In *Shyam Narayan Chouksey v. Union of India*, the Supreme Court required that all film theaters play the national anthem and audience members must stand.³⁸ The decree was issued without a legislative foundation and was interpreted as a moral rather than a constitutional decision.

D. Prohibiting fireworks and liquor sales near highways

In 2016-17, the Court barred liquor stores within 500 meters of highways and later banned all firecrackers in Delhi NCR to address pollution concerns.³⁹ These decisions, while motivated by public welfare, lacked legislative or executive support and exhibited the Court's administrative assertiveness.

E. Judicial Monitoring of the CBI, NRC, and COVID-19 Response

The Court has overseen several topics, including coal scam investigations and Assam's National Register of Citizens (NRC).⁴⁰ During the COVID-19 pandemic in 2020-21, the

³⁵ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

³⁶ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

³⁷ Law Commission of India, Report No. 121: Judicial Appointments, 1987, available at <https://lawcommissionofindia.nic.in/reports/121rpt.pdf>

³⁸ *Shyam Narayan Chouksey v. Union of India*, (2018) 1 SCC 610.

³⁹ *State of Tamil Nadu v. K. Balu*, (2017) 2 SCC 281; *Arjun Gopal v. Union of India*, (2018) 9 SCC 578.

⁴⁰ *Common Cause v. Union of India*, (2017) 11 SCC 731; *Assam Public Works v. Union of India*, (2019) 9 SCC 196.

Court mandated expenditures for oxygen supplies, medical infrastructure policies, and vaccine pricing.⁴¹

While such actions demonstrate response to public crises, they also raise concerns about judicial capability, accountability, and constitutionality.

3.3. Structural Facilitators of Overreach in India

A. Weak Legislative and Executive Performance

The judiciary frequently fills the vacuum created by inefficient or absent governance. As Justice D.Y. Chandrachud observed, "Judicial activism frequently emerges when other branches fail to act."⁴² However, the frequent substitution of executive decision-making undermines the institutional separation of responsibilities.

B. Absence of judicial accountability

India lacks a rigorous framework for evaluating judicial performance, and the Collegium system insures internal selection without parliamentary or public review. This institutional insulation may have encouraged the judiciary's conception of itself as the final moral arbiter.

C. Broad Interpretation of Article 142

Article 142 of the Constitution empowers the Supreme Court to "do complete justice" in any case. This open-ended clause has been used to provide binding principles, policy frameworks, and ongoing mandamus.⁴³ Critics say that such broad interpretation results in unconstitutional judicial lawmaking.

3.4. PIL and Continuing Mandamus: Benefit or Burden?

The PIL movement, which was originally designed to help disempowered people, has been hijacked by elite groups, NGOs, and individuals aiming to achieve ideological, commercial, or personal goals. According to a 2020 study by the Vidhi Centre for Legal Policy, 58% of PILs filed in the Supreme Court sought policy intervention rather than fundamental rights violations.⁴⁴ Furthermore, the practice of continued mandamus—in which the Court retains jurisdiction to monitor policy implementation—has essentially transformed the judiciary into an administrative body, as evidenced in environmental and educational cases. While such instruments are useful for ensuring compliance, they also take the Court out of its adjudicatory role.

3.5. Responses and Reforms

⁴¹ In Re: Distribution of Essential Supplies and Services during Pandemic, Suo Moto Writ Petition (Civil) No. 3 of 2021.

⁴² Justice D.Y. Chandrachud, Address at NALSAR University, Hyderabad (2022).

⁴³ The Constitution of India, 1950, Art. 142.

⁴⁴ Vidhi Centre for Legal Policy, PILs in the Supreme Court: Access to Justice or Power Without Accountability?, 2020, available at <https://vidhilegalpolicy.in>.

Recognizing these problems, legal experts and institutions have advocated for judicial restraint, institutional transparency, and increased communication across the departments of government. The Law Commission of India's 230th Report (2009) recommended:

Limiting judicial interventions into policy realms.

Improving judicial accountability procedures.

Implementing a Judicial Standards and Accountability Bill.⁴⁵

In 2023, the Supreme Court e-Committee implemented steps to improve judicial transparency, such as uploading court data, live-streaming hearings, and publishing cause lists and rulings on the *National Judicial Data Grid (NJDG)*.⁴⁶ While these are positive steps, more extensive reforms are needed to create a balance between judicial independence and constitutional bounds.

4. Global Case Studies of Judicial Overreach

Judicial overreach is not limited to any particular jurisdiction. Courts around the world have occasionally been accused of going beyond their constitutional responsibilities by interfering with legislative or executive functions. This section examines selected case studies from the United States, the United Kingdom, Pakistan, and Kenya to provide a comparative perspective on the nature, causes, and consequences of judicial overreach worldwide.

4.1. United States: Expansion of Judicial Power

The United States Supreme Court has always played a transformative role in defining American constitutional identity. The power of judicial review, established in *Marbury v. Madison*⁴⁷, allows the judiciary to overturn executive and legislative decisions. However, this power has occasionally resulted in charges of overreach, particularly when the Court's interpretations change key public policies.

(A) *Roe v. Wade* (1973)

In *Roe v. Wade*⁴⁸, the Court recognized a woman's right to abortion based on the fundamental right to privacy, even though the right was not explicitly stated in the Constitution. Critics said that the Court established new rights and took over the responsibility of state legislators in regulating reproductive health. In 2022, *Dobbs v. Jackson Women's Health Organization*⁴⁹ overturned the challenged decision, raising concerns about judicial activism and constitutional instability.

(B) *Obergefell vs. Hodges* (2015)

⁴⁵ Law Commission of India, 230th Report on Reforms in the Judiciary, 2009, available at <https://lawcommissionofindia.nic.in/reports/report230.pdf>

⁴⁶ . National Judicial Data Grid, available at <https://njdg.ecourts.gov.in/njdgnew/>

⁴⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁹ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ (2022).

In this landmark case, the Court recognized same-sex marriage in all states, interpreting the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁵⁰ While lauded as a win for LGBTQ rights, it was also attacked for ignoring democratic consensus, as other states had laws or constitutional amendments prohibiting same-sex marriage.

(C) Bush v. Gore (2000)

*Bush v. Gore*⁵¹, a contentious case, effectively determined the outcome of the 2000 Presidential election by halting the Florida recount. The decision was heavily criticized for eroding electoral federalism and bringing the Court into a partisan political dispute.

These instances demonstrate a pattern in which the Court's interpretive authority occasionally overshadows political discussion, sparking arguments over the legitimacy and democratic responsibility of judicial decisions.

4.2. United Kingdom: Judicial Interventions Post-Human Rights Act

The UK adheres to the notion of legislative sovereignty, and its courts lack statutory authority to overturn laws. However, the Human Rights Act of 1998 enhanced the judiciary's power by permitting courts to issue "declarations of incompatibility" against statutes that violate the European Convention on Human Rights.

(A) R. (Miller) v. Secretary of State for Exiting the EU (2017)

The Supreme Court ruled that the government cannot initiate Article 50 (Brexit withdrawal) without Parliament's assent.⁵² While constitutionally significant, the decision has been criticized for involving the judiciary in highly politicized parliamentary processes.

(B) R. Miller v. Prime Minister (2019)

The UK Supreme Court ruled that Prime Minister Boris Johnson's prorogation of Parliament was "unlawful," as it interfered with its constitutional functions.⁵³ This decision was lauded as a defense of democracy, but it also aroused concerns about the court interfering with executive discretion.

The UK experience demonstrates how judicial empowerment under rights-based systems can rise to allegations of overreach, particularly when courts intervene in controversial political choices.

4.3. Pakistan's Constitutional Overreach Under Judicial Populism

Pakistan is an instructive situation in which the court has regularly intervened in administrative and legislative activities, frequently justified by the rhetoric of public interest and constitutional primacy.

(a) Disqualification of prime ministers

⁵⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁵¹ *Bush v. Gore*, 531 U.S. 98 (2000).

⁵² *R (Miller) v. Secretary of State for Exiting the EU*, [2017] UKSC 5.

⁵³ *R (Miller) v. Prime Minister*, [2019] UKSC 41.

In *Imran Ahmad Khan Niazi v. Nawaz Sharif*⁵⁴, the Supreme Court disqualified Prime Minister Nawaz Sharif under Articles 62 and 63 of the Constitution for moral and financial wrongdoing. The ruling, issued without a full trial, sparked concerns about judicial adventurism, especially in light of military dominance and political divisiveness.

(b) Suo Motu Jurisdiction and Judicialization in Governance

The Pakistani Supreme Court has used Article 184(3) to launch suo motu lawsuits on water pricing, privatization, and sugar subsidies.⁵⁵ Former Chief Justice Iftikhar Muhammad Chaudhry was notorious for his hyper-activist interventions that blurred the distinction between adjudication and administration.

Such tactics have drawn international censure. The International Commission of Jurists has emphasized that the Pakistani judiciary's activity often lacks procedural protections and contributes to excessive politicization of judicial power.⁵⁶

4.4. Kenya: Judicial Assertion in Emerging Democracies

Kenya's court has earned recognition for its strong approach to defending constitutionalism, particularly after the 2010 Constitution, which strengthened judicial independence and review powers.

(a) Nullification of the Presidential Election (2017)

In a historic judgment, the Supreme Court of Kenya nullified the 2017 presidential election, citing "illegalities and irregularities" in the electoral process.⁵⁷ While widely praised, the ruling sparked political friction and highlighted concerns about judicial encroachment into electoral sovereignty.

(b) The "Building Bridges Initiative" (BBI) Verdict (2021).

The courts stopped a constitutional amendment process led by President Uhuru Kenyatta and opposition leader Raila Odinga, citing the "basic structure doctrine" as applicable even in Kenya.⁵⁸ This was the first time the theory had been recognized outside of South Asia, and it positioned Kenya's judiciary as a defender of constitutional values. However, many saw it as a judicial impediment to popular change initiatives.

Kenya's case demonstrates how younger democracies can experience forceful judicial interventions that occasionally verge on overreach, particularly when political constraints are lacking.

⁵⁴ . *Imran Ahmad Khan Niazi v. Nawaz Sharif*, PLD 2017 SC 692.

⁵⁵ International Crisis Group, "Reforming Pakistan's Judiciary," Asia Report No. 160 (Oct. 2008), available at <https://www.crisisgroup.org>.

⁵⁶ International Commission of Jurists, "Authority without Accountability," 2019, available at <https://www.icj.org>.

⁵⁷ *Raila Odinga & Another v. IEBC & Others*, Petition No. 1 of 2017 (Supreme Court of Kenya).

⁵⁸ *David Ndii & Others v. AG & BBI Steering Committee*, High Court of Kenya (2021), affirmed by Court of Appeal.

4.5. Emerging trends and patterns.

There are a few common themes across jurisdictions:

Constitutional vacuum-filling: In most circumstances, overreach occurs when legislators are inactive or executive acts are excessive.

Use of abstract rights language: Courts are increasingly relying on imprecise or broadly defined rights, which allow for broad interpretations.

people trust and legitimacy: Courts are more trusted by the people than other parts of government, hence judicial assertiveness is tolerated.

The rise of comparative constitutionalism: Courts take ideas such as basic structure, proportionality, and transformative constitutionalism, often from Indian or South African models, to broaden their scope. When regarded as politicized or unaccountable, judicial overreach has the potential to disrupt institutional balance, decrease policy flexibility, and spark political backlash around the world.

5. The role of judicial review vs. overreach: doctrinal boundaries and constitutional tests.

Judicial review is a fundamental element of constitutional democracies, allowing courts to interpret the constitution and regulate the acts of the other parts of government. However, its misuse or excessive application results in judicial overreach, weakening the notion of separation of powers. This section delves into the doctrinal distinctions between proper judicial review and overreach, as well as the constitutional standards and concepts utilized around the world to traverse this complicated interface.

5.1. Judicial Review: The Constitutional Mandate and Scope

Judicial review involves judges examining laws or government acts to ensure they align with constitutional norms.⁵⁹ It serves as a buffer against arbitrary power, ensures rule of law, and defends fundamental rights.

a. Origins and Evolution

The principle was originally established in the United States in *Marbury v. Madison*,⁶⁰ which found that it is "emphatically the province and duty of the judicial department to say what the law is." Various jurisdictions, including India, Canada, South Africa, and the European Union, have gradually incorporated and evolved this principle through various review mechanisms.

b. Types of Judicial Review

Judicial review takes various forms:

⁵⁹ Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, (5th edn., Wolters Kluwer, 2015) 35.

⁶⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

Abstract vs. Concrete Review (Germany vs. United States)

Pre-enactment and post-enactment review

Strong vs. weak-form review (Canada's "notwithstanding clause" is an example of weak review)⁶¹

Each model implies varying degrees of judicial deference to the legislative or executive branches.

5.2. Definition of Judicial Overreach: When Review Crosses the Line

Judicial overreach occurs when courts go beyond interpreting the law and effectively make policy, administer executive functions, or legislate from the bench. This reduces democratic accountability and disrupts institutional equilibrium.

Characteristics of Overreach

Encroachment on legislative powers

Policy choice substitution

Overreliance on wide constitutional interpretation

The judicialization of politics

Judicial overreach is frequently associated with judicial activism, but the two are not synonymous. While activism may involve progressive interpretation to protect rights, overreach involves unjustifiable violations of constitutional boundaries.

5.3. Constitutional Doctrines and Limitations on Judicial Power

To prevent overreach, courts and constitutional frameworks have established limiting principles. These ensure that judicial interventions are principled, controlled, and guided by constitutional language and structure.

a. Political Question Doctrine (United States).

According to this view, certain matters are not justiciable because they belong to the political branches.⁶² For example, diplomatic relations and impeachment procedures are not subject to judicial review. The criteria was famously articulated in *Baker v. Carr*.⁶³

b. Proportionality Test (EU, Germany, South Africa, and India).

The proportionality theory is a structured four-step examination for determining the legitimacy of restrictions on rights:

1. Legitimate aim

⁶¹ Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism," 2 Int'l J. Const. L. (2004) 1.

⁶² Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008) 5.

⁶³ *Baker v. Carr*, 369 U.S. 186 (1962).

2. Suitability.
3. Necessity
4. Proportionality in the strictest sense⁶⁴

By using this standard, courts guarantee that competing rights are balanced without prioritizing personal preferences over legislative judgment.

c. Wednesbury Unreasonableness (UK).

According to administrative law, courts can only interfere if a decision is so unreasonable that no reasonable authority would consider it.⁶⁵ It is a deferential barrier that prevents the ordinary judicial substitution of administrative decisions.

d. Margin of Appreciation (European Court of Human Rights).

This philosophy gives states latitude in balancing rights and public interests while respecting cultural, moral, and democratic distinctions. It prevents supranational judicial overreach.⁶⁶

5.4. The Indian Judiciary: An Expansion of Doctrinal Power

India is a unique case in which the court has created expansive constitutional concepts that protect rights while also blurring the distinctions between review and government.

a. Basic Structure Doctrine.

The Supreme Court ruled in *Kesavananda Bharati v. State of Kerala*⁶⁷ that Parliament could not change the Constitution's "basic structure". While lauded as a bulwark against dictatorship, the doctrine's ambiguous limits have permitted the Court to reject constitutional revisions based on subjective factors.

b. Judicial Regulations and Executive Directives

Cases like *Vishaka v. State of Rajasthan*⁶⁸ and *Lakshmi Kant Pandey v. Union of India*⁶⁹ demonstrate how the judiciary fills legislative and administrative deficiencies. The Vishaka guidelines, drafted in the absence of sexual harassment laws, were in force until Parliament passed the POSH Act in 2013.

Critics contend that such techniques result in parallel rulemaking by judges, undermining democratic procedures.

5.5. Comparative Institutional Analysis: Why Does Overreach Happen?

Why do courts overreach? Scholars have identified many systemic and institutional reasons:

⁶⁴ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 15.

⁶⁵ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

⁶⁶ ECHR, "The Margin of Appreciation," Factsheet, Council of Europe, available at <https://www.echr.coe.int>.

⁶⁷ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

⁶⁸ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

⁶⁹ *Lakshmi Kant Pandey v. Union of India*, AIR 1984 SC 469.

Legislative and executive failure: When the political branches fail to act, courts intervene to preserve rights or provide governance.

Public faith in the judiciary: In many democracies, judges have greater credibility than politicians.

Rise of rights-based litigation: Vague constitutional rights allow for broad interpretation.

Constitutional norms are becoming more global, and courts are borrowing transnational theories without regard for context.

The Kenyan judiciary used the basic structure theory in the BBI case, citing Indian precedent without considering the constitutional background or jurisprudential limits.⁷⁰

5.6. Balancing Judicial Power with Democratic Governance

Textual purity, procedural justice, and institutional humility are all necessary to maintain judicial legitimacy.

a. Textual interpretation vs. moral reasoning.

Courts must make decisions based on constitutional text, intent, and structure, not moral or philosophical inclinations. Judges frequently overreach when they deviate from legal sources and engage in abstract moralism.

b. Process Minimalism

Minimalist courts make only the required decisions, avoiding broad rulings. Justice Felix Frankfurter highlighted that courts should "avoid premature constitutional adjudication."⁷¹

c. Dialogue with the Legislature

Some jurisdictions, such as Canada, use a dialogic approach, in which courts find rights violations but allow legislatures to reply. This promotes institutional cooperation rather than opposition.

5.7. Constitutional amendments and safeguards against overreach

Some governments have altered their judicial authorities to prevent overreach.

The UK Constitutional Reform Act of 2005 established the Supreme Court and reformed judicial nominations.

Pakistan's 18th Amendment altered the makeup and functions of the Judicial Commission.

Kenya's 2010 Constitution established the Judicial Service Commission to increase accountability.

⁷⁰ David Ndii & Others v. Attorney General, High Court of Kenya, 2021.

⁷¹ Felix Frankfurter, "The Passive Virtues," 75 Harv. L. Rev. (1962) 40.

Judicial overreach can also be limited by parliamentary discussions, media criticism, and civil society activism, resulting in a more balanced constitutional culture.

Conclusion

Judicial review is vital for maintaining constitutional supremacy and protecting fundamental rights. However, unrestricted expansion transforms courts into "super-legislatures" or "shadow executives." Constitutional democracies must constantly clarify theories, impose institutional checks, and promote judicial restraint in order to defend liberty and democratic governance.

6. Recommendations and Conclusion

Judicial overreach is a complicated, multilayered phenomena influenced by institutional dynamics, political environment, and evolving constitutional interpretation. While courts are tasked with maintaining constitutional primacy and protecting rights, an unchecked judiciary threatens democratic legitimacy and governance institutions. Based on the doctrinal evolution and global patterns observed, the following recommendations are proposed:

6.1. Recommendations

Codified Doctrinal Limits

To prevent misapplication, countries must codify constitutional ideas such as separation of powers, judicial restraint, and proportionality. To maintain predictability and accountability, guidelines for the use of suo motu powers in India, as well as the invocation of the basic structure doctrine, must be explicitly stated.

Promoting Dialogue-Based Constitutionalism.

Courts should encourage institutional interaction with legislators and executives, enabling for democratic reactions to judicial decisions. The Canadian Charter approach is a good example, in which courts interpret rights but legislatures can reply using the "notwithstanding clause."

Judicial Training and Capacity Development

Judicial academies should teach comparative constitutional law, institutional functions, and restraint-oriented jurisprudence. Judges must get training in minimalist adjudication, context-sensitive reasoning, and the political ramifications of their decisions.

Constitutional Amendments for Institutional Oversight.

Constitutions can be modified to create Judicial Oversight Commissions that investigate accusations of overreach or abuse of power. These measures, which are existent in nations such as Kenya and South Africa, contribute to the maintenance of public trust.

Public Transparency and Civil Society Engagement.

Judicial decision-making processes should be transparent, easily available, and clearly explained to the public. Civil society organizations and media must act as watchdogs, reporting, critiquing, and educating public about the limits of judicial power.

6.2. Conclusion

Judicial review remains a key component of constitutional governance. However, when it intrudes into the executive and legislative branches, it disrupts the balance required for democratic functioning. Courts must employ their powers with constitutional humility, understanding that they are not sovereign arbiters of all political matters, but rather guardians of the Constitution within its limitations. According to a global survey, when courts deviate, it is usually due to a political vacuum, public pressure, or confusing constitutional provision. Courts can balance activism and accountability by adhering to principles of judicial restraint, doctrinal coherence, and inter-institutional respect. As constitutional democracies mature in the twenty-first century, the necessity to limit judicial overreach while maintaining judicial independence becomes more critical. The future of democratic governance hinges on resetting this delicate equilibrium through doctrine, discourse, and careful adjudication.

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RULE OF LAW BEYOND BLACK LETTERS: SOCIO-LEGAL AND COMPARATIVE PERSPECTIVES ON JUDICIAL REVIEW DURING EMERGENCIES

Neha Tiwari¹

"In times of emergency, the law must not fall silent—it must speak with greater clarity, courage, and conviction than ever before."

I. Abstract

This chapter offers socio-legal perspective on judicial review exercised during periods of emergency, extending beyond conventional legal doctrine to evaluate its broader impacts on governance structures, public confidence in the judiciary, civic participation, and potential for political backlash. Positioned at the intersection of constitutional and administrative law, the chapter redefines judicial review not only as a tool of legal analysis but also as a potent social instrument that profoundly shapes the contours of emergency governance. This work adopts a comparative approach that spans various legal systems—developed (United States, United Kingdom), developing (India, South Africa), and underdeveloped (Myanmar, Sudan). It investigates how judicial decisions taken during times of crisis influence constitutional resilience, public trust, and the operational legitimacy of state power. Recent emergencies, including the COVID-19 pandemic, digital surveillance regimes, and counter-terrorism measures, provide the empirical basis for analysis. Prominent judicial precedents such as *ADM Jabalpur v. Shivkant Shukla* (India), *Hamdan v. Rumsfeld* (U.S.), and *Economic Freedom Fighters v. Speaker of the National Assembly* (South Africa) are examined to understand how judicial institutions have either upheld or failed democratic values in critical times. Statutory instruments, such as India's Disaster Management Act, 2005, the U.S. Patriot Act, and South Africa's Protection of Constitutional Democracy against Terrorist and Related Activities Act, are scrutinised alongside global human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR). Ultimately, this chapter argues for a reconceptualization of judicial review to include a socio-legal lens that better captures its real-world consequences during states of emergency, ensuring it serves as a bastion for democratic integrity.

Keywords: Judicial Review, Emergencies, Public Trust, Civil Society, Socio-Legal

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II. Introduction

The doctrine of judicial review is the power of courts to assess the constitutionality of legislative and executive actions that has long been celebrated as a cornerstone of constitutional governance. Traditionally, this doctrine has been interpreted through a strictly legalistic or "black letter" approach, focusing on whether specific actions adhere to the text and spirit of a nation's constitution. However, as Benjamin Cardozo, former Associate Justice of the U.S. Supreme Court, rightly observed, "*The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.*" This insight is especially poignant when judicial review intersects with states of emergency. Emergencies, whether arising from pandemics, natural disasters, wars, or internal unrest, stress-test not only legal structures but also the moral and social contract between the state and its citizens. The judiciary, in such contexts, cannot remain a neutral observer, applying laws in a vacuum. "*Fiat justitia ruat caelum*" (Let justice be done though the heavens fall), the old Latin maxim, becomes both a guiding principle and a point of contention, for too much judicial intervention may seem like overreach, while too little might erode democratic foundations. This chapter pivots from a purely doctrinal analysis to a socio-legal understanding of judicial review in emergencies. It examines how judicial pronouncements resonate beyond courtrooms affecting public trust, the legitimacy of state institutions, and the agency of civil society. Judicial decisions in such times become norm-creating events, not merely applications of existing law. As Justice H.R. Khanna famously held in *ADM Jabalpur v. Shivkant Shukla*, dissenting against the majority's abdication of liberty during India's Emergency (1975–77): "*Even when the chips are down, the rule of law must remain steadfast.*" The judiciary, when it rises to the occasion, becomes the *custos morum*—the guardian of morality and constitutionalism. However, in several jurisdictions, courts have either succumbed to executive pressure or adopted excessive deference, as seen in the U.S. post-9/11 context or during Myanmar's military takeovers. This dynamic invites us to ask: what is the true measure of constitutional fidelity during emergencies? As Ronald Dworkin pointed out, rights are not trinkets to be traded during crises. Rather, "*rights are trumps*"—principles that stand tall even in the face of utilitarian state interests. Emergencies often generate legal grey zones—*inter arma enim silent leges* ("in times of war, the law falls silent")—yet the judiciary must resist such fatalism. Instead, it must evolve mechanisms to ensure that constitutional values do not perish in the name of expediency. This chapter, therefore, does not merely assess whether laws were rightly interpreted but scrutinizes whether judicial behaviour upheld democratic ethos in the face of exceptional circumstances. The argument advanced here is that judicial review must function not only as a legal shield but as a social compass—guiding society toward justice, legitimacy, and accountability even when chaos looms large.

III. Historical Background

The evolution of judicial review is inextricably linked with the rise of constitutionalism as a safeguard against arbitrary governance. Its journey from a procedural safeguard to a dynamic mechanism of democratic accountability marks one of the most transformative developments in modern jurisprudence. The doctrine, as we know it today, finds its doctrinal roots in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice John Marshall famously declared, “*It is emphatically the province and duty of the judicial department to say what the law is.*” This case not only laid the foundation for judicial review in the United States but also became a beacon for other constitutional democracies.

In India, the doctrine was not only accepted but entrenched within the fabric of the Constitution. Articles 13, 32, 226, and 136 collectively empower the judiciary to declare laws unconstitutional, issue writs, and exercise appellate and supervisory powers. Article 13(2) specifically mandates that the state shall not make any law that takes away fundamental rights, and any law made in contravention of this shall be void. This reflects the foundational principle of *lex iniusta non est lex* (an unjust law is no law at all). However, the true test of judicial review in India came during times of constitutional crisis, notably the Internal Emergency (1975–77) declared under Article 352 by then Prime Minister Indira Gandhi. The government suspended fundamental rights under Article 359, and thousands were detained without trial. The most infamous legal validation of executive overreach came in *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207, where the majority of the Supreme Court ruled that even the right to life could be suspended during an emergency. This judgment is widely criticized as a “dark hour” in Indian judicial history. Justice H.R. Khanna, in his lone dissent, wrote: “*Even in absence of Article 21, the state has no power to deprive a person of his life or liberty without the authority of law.*” His dissent, though ignored at the time, later became a moral and constitutional compass for Indian jurisprudence². The post-Emergency era ushered in judicial reform, resilience, and activism. Stung by its earlier failure, the judiciary began to assert itself as the sentinel *qui vive*—a watchful guardian of the Constitution. Through the Public Interest Litigation (PIL) movement initiated in the 1980s, the Indian judiciary expanded the scope of judicial review to address socio-economic rights, environmental concerns, and governmental accountability. Cases like *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, redefined Article 21 to include the right to live with dignity, thereby making judicial review a vehicle for substantive justice³. The judiciary’s role evolved further with the emergence of what scholars call a “thick” version of judicial review, one that transcends mere statutory interpretation and engages with equity, social justice, and policy outcomes. This transformation was not unique to India. Countries like South Africa, following the end of apartheid, adopted a constitution with an explicitly justiciable Bill of Rights, empowering courts to strike down laws inconsistent with human dignity. Similarly, Germany’s Federal Constitutional Court has been proactive in enforcing proportionality and rights-based review,

² *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207

³ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

particularly under Article 1 of its Basic Law which enshrines human dignity as inviolable. Yet, the function of judicial review during emergencies continues to raise complex questions globally. In Myanmar, post-2021 coup judicial institutions have been rendered impotent, revealing the fragile nature of legal checks without political will. In contrast, courts in South Africa (e.g., *Economic Freedom Fighters v. Speaker of the National Assembly*) have shown remarkable fortitude in holding executive actors accountable⁴. To conclude, the history of judicial review demonstrates that it is not a static doctrine. Rather, it is a living mechanism—shaped by crises, calibrated by precedent, and animated by constitutional morality. As Lord Acton once said, “*Power tends to corrupt, and absolute power corrupts absolutely.*” Judicial review, especially during emergencies, is the constitutional antidote to such corruption. Its strength lies not in its textual origins but in its ability to adapt, critique, and uphold the democratic order in the face of adversity.

IV. Definitional Framework

A precise understanding of the key concepts—judicial review, emergency, and the socio-legal approach—is essential for framing the discourse around judicial responses in times of crisis. These terms carry deep constitutional, philosophical, and practical implications that evolve depending on the context in which they are invoked.

Judicial Review

The doctrine of judicial review lies at the heart of constitutional democracies. It refers to the authority vested in courts to examine the constitutionality of legislative acts and executive decisions. As famously articulated by A.V. Dicey, judicial review is “*the means by which the judiciary controls the legislative and executive branches in accordance with the Constitution*”⁵. Dicey’s exposition emphasizes the doctrine of the rule of law—that no one, not even the government, is above the law. Further elaborating on this idea, Wade and Forsyth define judicial review as a procedural mechanism ensuring that “decision-makers act within the bounds of law, reasonableness, and fairness.”⁶ This interpretation reflects the principle of legality—*nullum crimen sine lege* (no crime without law)—as the bedrock of a fair legal order. Judicial review is thus not merely a technical device, but a constitutional safeguard against arbitrary governance. In Latin jurisprudential tradition, this protective function of the judiciary can be seen in the phrase “*fiat justitia ruat caelum*”, which translates to “*let justice be done though the heavens fall.*” It underscores the unflinching role of the judiciary, even in times of political or social tumult.

Emergency

The term emergency in constitutional law denotes an extraordinary situation that necessitates

⁴ *Economic Freedom Fighters v. Speaker of the National Assembly*, [2016] ZACC 11 (South Africa).

⁵ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), p. 202.

⁶ H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th ed. (Oxford: Oxford University Press, 2014), pp. 31–32.

deviation from normal legal procedures to address grave threats to the state or public order. Emergencies may be formally declared (such as under Article 352 of the Indian Constitution), or may arise de facto as public health crises, natural disasters, or national security threats. The most famous theorist of the constitutional state of emergency is Carl Schmitt, who argued in his work *Political Theology* that: "Sovereign is he who decides on the exception."⁷ This provocative statement captures the essence of constitutional exceptionalism—the idea that in a crisis, legal norms may be suspended by a sovereign power to restore order. However, this also presents a paradox: to protect the constitution, one might have to act outside of it. In such moments, the constitutional balance between liberty and security, order and legality, is most vulnerable. The emergency powers may lead to the suspension of fundamental rights, as witnessed during India's 1975–77 Emergency, or the expansion of executive authority, as seen in the USA's Patriot Act era following 9/11.

Socio-Legal Approach

The socio-legal approach moves beyond formalistic legal analysis to integrate the law's impact on society and society's influence on law. It is grounded in the understanding that law is not an isolated set of rules but a social construct that operates within complex political, economic, and cultural frameworks. Socio-legal scholars argue that judicial decisions are not made in a vacuum but are shaped by societal values, institutional dynamics, and political pressures. This approach examines how courts not only interpret the law but also influence public discourse, trust in institutions, and civic behavior. For example, decisions that expand civil liberties during emergencies may inspire civil society mobilization, while overly deferential rulings may erode faith in judicial independence. In essence, the socio-legal method underscores the idea expressed by Roscoe Pound: "*The law must be stable, but it must not stand still.*" It calls for a nuanced understanding of law in action, *lex animata* (law animated by life), rather than law in the books.

V. Socio-Legal Analysis of Judicial Review in Emergencies

Judicial review, especially in times of emergency, transcends the realm of abstract constitutional doctrine to become a practical expression of democracy in action. As Justice Benjamin Cardozo wisely noted, "*The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.*"⁸ In such moments, the judiciary becomes both the mirror and molder of constitutional conscience. The Latin phrase *fiat justitia ruat caelum*, "Let justice be done though the heavens fall", captures the ideal essence of judicial intervention in crises.

⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), p. 5.

⁸ Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921.

Judiciary and Public Narratives

In states of emergency, judicial action (or inaction) speaks louder than its verdicts. Courts can uphold the constitutional spirit or appear complicit in its erosion. Public trust, a key component of democratic legitimacy, hinges upon the perceived neutrality and courage of the judiciary. The failure of courts to act in emergencies risks eroding civic faith — what Rabindranath Tagore called, “*Faith is the bird that feels the light and sings when the dawn is still dark.*”⁹

Case Study 1: India – COVID-19 Migrant Crisis

During the COVID-19 pandemic, the Indian Supreme Court initially refused to direct the government regarding the mass exodus of migrant workers.¹⁰ The judiciary’s inertia prompted criticism from civil society and former judges. Only later, in *In Re: Problems and Miseries of Migrant Workers*,¹¹ did the Court intervene, ordering the government to ensure food, shelter, and transport. While laudable, the delayed engagement underscores the consequences of judicial passivity during crises.

Case Study 2: United States – Post-9/11 Surveillance

In the United States, following the 9/11 attacks, laws such as the Patriot Act¹² were enacted, significantly expanding executive surveillance powers. The judiciary’s response was inconsistent. In *Hamdan v. Rumsfeld*,¹³ the U.S. Supreme Court ruled against the military commissions set up by President Bush, reaffirming adherence to the Geneva Conventions. However, the Court remained largely silent on mass surveillance, raising the perennial question, *Quis custodiet ipsos custodes?* — “Who will guard the guards themselves?”

Case Study 3: South Africa – Political Accountability

In *Economic Freedom Fighters v. Speaker of the National Assembly*,¹⁴ the South African Constitutional Court directed Parliament to implement remedial actions against President Jacob Zuma. This intervention reflected judicial courage and commitment to accountability even in turbulent political climates. The Court demonstrated that *jus est ars boni et aequi* — “law is the art of the good and the fair” — especially during emergencies.

VI. Institutional Practices and Regional Contrasts

The response of judicial institutions to emergencies is deeply influenced by the political maturity, institutional integrity, and historical evolution of the jurisdictions in which they function. While constitutional principles may be universal, their application is tempered by local

⁹ Rabindranath Tagore, *Stray Birds*, Macmillan, 1916.

¹⁰ Arghya Sengupta, “A Judicial Lockdown: The Indian Supreme Court During COVID-19”, *Indian Journal of Constitutional Law*, 2020.

¹¹ *In Re: Problems and Miseries of Migrant Workers*, Suo Motu Writ Petition (Civil) No. 6 of 2020.

¹² USA PATRIOT Act, Public Law 107-56, October 26, 2001.

¹³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁴ *Economic Freedom Fighters v. Speaker of the National Assembly and Others*, [2017] ZACC 47.

realities. The Latin maxim *ubi jus ibi remedium*, “where there is a right, there is a remedy”, often finds varied interpretations and effectiveness across national boundaries, especially under emergency rule.

Developed Jurisdictions

In the United Kingdom, a nation traditionally governed by parliamentary sovereignty, courts have nevertheless carved out a significant space for judicial scrutiny of executive power during crises. The decision in *Begum v. Home Secretary*¹⁵ reaffirmed the role of proportionality in assessing national security-related decisions, particularly the removal of citizenship. The UK Supreme Court upheld the government's decision, emphasizing deference in matters of national security, yet recognized the need for “procedural fairness and proportional scrutiny”. Germany, with its post-Nazi constitutional sensitivity, exemplifies a rigorous model of emergency judicial review. The Bundesverfassungsgericht (Federal Constitutional Court) consistently applies the *Verhältnismäßigkeitsprinzip* (principle of proportionality) and the doctrine of “necessity in democracy”. Even in public health or terror emergencies, the German court ensures that rights restrictions are narrowly tailored, time-bound, and legally justified. As former Justice Udo Di Fabio once declared, “*Constitutional freedoms do not hibernate during crises; they evolve to shield the vulnerable.*”¹⁶

Developing Jurisdictions

In India, the judiciary's approach reflects a duality between restraint and activism. During the COVID-19 pandemic, the Supreme Court faced criticism for initial judicial passivity, followed by a late intervention in *In Re: Migrant Workers*¹⁷. The oscillation between silence and interventionism revealed the complex nature of judicial independence in a politically vibrant but institutionally pressured environment. South Africa offers a more consistent example of transformative constitutionalism. The Constitutional Court has embraced an activist posture in defending rights and ensuring executive accountability. In *Economic Freedom Fighters v. Speaker of the National Assembly*¹⁸, the judiciary affirmed that constitutionalism cannot be suspended during emergencies, reinforcing that “*the Constitution is not a fair-weather document.*”¹⁹

Underdeveloped Nations

In countries like Myanmar and Sudan, the absence of robust judicial structures renders judicial review largely ceremonial during emergencies. The militarization of governance, the absence of judicial security of tenure, and the lack of access to international legal standards paralyze courts.

¹⁵*Begum v. Secretary of State for the Home Department*, [2021] UKSC 7.

¹⁶Udo Di Fabio, *Human Dignity as the Centerpiece of Constitutional Jurisprudence*, 2010, Federal Constitutional Court Archives, Germany.

¹⁷*In Re: Problems and Miseries of Migrant Workers*, Suo Motu Writ Petition (Civil) No. 6 of 2020.

¹⁸*Economic Freedom Fighters v. Speaker of the National Assembly*, [2017] ZACC 47.

¹⁹See Justice Dikgang Moseneke's opinion, *Economic Freedom Fighters v. Speaker*, *ibid*.

In Myanmar, following the 2021 military coup, the judiciary effectively ceased to function independently²⁰. Sudan's constitutional court, too, has faced chronic dysfunction, rendering it incapable of reviewing the legality of emergency declarations or military overreach²¹. As the Roman maxim warns, "*Silent leges inter arma*", "Laws are silent amidst arms." Yet the role of judicial institutions, even in frail democracies, becomes critical to restore a semblance of the rule of law when stability returns. The global landscape thus demonstrates a spectrum of judicial courage and constraint, shaped not merely by doctrine but by political will, institutional independence, and societal expectation.

VII. Impact on Public Trust and Civil Society

Judicial review is not merely a constitutional checkpoint; it serves as a moral compass during turbulent times. In periods of emergency, when executive power expands and legislative oversight weakens, the judiciary stands as the last bulwark between the rule of law and the rule of force. Its role in such moments is critical for cultivating or corroding public trust. The Latin maxim "*Fiat justitia ruat caelum*", let justice be done though the heavens fall, epitomizes the courage courts are expected to show in upholding justice, even when the state is under duress. When courts actively engage with emergency powers, subjecting them to constitutional scrutiny, they foster a culture of accountability and strengthen the democratic legitimacy of institutions. On the contrary, when courts remain silent or complicit, they risk alienating citizens, delegitimizing their own authority, and emboldening autocratic governance. As Justice Louis Brandeis aptly noted, "The most important office... is the office of citizen,"²² and it is the judiciary's responsibility to protect that office from being rendered meaningless.

The Indian Context: Environmental Jurisprudence and Public Confidence

In India, despite criticisms of judicial passivity during certain emergencies, the Supreme Court has historically commanded substantial public trust, especially in areas like environmental protection and social justice. Landmark cases such as *M.C. Mehta v. Union of India*²³ on pollution control and the *Vellore Citizens' Welfare Forum Case*²⁴ dealing with sustainable development, illustrate how judicial assertiveness has empowered civil society to become a watchdog of governance. The Court's proactive role has been crucial in institutionalizing mechanisms like the "Polluter Pays" principle and Public Interest Litigation (PIL), creating "a jurisprudence of participation" where the public could seek redress beyond traditional legal confines.

²⁰Human Rights Watch, "Myanmar's Judiciary Post-Coup: A Silent Tool of Repression", HRW Report, March 2022.

²¹International Commission of Jurists, "The Role of Sudan's Judiciary During Emergency Rule," 2019 Briefing Paper.

²²Louis Brandeis, *Whitney v. California*, 274 U.S. 357 (1927).

²³*M.C. Mehta v. Union of India*, AIR 1987 SC 965.

²⁴*Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715.

Kenya: Judicial Independence and Electoral Justice

Kenya provides a compelling case of how judicial courage can galvanize public action. The Kenyan High Court's historic decision in 2017 to annul the presidential election due to irregularities²⁵ was hailed globally as a triumph of constitutionalism in Africa. The judgment, unprecedented in the region, triggered widespread civic mobilization and reaffirmed judicial independence in a deeply polarized polity. The Court's assertion, "*Elections are not events but processes*", reflected a nuanced understanding of the democratic mandate.

The Chilling Effect of Judicial Passivity

In contrast, judicial silence in the face of state overreach can have a chilling effect on civil society. The *ADM Jabalpur v. Shivkant Shukla*²⁶ the verdict during India's 1975 Emergency, where the Supreme Court denied habeas corpus rights, is widely regarded as a dark chapter in judicial history. Not only did it suppress public resistance, but it also sent a disheartening signal that constitutional safeguards could be suspended by political will.

Conclusion: Trust as a Two-Way Street

Thus, public trust in judicial institutions is not static; it is contingent upon the judiciary's commitment to constitutional courage. As Chief Justice Earl Warren once remarked, "*The law floats on a sea of values*,"²⁷ and in emergencies, it is the judiciary that must anchor these values against tides of authoritarianism. Empowered courts empower people; restrained courts risk rendering democracy hollow. "*Lex iniusta non est lex*", an unjust law is no law at all reminds us that it is not legality alone, but justice, that sustains the social contract.

VIII. International Legal Frameworks: Judicial Review in Emergencies

In an increasingly interconnected world, domestic legal systems cannot remain isolated from international legal obligations especially in times of national emergencies, when the risk of authoritarian overreach is highest. Judicial review during such times must be anchored not only in constitutional provisions but also in the principles of international human rights law, which serve as a universal yardstick for legitimacy and legality.

As Cicero famously said, "*Salus populi suprema lex esto*", the welfare of the people shall be the supreme law. Yet, this maxim, often invoked by governments to justify extraordinary measures, must be balanced with "*Fiat justitia ruat caelum*", let justice be done though the heavens fall. International legal frameworks such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) provide this essential balance by permitting limited derogations only under strict conditions, ensuring that emergency powers are not a pretext for systemic violations of civil liberties.

²⁵ *Raila Odinga v. Independent Electoral and Boundaries Commission*, Petition No. 1 of 2017, Supreme Court of Kenya.

²⁶ *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

²⁷ Earl Warren, quoted in Anthony Lewis, *Gideon's Trumpet*, Random House, 1964.

ICCPR – Article 4: Derogation with Discipline

Article 4 of the ICCPR allows states to temporarily derogate from certain obligations "in time of public emergency which threatens the life of the nation,"²⁸ but imposes four key conditions:

1. The emergency must be officially proclaimed;
2. Derogation measures must be strictly necessary and proportionate;
3. They must not involve discrimination;
4. States must notify the United Nations.

Judicial review plays a critical role in ensuring that such derogations meet these thresholds. In *General Comment No. 29* issued by the UN Human Rights Committee, it was emphasized that derogation "does not give carte blanche for unlimited suspension of rights."²⁹ The principle of *necessitas non habet legem* (necessity knows no law) cannot justify wholesale suppression of rights, and courts must vigilantly uphold this boundary.

ECHR – Article 15: The Margin of Appreciation

The European Court of Human Rights (ECtHR) has been instrumental in examining derogations under Article 15 of the ECHR. It allows temporary suspension of certain rights during war or public emergencies, but under "strict scrutiny" of necessity and proportionality. In *A and Others v. United Kingdom*³⁰, the Court held that indefinite detention without trial of foreign nationals was disproportionate and violated Article 5. This affirmed that "not even emergencies can be a license to abandon the rule of law." The Latin phrase "*Inter arma enim silent leges*" (In times of war, the laws fall silent), often reflects the grim reality—but institutions like the ECtHR challenge this fatalism by insisting that even in crisis, legality must speak louder than expediency.

India and the Global Commitment: Article 51(c)

The Indian Constitution, under Article 51(c), directs the state to "foster respect for international law and treaty obligations."³¹ While not directly enforceable, this provision has been interpreted to support harmonious construction between domestic law and international norms. In *Vishaka v. State of Rajasthan*, the Supreme Court held that international conventions, even if not incorporated, may guide constitutional interpretation.³² In emergencies, this constitutional vision requires the judiciary to align its review with international human rights safeguards, reaffirming that India is not an island unto itself but a responsible actor in the international legal order.

²⁸ International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171.

²⁹ UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

³⁰ *A and Others v. United Kingdom*, App. No. 3455/05, ECHR 2009.

³¹ The Constitution of India, art. 51(c)

³² *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

Thus, the judiciary must not only interpret constitutional texts but also uphold universal legal principles during emergencies. International legal frameworks do not obstruct national sovereignty—they enhance it by reinforcing democratic integrity. The challenge lies not in choosing between security and liberty, but in maintaining both through measured and meaningful judicial review.

IX. Conclusion: Rethinking Judicial Review Beyond Doctrine

This chapter calls for a fundamental rethinking of judicial review, urging it to evolve from a doctrinal exercise into a multidimensional socio-legal mechanism that upholds constitutionalism during times of crisis. Emergencies whether public health disasters, national security threats, or political upheavals do not suspend the Constitution. Rather, they heighten the need for judicial vigilance. Judicial review, in such moments, must move beyond legal text to engage with the broader realities of power, accountability, and democratic resilience. As Ulpian rightly declared, "*Ius est ars boni et aequi*", the law is the art of the good and the equitable. In emergencies, equity must be at the heart of judicial reasoning. Courts must not only test the legality of executive actions but also their legitimacy, necessity, and proportionality. They are called upon not just as interpreters of law, but as guardians of democratic values. The judiciary's failure in *ADM Jabalpur v. Shivkant Shukla* (1976) remains a stark reminder of the dangers of excessive judicial deference. The judgment's denial of habeas corpus rights during the 1975–77 Emergency in India is often described as a "constitutional betrayal."³³ On the contrary, judgments like *Hamdan v. Rumsfeld*³⁴ in the U.S. and *Economic Freedom Fighters v. Speaker* in South Africa show how assertive judicial review can anchor constitutional values, even when politics threaten to derail them.³⁵ Latin wisdom reminds us: "*Fiat justitia ruat caelum*", let justice be done though the heavens fall. This is not mere rhetoric; it is a moral imperative. Where courts remain silent, injustice thrives. "*Qui tacet consentire videtur*", he who is silent is taken to agree. Judicial silence, especially in the face of rights violations, can amount to institutional complicity. Judicial review, when used effectively, strengthens public confidence in democratic institutions. During the COVID-19 pandemic, for instance, the Indian Supreme Court's delayed but eventual suo motu intervention in the migrant crisis rekindled faith in judicial responsiveness.³⁶ Similarly, the Kenyan judiciary's bold annulment of a presidential election in 2017 affirmed its independence and democratic commitment.³⁷ This chapter also examined how international human rights law informs domestic judicial review during emergencies. Article 4 of the ICCPR and Article 15 of the ECHR permit derogation of rights only under strict conditions necessity, proportionality, and temporal limitation. India's Constitution under Article 51(c) reflects its

³³ *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

³⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁵ *Economic Freedom Fighters v. Speaker of the National Assembly*, (2017) ZACC 47.

³⁶ *In Re: Problems and Miseries of Migrant Workers*, Suo Motu Writ Petition (Civil) No. 6 of 2020.

³⁷ *Raila Odinga v. Independent Electoral and Boundaries Commission*, [2017] eKLR (Kenya SC).

obligation to uphold such international norms.³⁸ The global comparison reveals divergent trends. In countries like India and South Africa, courts oscillate between deference and activism, depending on political climate and institutional capacity. In contrast, in nations like Myanmar and Sudan, weak judicial systems fail to constrain executive overreach, demonstrating how fragile democracies suffer in the absence of an independent judiciary.³⁹ To conclude, judicial review must be remained as a living instrument capable of engaging with both constitutional doctrine and the socio-political consequences of its application. As Justice Brennan wisely observed, “The Constitution is not suspended in times of crisis.”⁴⁰ The judiciary must rise to its calling as a constitutional sentinel, ensuring that emergency powers do not become a gateway to permanent authoritarianism. By embracing a socio-legal paradigm, courts can ensure that the rule of law remains not only a technical principle but also a lived experience for all. In rethinking judicial review beyond doctrine, we reaffirm the idea that courts are not only halls of legal reasoning but also bastions of democratic endurance and human dignity.

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³⁹ Christina Murray and Richard Simeon, “Recognition Without Empowerment: Minorities in a Democratic South Africa”, (2001) 5 International Journal on Minority and Group Rights 123.

⁴⁰ William J. Brennan, “The Constitution is Not Suspended in Times of Crisis,” in *Human Rights and the Constitution: Essays*, eds. C. Raj Kumar and K. Chockalingam, Oxford University Press, 2007.

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THE ROLE OF JUDICIARY IN REVIEWING & UPHOLDING THE RIGHTS OF INTELLECTUAL PROPERTY HOLDER

-L. Keerthana

Abstract:

“CREATION IS A KEY FOR INNOVATION”

Every creation leads to innovation. The legal protection of such innovation must take several forms. For example, patents protect the inventor rights, copyright protects the author rights, trademarks protect the ownership of tangible property or goodwill over a company's reputation, etc. Similarly, numerous laws under the single shield of intellectual property laws which are protected and prohibited countless rights of human creations. However, because of the administrative action's failure mechanism, government authorities' arbitrary acts resulted in the denial or violation of their rights. This study will contribute to the analysis of how courts evaluate government or administrative rulings pertaining to IP enforcement. How can courts strike a balance between administrative discretion and IP holders' rights? Discuss about other allied functions of judicial review in controlling IP enforcement actions that could violate those rights of IP holders.

Keywords: Intellectual Property, Rights, Judicial Review, Innovation, Discretion.

Introduction:

Intellectual Property (IP) rights are essential for promoting innovation, creativity, and economic development. These rights give creators and inventors sole authority over their creations, allowing them to profit from their efforts and ensuring that their ideas are safeguarded against unauthorized usage. However, as the value of intellectual property increases, so does the complexity of protecting it. Here is where the judiciary significantly contributes by interpreting, enforcing, and balancing the rights of intellectual property owners with the wider public good. The judicial system acts as the protector of intellectual property laws, guaranteeing that the rights of IP owners are recognized and properly safeguarded by the law. Judicial bodies are tasked with examining cases related to IP violations, settling disagreements about patent legitimacy, protecting copyright assertions, determining trademark conflicts, and upholding the legal regulations that oversee trade secrets. The judiciary's role extends beyond merely enforcing these rights; it also includes making important decisions that influence the development of IP laws and their use in society.

There is complex relationship between law and creativity necessitates that judges find a careful equilibrium-safeguarding the unique rights of artists while also making sure that these protections do not obstruct competition, innovation, or public access to information. Court rulings can establish precedents that affect the future of IP law, and consequently, the judiciary has a crucial role in both forming and preserving the integrity of intellectual property frameworks.

Fundamentals of IPR¹:

Intellectual property rights are the rights gives people have over their own works of literature, art, inventions, names, symbols, and photographs are known as intellectual property rights. Businesses may find it to be a useful asset, thus it's critical to comprehend the fundamentals of ownership. For a set amount of time, they often grant the inventor the only right to utilise their creation. Ownership of intellectual property is important for people as well as companies. Because the owner has the sole authority to determine whether their idea or piece of work should be published or sold in a specific field.

The ownership of intellectual property depends on several factors:

- The Indian Patents Act, 1970 governs the patent system, which grants exclusive rights to the inventor or inventor for a period of 20 years. The owner of a patent is typically the inventor or inventor, and without their permission, no one else can create, use, produce, or sell the innovation.
- Trademarks are owned by the individual or company that initially used the mark in commerce, and their protection is 15 years, renewable until the succession of business or trade.
- Copyrights are owned by the creator of the work, with a duration of 60 years plus the author's lifetime.
- Design refers to the features of shape, configuration, pattern, ornament, or composition of lines or colors applied to any object, whether two-dimensional, three-dimensional, or both.
- Trade secrets are owned by the person or business that developed or acquired the information through legitimate means. Geographic indication (GI) refers to goods and services available in specific or rare types of available resources, such as Tindugal lock, selam mangoes, and thirunelveli halwa.
- Plant variety protection is provided through Plant Breeder's Rights (PBRs), which grant exclusive rights to a registered variety's breeder. The aim of India's Sui generis Plant Variety Protection and Farmers Rights (PPVFR) Act, 2001, is to build an efficient system for safeguarding plant variations and the rights of farmers and plant breeders.

¹ <https://ironcladapp.com/journal/contract-management/intellectual-property/>

This existing intellectual property controlled by the various international organisations such as TRIPS(trade related aspect of intellectual property rights), WIPO, UCC, BERNE Convention and Paris conventions, UPOV Convention, Madrid protocol, Nagoya protocol, etc., this organization creates their own regulatory framework to uphold the rights of IP holder across the global level.

The Role of Judiciary In IP Protection:

Initially, judiciary should not directly entertain the individual rights. Instead of that, that had instituted separate administrative bodies to deal with the IP's registration, cancellation, objection, revocation and redressal between the parties to the disputes. The role of judiciary will only come after the administrative decision, in the early stage of enactment of IP laws some many cases have been pending before the court of law, due to technical, scientific reasons and violation of IP holders right against their will other issue. So, they planned to give innumerable power to administrative authorities, they have discretionary power to decide the right of IP by granting, rejecting, surrender, revocation and dispute resolution. In case, the parties are not satisfied with the order of the administrative action they can go for appeal to court of law. Due of lack of transparency, biased opinions, non-observance of fairness, and subject matter of the IP is not fulfilled as per law and failure of principles of natural justice. Generally, the Appeal is filed upon the High Court of the concerned state and the final stage of appeal is placed before the Supreme Court of India and that must be final one.

Role of the Judiciary In Enforcing IP

Prevention of Infringement acts by others:

Infringement in Intellectual Property Rights (IPR) refers to the unauthorized use, reproduction, distribution, or exploitation of intellectual property that is protected by law, without the permission of the rights holder. In simple terms, **IPR infringement** occurs when someone uses another person's legally protected intellectual creation such as a **patent, copyright, trademark, or design**—without approval, thereby violating the exclusive rights granted to the creator or owner.

Types of IPR Infringement:

Patent Infringement: Using or selling a patented invention without the patent holder's permission.

Copyright Infringement: Copying or distributing creative works like books, music, or films without the author's consent.

Trademark Infringement: Using a registered brand name or logo in a way that causes confusion among consumers.

Design Infringement: Copying a registered design without authorization.

Remedies:

Infringement can be **civil or criminal**, depending on the type and severity, and legal remedies may include **injunctions, damages, penalties**, or even imprisonment in some cases. The IP laws gives various remedies with respect to the infringements.

1. Civil Remedies
2. Criminal Remedies

Civil Remedies

1. Injunction – Restricting or restraining the parties from not to do some act or prevent to act certain act without the permission of the court.
 - Interlocutory or interim\ temporary injunction
 - Permanent or Final (for injunction refer Specific relief Act S. 37-42 with CPC,1908)

Anton Pillar Orders or Ex Parte Orders – in some of the In India, courts have adopted Anton Pillar orders mainly in **IPR and copyright infringement cases**, especially involving piracy, counterfeit goods, or software violations. The order must be executed with strict safeguards to prevent abuse, often in the presence of an independent legal officer (like a commissioner). In essence, an **Anton Pillar order** is a powerful tool to **preserve evidence** and uphold justice in IPR disputes, especially where the risk of tampering or destruction is high.

2. Orders for deliver-up/surrender or seize and destroy
3. Validation of certificate.
4. Damages:

Lost Profits

- A demand for the products;
- An absence of acceptable non-infringing substitutes;
- That the plaintiff market has been exploited by the infringer in an unlawful manner.
- The amount of profit that the plaintiff may occurred due to the infringement.

Reasonable Royalty – The landmark Georgia-Pacific Corp. v. U.S. Plywood Champion Papers case listed 15 factors representing the guidelines provided by the court for determining what would be a reasonable royalty based upon a hypothetical negotiation following a finding of an infringement in that case.

Supplement damages - "Entire Market Value" in additional damages to make up for any losses brought on by infringement. The Entire Market Value Rule has given rise to several extra harm ideas. Price erosion, convoluted sales, lost profits on unpatented item sales, and damages from accelerated market entry are all included.

Cost for the suit

Criminal Remedies

Criminal remedies in Intellectual Property Rights (IPR) are legal actions taken to penalize those who intentionally infringe IP with fraudulent or malicious intent. The main goals of these remedies are to discourage deliberate infringement, counterfeiting, and piracy. Criminal sanctions are provided by a number of intellectual property acts under Indian law, including the Copyright Act of 1957, the Trade Marks Act of 1999, and the Geographical Indications of Goods Act of 1999. Offenders risk fines, jail time (from six months to three years or longer), or both. The destruction of fake goods as well as the search and seizure of illegal items are examples of criminal remedies. These steps are particularly crucial when there is commercial-scale infringement because civil remedies might not be enough to halt the unlawful conduct or shield the IP owner from more harm. A court ought to ensure that the remedies for intellectual property violation include adequate penalties to discourage wrongdoing. Deterrence is essential because intellectual property rights violations frequently do not result in the loss of material possessions and do not even necessitate direct communication with the holder of the rights; in fact, the holder of the rights is frequently unaware that it is a victim until the defendant's actions are specifically traced and looked into.

Judicial Interpretations on Intellectual Property Right Cases:

The United States Supreme Court rendered a significant decision in biotechnology patent law in the 1980 *Diamond v. Chakrabarty* case. In one example, a scientist named Ananda Mohan Chakrabarty created a genetically modified microbe that could degrade crude oil, which may be used to clean up oil spills. His patent application was rejected by the U.S. Patent Office, which claimed that present legislation did not allow for the patenting of living objects. The Court was asked to decide whether a genetically modified microorganism created by humans might be covered by Title 35 U.S.C. Section 101 as patentable subject matter. The Supreme Court decided in Chakrabarty's favour in a close 5–4 ruling, holding that his innovation qualified for patent protection because it was the product of human creativity rather than nature. "Anything under the sun that is made by man" is patentable, according to the Court's well-known statement. By confirming that genetically modified organisms can be patented if they are not naturally occurring, this ruling established a crucial precedent that paved the way for the contemporary biotechnology sector.

The *Bayer Corporation vs. Union of India*² case is a landmark judgment in Indian patent law concerning compulsory licensing. Nexavar, a life-saving cancer treatment that costs about ₹2.8 lakh a month and is out of reach for the majority of Indian patients, was patented by Bayer. Natco Pharma responded by requesting a compulsory licence to manufacture a less expensive generic version under Section 84 of the Indian Patents Act, 1970. The Controller of Patents was able to secure the licence, which allowed Natco to sell the drug at a much lower monthly cost of

² SCC, (2012)

8,800. The Intellectual Property Appellate Board (IPAB) upheld the decision notwithstanding Bayer's challenge. Three main factors led to the decision: the medication was not being produced locally in India, it was not being reasonably priced, and it did not comply with government regulations. This was the first compulsory licence ever given in India, and it set a major precedent for guaranteeing access to necessary medications while striking a balance between public health and intellectual rights.

Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd³, The Supreme Court established specific criteria to determine a passing off claim based on an unregistered trademark. It stated that elements such as the type of marks, meaning whether they are word marks or label marks, the extent of resemblance between the marks being phonetically alike & thus similar to the concept of the type of goods for which they function as trademarks, the resembleness in the nature, character, and performance of the goods from opposing parties, the demographic of consumers who may purchase the goods featuring the marks they seek, the method of ordering or buying the goods, and any other contextual factors that might be significant in assessing the degree of dissimilarity between the competing marks should be taken into account.

The ruling in *Louis Vuitton Malletier v. Santosh & Ors*⁴ emphasizes the significance of safeguarding intellectual property rights, particularly for renowned trademarks. The defendants were convicted of trademark violation and counterfeiting, misguiding consumers and harming the plaintiff's brand. The court granted a permanent injunction, awarded compensation, and referenced earlier cases to emphasize the precedent that "Louis Vuitton" and its trademarks warrant protection. The ruling conveys a warning to possible violators regarding the serious repercussions of counterfeiting and the significance of safeguarding intellectual property.

Intermediary Liability under the IT act, 2000 with respect to IP Infringement:

*Myspace Inc. v. Super Cassettes Industries Ltd*⁵ (Delhi High Court) Super cassettes owns music, MySpace was a website through which music could be downloaded. It was dabated under exemption on intermediaries under section 79 of the IT Act. SC held intermediary are not fully responsible for the activities takes place in cyberspace. Unless, there are special circumstances, they are not liable for third-party data they host or make available. "Safe harbour" protection is the name given to this exemption. This immunity, however, is not unqualified and may be withdrawn in the specific situations listed in Section 79(3). Delhi court has recently held that MySpace is not liable and it only has a PULL DOWN obligation.

Samridhi Enterprises v Flipkart Internet Pvt. Ltd. & Ors, CS (COMM) 63 of 2023], in this case, the intermediary is not obligated to do anything in response to a report of IP infringement. The responsibilities of intermediaries under the Information Technology (Intermediary

³ (JT 2001 (4) SC 27),

⁴ Delhi high court, 2023.

⁵ DHC, 2011.

Guidelines and Digital Media Ethics Code) Rules, 2021 have been clarified by the Delhi High Court. The court dismissed the plaintiff's claim that the defendant's failure to remove pirated listings from its website constituted a violation of the IT Rules. The court pointed out that before consumers can access an intermediary's platform, Rule 3(1) of the IT Rules simply requires the intermediary to disclose its rules, regulations, privacy policy, and user agreement. The court further explained that in response to an infringement allegation, the IT Rules do not require any particular course of action.

The court further explained that in response to an infringement allegation, the IT Rules do not require any particular course of action. In addition, the court established a precedent for future disputes involving underlying works and defined who owns copyright in film adaptations. The plaintiff had no authority to prevent the defendants from novelising the script of the film "Nayak," the court said, interpreting Section 13(4) of the Copyright Act as making a distinction between copyright in a film and any underlying works.

In the Delhi High Court, Pidilite Industries Ltd⁶ filed a rectification application against Sanjay Jain's trademark "POMA-EX KIWKHEAL," arguing it was deceptively similar to their own. Pidilite claimed that the defendant's mark and packaging were designed to mislead consumers into believing there was an association with their products, benefiting from their established goodwill. The court found that the defendant's mark was indeed deceptively similar and had been registered in bad faith, intending to benefit from the goodwill of "Fevikwik." In order to support Pidilite's claims and strengthen the defence of well-known trademarks against infringement and consumer confusion, the court ordered the defendant's trademark to be cancelled.

Fab India v. Fab India Emporium (Delhi High Court)

Fabindia⁷, Fab India Emporium was sued for trademark infringement by a well-known handcrafted goods business. According to Fabindia, the defendant's use of the name "Fab India Emporium" was misleadingly similar to their trademark "FABINDIA," which had been in use since 1960 and had garnered significant goodwill and reputation. The Delhi High Court ruled in Fabindia's favour, concluding that the defendant's usage of "Fab India Emporium" was in fact confusing and deceptively similar. By prohibiting the defendant from using the name "Fab India Emporium" or any other mark that is confusingly similar to "FABINDIA," the court upheld the plaintiff's trademark rights and avoided consumer confusion.

The case of **R.G. Anand v. Deluxe Films**⁸ is a case which filed before the SC for the **copyright infringement** in literary and dramatic work of anand. R.G. Anand, a playwright, claimed that the film "*Hum Hindustani*" produced by Deluxe Films had copied the theme, plot, and characters of his play "*Hum Hindustani*." The Court ruled that while both works shared a similar theme, **there**

⁶pidilite Industries Ltd. v. Sanjay Jain (Delhi High Court)2018.

⁷ Fab India v. Fab India Emporium (Delhi High Court)

⁸ SCC, 1978.

was no substantial copying of the expression of the idea, which is essential for copyright infringement. The Supreme Court held that ideas are not copyrightable, only the original expression of ideas is protected. This case is significant for establishing the legal principle that similarity in theme or subject does not amount to copyright infringement unless there is a substantial and material similarity in the expression of the idea. It introduced the "substantial similarity test" in Indian copyright law.

In the case of **Yahoo Inc. v. Akash Arora (1999)**, filed before the **Delhi High Court** dealt with the issue of **domain name and trademark infringement**. Yahoo Inc., a well-known global internet company, filed a suit against Akash Arora, who had registered the domain name **“yahooindia.com”**, arguing that it was deceptively similar to Yahoo’s trademark and could mislead internet users. The Court ruled in favor of Yahoo Inc., stating that domain names serve the same function as trademarks in the online world and are therefore entitled to equal protection. The use of a similar domain name was likely to cause **confusion and deception** among users. This was one of the first Indian cases to recognize that **domain names are protected under trademark law**, and it established a strong precedent for **cybersquatting** and internet-based trademark disputes in India.

In the case of **Microsoft Corporation v. Kiran & Another (2007)**, the **Delhi High Court** dealt with the issue of **software piracy**, which is a form of copyright infringement. Microsoft alleged that the defendants were illegally using and distributing its copyrighted software without proper licenses. The Court awarded relief to Microsoft after concluding that the defendants had violated its intellectual property rights. This case is significant as it reaffirmed that **software is protected under copyright law** in India, and unauthorized reproduction or use of software constitutes **infringement**. The court also emphasized the availability of both **civil and criminal remedies** against software piracy, helping strengthen enforcement against IP violations in the software industry.

Adidas India v. Three-Stripe Infringers⁹

Adidas AG sued several defendants for trademark infringement, claiming unauthorized use of their iconic "three-stripe" mark on various goods, including textiles. The defendants argued that the stripes were not identical and did not infringe on Adidas's trademark rights. Since the use of comparable stripes was likely to cause confusion and constituted trademark infringement, the Delhi High Court ruled in favour of Adidas. In order to prevent the defendants from producing, distributing, or selling anything with the infringing stripes, the court issued a permanent injunction.

Asian News International v. OpenAI¹⁰

⁹ Delhi District court, 2024.

¹⁰ 2024.

The Indian news organization ANI charged OpenAI with copyright violation, claiming that OpenAI utilized ANI's protected news material to train its language model, ChatGPT, without securing required permissions. ANI argued that ChatGPT produced replies that were either identical or notably alike to ANI's original articles, breaching copyright laws and harming ANI's reputation by ascribing inaccurate statements and invented interviews to the organization. OpenAI justified its actions by referencing the fair use doctrine, claiming that it utilized publicly accessible content in accordance with legal guidelines. The court, nonetheless, ruled in favor of ANI, determining that OpenAI's usage of ANI's content without permission was a violation of copyright. The court set a significant precedent for AI and copyright laws by issuing an interim injunction that forbade OpenAI from using ANI's content and required them to take measures to prevent future unauthorised use.

UTI Infrastructure Technology and Services Ltd. (UTIITSL)¹¹, the plaintiff sued a number of defendants for using their trademarks "UTI," "UTI PAN," and "UTIITSL" without authorisation on websites that falsely claimed to provide PAN-related services. UTIITSL, exclusively authorized by the Income Tax Department for processing PAN and related services, argued that the defendants' websites were collecting personal data and issuing fake PAN cards, deceiving the public about their affiliation with UTIITSL. The complainant argued that by compromising sensitive information, this unlawful usage not only violated their trademarks but also constituted a serious national security risk. The defendants contended that their use was lawful and did not violate the rights of UTIITSL. Nonetheless, the Bombay High Court ruled in support of UTIITSL, concluding that the defendants' conduct amounted to a threat to the public interest and trademark infringement. In order to protect UTIITSL's trademark rights and protect public data, the court issued an ex-parte ad-interim injunction that forbade the defendants from using the contested trademarks and ordered the domain names linked to the fake websites to be suspended.

Phonographic Performance Ltd. v. State of Goa

A circular issued by the State of Goa on January 30, 2024, was challenged in a writ case brought by Phonographic Performance Ltd. (PPL) and Sonotek Cassettes Company. According to the circular, musical performances during religious ceremonies—including weddings—were not deemed to be copyright infringements under the 1957 Copyright Act. PPL, a registered copyright organisation, contended that the circular limited their ability to file a lawsuit for copyright infringement and illegally broadened the application of Section 52(1)(za) of the Copyright Act, which deals with fair dealing exceptions. The State of Goa argued that it had the power to interpret the law in the public interest through the circular. The Bombay High Court, however, ruled in favour of PPL, concluding that the State of Goa had overreached itself by interpreting the law - a role that belongs to the court. Because the circular could not supersede the Copyright

¹¹ *UTI Infrastructure Technology and Services Ltd. v. Extra Tech World & Ors*(2024).

Act's provisions, the court ruled it unlawful and void, quashing it. This ruling safeguarded copyright holders' rights against unauthorised use and upheld the judiciary's sole authority to interpret copyright laws.

***Pocket FM Pvt. Ltd. v. Novi Digital Entertainment Pvt. Ltd*¹²**

The plaintiff, Pocket FM, requested an ad interim temporary injunction against Novi Digital Entertainment, the company that runs Disney+ Hotstar, for allegedly violating their copyright by producing a television show called "Yakshini," which Pocket FM claimed was an unapproved adaptation of their well-known audio series of the same name.

Pocket FM argued that they held exclusive rights to the "Yakshini" audio series, which had been published on their platform and had garnered significant popularity. They contended that Novi Digital's television series, also named "Yakshini," was conceptually similar and likely to mislead consumers into believing there was an association between the two. Novi Digital retorted that since the series was about to be released, there was no prima facie case for infringement and that the injunction would inflict irreversible harm. The Delhi High Court denied Pocket FM's request for an interim injunction, stating that the plaintiff had not presented a compelling case for the injunction and that there was not enough proof of a copyright infringement prior to the publication. The court stressed that an interim injunction was not necessary due to the series' impending distribution and the absence of hard proof of infringement.

***Star India Pvt. Ltd. v. Magicwin.Games*¹³**

Major media business Star India sued Magicwin.Games and other defendants for violating copyright and using intellectual content without authorisation. According to Star India's exclusive digital media and television rights under a Media Rights Agreement with the ICC, the defendants were unlawfully streaming and broadcasting live cricket matches. The defendants, which included rogue betting websites and domain name registrars, were charged with violating Star India's broadcast reproduction rights under Section 37 of the Copyright Act, 1957, by providing internet gambling services and broadcasting the matches without permission. The plaintiff requested a "Dynamic" injunction to stop their content from being illegally distributed in real time. By granting the injunction and prohibiting the defendants from streaming or broadcasting the matches, the Delhi High Court ruled in favour of Star India. The court underlined how important it is to safeguard intellectual property rights in the digital era and stop illegal use that can endanger the owners of those rights.

Conclusion:

The judiciary plays an indispensable and evolving role in the protection, interpretation, and enforcement of intellectual property (IP) rights in India and globally. While administrative

¹² DHC, 2024. ORDER DATED 10.7.2024.

¹³ DHC, 2024, O.D. 30.05.2024.

bodies are primarily tasked with registration, adjudication, and initial dispute resolution concerning IP matters, the judiciary remains the final and most authoritative forum for addressing grievances, correcting administrative overreach, and enforcing rights with constitutional legitimacy. Through judicial review, courts act as a critical check on administrative discretion, ensuring that IP rights are not arbitrarily denied, revoked, or infringed upon due to bureaucratic inefficiencies or biased decision-making. Indian courts, particularly the High Courts and the Supreme Court, have consistently demonstrated their commitment to safeguarding the rights of IP holders through robust precedents, expansive interpretation of IP laws, and equitable balancing of public interest with private innovation.

The cases reviewed underscore the judiciary's proactive stance in protecting not only the economic interests of IP holders but also public welfare striking a balance between monopolistic protections and access to essential innovations like medicines (*Bayer case*) or digital content rights (*Star India case*). Courts have clarified legal ambiguities in domain names, intermediary liability, and copyright exceptions, and have increasingly addressed the challenges posed by emerging technologies. Looking ahead, the judiciary must continue to uphold transparency, proportionality, and adherence to principles of natural justice in all IP matters. Simultaneously, it should engage with international legal norms and adapt to technological advancements to provide nuanced, forward-looking decisions. Thus, while the legislative and executive branches lay the foundational structure of intellectual property law, it is the judiciary that breathes life into these frameworks ensuring that creativity, innovation, and rights are not only recognized but meaningfully protected.

BALANCING POWERS: IS JUDICIAL ACTIVISM A THREAT TO DEMOCRATIC GOVERNANCE?

-Garima Pahwa

Abstract:

Judicial activism is defined as judicial decisions shaped primarily by personal or political considerations of judges, whereas judicial overreach involves the judiciary exceeding its mandate by interfering with the functions of the legislative or executive branches, thereby challenging the constitutional balance of power. The paper traces the historical evolution of these concepts and analyzes significant landmark judgments and recent court rulings in the three countries to determine whether a thin line exists between judicial activism and overreach, and to what extent one overlaps the other. This research paper critically examines the doctrine of separation of powers with a specific focus on the judiciary's role in the governance of India. Through comparative legal analysis, the study aims to shed light on current judicial trends and proposes recommendations to prevent judicial overreach while upholding judicial accountability and independence.

Keywords: Judicial Activism, Overreach, Separation of powers, Governance, Accountability

Introduction

The Constitution of India is the longest written Constitution in the world displaying intriguing uniqueness and versatility. The drafters had made an endeavor to address the diverse range of issues that has challenging for the course of decade. The government system laid down in the Constitution mainly divides into three prominent pillars which are legislature, executive and judiciary. The third organ judiciary has a hierarchal structure with the Supreme Court as the apex body.

“The Supreme Court has been called upon to safeguard civil and minority rights and plays the role of 'guardian of the social revolution’.”¹ Each organ plays its own role. The Principle of Separation of Powers delineates the powers vested in each brand. Where the gap is created by the Legislature the judiciary steps in and plays a proactive role. The doctrine of judicial review gives a distinctive power to courts to decide the constitutional validity of the law made by legislative and actions of executive. The landmark judgment of Keshavanada Bharti case² gave a basic structure theory identified the power of judicial review as a basic structure.

¹ R Shunmugasundaram, Judicial Activism and Judicial Overreach in India

² AIR 1972

The judicial review can be traced back to the most celebrated case of American Judiciary *Marbury v. Madison*³. The Chief Justice Marshall in his words marked, “It is emphatically the powers and duty of the Judiciary to say what the law is.”⁴ The Constitution of India under Article 13 vests power with the Courts of Judicial Review. Judicial Activism is the embedded component of the judicial review. Article 32, 226 and 143 of the Indian Constitution reflects the important element of judicial activism. In the Conference Dr. Manmohan Singh, stated that:

“Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that.... There is growing dissatisfaction regarding the functioning of the executive and the legislature and their ability to deliver effective governance to meet the needs and challenges of our times. In this background, it is a matter of great satisfaction that the public at large continues to hold our judiciary in high esteem. The judiciary as custodians and watchdogs of the fundamental rights of our people has discharged its responsibility very well indeed.”

The annals of the Judicial Activism in India, was anchored by the Public Interest Litigation (PIL). The first case of PIL *Mumbai Kamgar Sabha v. M/s Abdulbhai Faizullabhai & Ors.*⁵ laid down the foundation for judicial activism. The concept of the PIL flourished after notable actions of J PN Bhagwati through landmark developments provided the doctrine of basic structure and prospective overruling.

However, the ambits of judicial activism have no boundaries. The judicial activism becomes judicial adventurism and eventually takes the form of judicial overreach which poses danger to the democracy of the nation. The judges give their opinions after judgments or beyond facts of the case which affects legislative wing. *The Indian Drugs & Pharmaceuticals Limited V. Workmen*⁶ commented that *“the Supreme Court cannot arrogate to itself the powers of the executive and the legislature.... There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits.”*

In other words, judicial activism denotes the judiciary's proactive role in the interpretation of statutes and constitutional provisions, wherein courts may influence or shape public policy by rendering expansive readings of the law. While such judicial engagement can serve as a vital mechanism for upholding justice and addressing pressing social concerns, it raises constitutional concerns when it exceeds its legitimate jurisdiction—an occurrence referred to as judicial overreach. Judicial overreach arises when the judiciary acts *ultra vires*, encroaching upon the constitutional functions allocated to the legislative or executive branches. This doctrine underscores the necessity for judicial activism to remain circumscribed by constitutional

³ 1803

⁴ Ibid.

⁵ 1976 AIR 1455

⁶ (2007) 1 SCC 4086

parameters, thereby preserving the foundational principle of separation of powers and maintaining institutional equilibrium among the branches of government.

Evolution of Judicial Activism

In India, there are two sources of law are precedents and legislative enactments. The Supreme Court has primarily focused on interpretation of laws and facts which gave a new approach to law. Article 13 of the Constitution prohibits the State from enacting any law that infringes upon the fundamental rights of its citizens. In *A. K. Gopalan v State of Madhya Pradesh*,⁷ the Supreme Court opined “*The inclusion of Article 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights are infringed by any legislative enactment, the Court has the authority to declare the enactment to the extent that it transgresses the limits, invalid.*”

The Supreme Court has the power to issue writ or any order to protect fundamental rights under Article 32 of the Constitution of India. The Supreme Court ruled in the case of *Fertilizer Corporation Kamgar Union v. Union of India*,⁸ “The authority under Article 32 is an essential component of the fundamental framework of the Indian Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.”

Similarly, Article 226 of the Constitution of India, the High Courts of each state are vested with the authority, to issue writs, orders, or directions to any person, authority, or government within their territorial jurisdiction. This power may be exercised not only for the enforcement of fundamental rights but also for any other purpose deemed legally valid. The jurisdiction conferred under Article 226 is broader in scope than that under Article 32, enabling the High Courts to address violations of legal rights in addition to constitutional rights. Article 227 of the Constitution of India empowers every High Court with the power of superintendence over all courts and tribunals functioning within its territorial jurisdiction, except those dealing with matters under the armed forces. This supervisory jurisdiction includes both administrative and judicial supervision, ensuring that the subordinate judiciary operates within the bounds of legality and procedural propriety. Article 136 confers upon the Supreme Court the discretionary power to grant special leave to appeal from any judgment, decree, determination, sentence, or order rendered by any court or tribunal in India, including High Courts, subject to certain conditions. This extraordinary appellate jurisdiction is not a matter of right but is invoked to correct grave miscarriages of justice.

Article 142 endows the Supreme Court with wide-ranging discretionary powers to pass any decree or make any order as may be necessary for doing "complete justice" in any cause or

⁷ AIR 1950 SC 27

⁸ SCC (1) 568

matter pending before it. This provision enables the Court to transcend procedural technicalities and, where necessary, assume executive or legislative functions to ensure the delivery of substantive justice, thereby reinforcing its role as the final arbiter in the constitutional and legal framework of the nation.

Development of Judicial Activism In India

In *A.K. Gopalan vs State of Madras*⁹, “Article 21 was given a narrow interpretation by the Apex Court. The verdict, in this case, was pronounced by a six-member constitutional bench of the Supreme Court, with a majority of six judges in favor and five against it. The dissenting opinion was given by Justice Fazl Ali. Barrister M.K. Nambiar, in this case, advocated for a conjoined reading of Articles 19 and 21, arguing that “a common thread” ran through all the liberties enshrined in Part III. The court while rejecting all the contentions held that personal liberty means freedom of the physical body only and nothing else. The court gave a restrictive meaning of Article 21 of the Constitution on the basis of mutual exclusivity of Fundamental rights.”

Later, in *Rustom Cavasjee Cooper vs Union of India*¹⁰, “the “theory of mutual exclusivity” got rejected which was in use for 20 years prior to this case right from the time of *A.K. Gopalan*. The Court ruled that it cannot dismiss a petition that unequivocally demonstrates that people's fundamental rights are being infringed based only on technicalities. The Court also established the "Effect" test and abolished the "Object" test.”

In the landmark judgment of “*Maneka Gandhi v. Union of India*”¹¹, a” seven-judge bench of the Supreme Court effectively overruled the earlier decision in *A.K. Gopalan*¹², which had been rendered by a five-judge bench. This case marked a transformative moment in Indian constitutional jurisprudence, as the Court introduced the doctrine of due process into the interpretation of Article 21.”

The Court held that the term “personal liberty” in Article 21 must be understood in its broadest sense, encompassing a wide range of rights that are essential to human liberty.¹³ It further observed that many of these rights are separately protected as fundamental rights under Article 19, thereby reinforcing the interconnectedness of the constitutional guarantees. Significantly, the Court rejected the notion that fundamental rights are mutually exclusive, declaring instead that they must be read together as a cohesive whole. Thus, Article 21 is to be interpreted in harmony with Articles 14 and 19, forming a triad of rights that collectively safeguard individual freedoms.¹⁴

⁹ AIR 1950 SC 27

¹⁰ (1970)

¹¹ 1978 SCR (2) 621

¹² Supra 9

¹³ Ibid.

¹⁴ The Constitution of India

The judgment also fundamentally altered the understanding of the phrase “procedure established by law” in Article 21. The Court ruled that such a procedure must be “fair, just, and reasonable”, and cannot be arbitrary, fanciful, or oppressive. In doing so, the Court effectively imported the essence of the American “due process” doctrine, thereby expanding the scope of judicial review under Article 21 and reinforcing the protection of individual liberties.

Implications For Judicial Activism

According to Granville Austin, “the Supreme Court of India bears the crucial responsibility of protecting the rights and future of India's socio-economic and religious minorities. The Indian judiciary is widely regarded as the guardian of Indian democracy and the ultimate protector of the Constitution, which is revered as the foundational law of the land.”¹⁵

Through the mechanism of judicial activism, the judiciary has considerably broadened its role, asserting its authority to advance social and economic justice. This expansion has enabled the courts to enforce the Directive Principles of State Policy enshrined in Part IV of the Constitution, thereby transforming them from non-justiciable guidelines into tools for promoting equality and addressing systemic injustices.¹⁶

Judicial Overreach in India

There are few words that can truly capture the Indian judiciary’s commendable efforts in safeguarding the nation during one of its most severe emergencies. Faced with a subservient Parliament, the Indira Gandhi administration sought to distort and undermine the Constitution both prior to and throughout the Emergency. In times like these, the presence of a strong, independent judiciary capable of standing up to authoritarian rule is seen as essential by the people.¹⁷ The Indian judiciary is often criticized for judicial overreach, with several instances cited as evidence of its increasingly assertive stance. This criticism is frequently echoed even within the legal system, particularly by politicians and advocates of the positivist view of law. Historically, followers of Chief Justice Hidayatullah and constitutional expert H. M. Seervai have consistently opposed the judiciary's activist approach, arguing that it endangers the principle of separation of powers—a fundamental cornerstone of the Constitution.¹⁸

Several prominent cases have drawn attention as examples of alleged judicial overreach in India. These include:

¹⁵ *Adding the Dimension of Judicial Activism to the role of The Indian Judiciary*, *Jus Corpus Law Journal*, ISSN No. 2582-7820

¹⁶ *Ibid.*

¹⁷ Top 10 Landmark Supreme Court Judgments of 2022, available at: <https://blog.finology.in/Legal news/landmark-supreme-court-judgments-2022> (last visited on February 4, 2023)

¹⁸ *Ibid.*

- **Shyam Narayan Chouksey v. Union of India**¹⁹: “In this case, the Supreme Court directed that the national anthem must be played before the screening of films in cinema halls. Critics argued that this directive imposed unnecessary patriotism and extended beyond the court’s jurisdiction.”
- **Censorship of Jolly LLB II**²⁰: “The film faced legal scrutiny after a writ petition claimed it portrayed the judiciary in a mocking manner, amounting to provocation and contempt of court. The Bombay High Court formed a special three-member committee to review the film, even though the Central Board of Film Certification (CBFC) is the designated authority for such matters. Following the committee’s recommendations, the filmmakers were compelled to remove four scenes. This intervention was seen as an infringement on creative freedom and a potential violation of Article 19(2) of the Constitution, which safeguards freedom of speech and expression with reasonable restrictions.”
- **Rajiv Sharma v. State of West Bengal**²¹: “In this case, the Supreme Court granted bail to BJP Yuva Morcha member Priyanka Sharma but required her to issue an apology for sharing a meme. The Court maintained that freedom of expression under Article 19(1)(a) does not extend to speech that infringes upon the rights of others.”
- **State of Tamil Nadu v. K. Balu & Others**²²: “A public interest litigation (PIL) was filed before the Supreme Court concerning road safety. In response, the Court issued an order banning the sale of alcohol at retail outlets, restaurants, and bars located within 500 metres of national and state highways. While aimed at reducing traffic accidents, the ruling had significant economic consequences, including revenue losses for state governments and job losses in affected businesses. Critics viewed this decision as judicial overreach, arguing that it involved an administrative matter better suited to executive expertise and discretion.”

Consequences of Judicial Overreach in India

The notion of judicial overreach—where the judiciary steps beyond its constitutionally assigned role and intervenes in matters traditionally reserved for the executive and legislature—has become a focal point of legal and political discourse in India. While the judiciary is entrusted with the vital responsibility of upholding the rule of law and protecting the fundamental rights of citizens, its overextension into policymaking and administrative affairs can produce significant repercussions. Such instances may disrupt the balance of powers, weaken democratic accountability, create policy uncertainty, erode public trust, and affect the smooth operation of democratic institutions.

1. Waving Separation of Powers

¹⁹ 2018

²⁰ Fox Star Studios India Pvt. Ltd. v. Union of India & Ors., **AIR ONLINE 2020 DEL 1108**

²¹ 2019

²² 2017

A significant consequence of judicial overreach in India is the weakening of the separation of powers, which is a fundamental principle of the Constitution. The judiciary, as intended by the Constitution's framers, is responsible for interpreting laws and ensuring their conformity with the Constitution. However, in landmark decisions such as *Kesavananda Bharati v. State of Kerala*²³ “the judiciary extended its role by ruling on the basic structure of the Constitution, thus encroaching upon the domain of constitutional amendments—a function traditionally reserved for the legislature. Such actions blur the clear boundaries between the branches of government and compromise the system of checks and balances.”

2. Accountability of Democracy

Democratic accountability is fundamental to the functioning of a healthy democracy. In India, where the responsibility for policymaking and governance lies with elected representatives, judicial overreach can undermine this accountability. “When the judiciary intervenes in issues with significant policy implications—such as environmental regulation or economic policy—it bypasses the accountability that elected officials owe to the public. This concern was highlighted by the Supreme Court’s directive prohibiting the sale of liquor along highways, which sparked debate over the democratic legitimacy of such judicial involvement in policymaking.”

3. Instable Policies

Judicial overreach may result in policy instability, thereby disrupting long-term planning and effective governance. Repeated judicial interventions in policy matters create uncertainty regarding the continuity and direction of regulations. “A notable example is the Supreme Court’s cancellation of 2G spectrum licenses in the 2G spectrum case, which generated considerable uncertainty within the telecommunications sector, adversely impacting investments and undermining policy consistency. Such instability poses challenges to economic development and the smooth functioning of governance.”

4. No Public Confidence

Public trust in the judiciary is essential for maintaining an effective legal system. However, judicial overreach can erode this trust when the public perceives judges as exceeding their constitutional mandate or advancing personal views. For example, while “the Supreme Court’s ruling in the Vishakha case—establishing guidelines to prevent sexual harassment in the workplace—was a landmark decision, such judicial involvement in areas traditionally managed by the legislature and executive can lead to concerns about the judiciary’s impartiality and its role in policy-making.”

5. Political Instability

²³ (1973)

Excessive judicial overreach can provoke political resistance, leading to demands for curbing judicial authority. “The controversy surrounding the National Judicial Appointments Commission (NJAC) exemplifies the conflict between the judiciary and the legislature regarding the appointment of judges. This dispute sparked calls for reform and raised concerns about the potential weakening of judicial independence, highlighting the tensions that emerge when the judiciary is seen as intruding upon the functions of the other branches of government.”

6. Power Centralisation

Although the judiciary’s function in interpreting laws and protecting fundamental rights is essential, excessive judicial overreach may result in an undue concentration of power within the judicial branch. Such a concentration undermines the principles of checks and balances and democratic governance. For instance, “the case of *Suresh Kumar Koushal v. Naz Foundation* (2013), which addressed the decriminalization of homosexuality, raised concerns about unelected judges making determinations on critical social matters traditionally left to the legislature.”

7. Legislative Process Interference

Judicial overreach can interfere with the legislative process by dictating policy changes without the broader public input that the legislative process provides. “The court’s involvement in policy matters, such as its orders on banning certain types of fireworks during Diwali to curb pollution, can bypass the nuanced considerations that legislative bodies engage in.”

8. Legislative Incentive

When the judiciary takes an active role in policy-making, elected officials may become less motivated to tackle urgent social issues themselves. They might rely on the courts to resolve controversial matters, thereby avoiding potential political fallout. “This shift can diminish the legislature’s drive to engage in proactive governance and address important challenges directly.”

9. Overburdened Judiciary

Excessive judicial overreach can place a heavy strain on the judiciary, leading to increased case backlogs and delays in delivering justice. “With judicial resources already stretched thin due to a high volume of pending cases, diverting attention to issues that properly belong to the legislative or executive branches further impairs the system’s efficiency. This not only hampers the judiciary’s operational effectiveness but also undermines its capacity to administer timely and fair justice.”

The impact of “judicial overreach” in India is both “extensive and multifaceted, affecting key aspects such as the separation of powers, democratic accountability, policy consistency, and public trust”. Although a “proactive and vigilant judiciary” is essential for “defending citizens’ rights and ensuring the rule of law”, it is equally crucial to prevent “judicial activism” from upsetting “the balance of power or weakening democratic governance”. By clearly defining the limits of “judicial authority” and “maintaining a careful equilibrium” between judicial review and the functions of “the legislative and executive branches”, India can preserve its democratic values while promoting responsible governance and robust checks and balances.

Conclusion

The Judiciary is the weakest wing of the government. The lack of public trust and confidence is the power that what it is formed of. The check on constitutionality of laws and judicial activism are the pillars of trust of judiciary. It is not administration of justice but the delivery of justice to the people of country while working in the bounds of the law of the land to verify the inappropriate or unreasonable actions of the other wings of government. The judges are bound to interpret the laws in a fair, impartial, unbiased and open minded ways for judicial activism.

The judicial activism strengthens and guards the basic structure of the Constitution, rule of law and constitutionalism in the judiciary and acts the safe area in the happening of crisis or chaos caused by the groups of different interests. The judiciary controls and guides the administration of justice and guarantees the action taken are in good faith and in public interest.

However, the challenge arises in cases when judges become over excited and active to encroach into dimensions out of their ambit and jurisdiction and this has become the trend. There is a narrow boundary between judicial activism and judicial overreach. When the activism becomes excessive and inevitably upsets the institutional balance. The actions of the judiciary must be compassionate in making decisions regularizing the government. The courts in India must act at caution while using judicial activism as when judges’ steps outside their arena and acts agitated. Through PILs and other types of activism, the society has taken an active role in innovating laws and its interpretation. The rights of socially marginalized groups have been restored as a result, leading to increased public respect for the nation's legal system. The Supreme Court and High Courts have supported forward-thinking social initiatives. In a democratic society, maintaining the principle of separation of powers and ensuring the legitimacy of all three branches of government is crucial.

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Judicial Review and Legislative Intent

~ Nikke

Abstract

The relationship between judicial review and legislative intent is central to constitutional governance, mediating the balance between judicial authority and democratic legitimacy. This chapter investigates how courts interpret and apply legislative intent during judicial review, with a primary focus on India's transformative constitutional framework and comparative insights from the United States, United Kingdom, and Canada. It explores the conceptual foundations of judicial review, exemplified by India's basic structure doctrine in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, and legislative intent, driven by purposive interpretation in cases like *Shayara Bano v. Union of India*, (2017) 9 SCC 1. The chapter analyzes interpretive methods—textual analysis, contextual approaches, and extrinsic aids such as India's statements of objects and the UK's *Hansard* (*Pepper v. Hart*, [1993] AC 593)—to discern legislative purpose. Through landmark and contemporary case studies, including India's public interest litigation (*Vishaka v. State of Rajasthan*, AIR 1997 SC 3011), it examines practical applications and challenges, such as judicial activism and ambiguous legislative records. Critiques highlight debates over judicial legitimacy and India's documentation gaps, while future directions address emerging issues like AI-drafted laws and international law's influence (*Vishaka*). The chapter underscores the rule of law's dependence on this equilibrium, advocating for enhanced legislative clarity and interdisciplinary research. By synthesizing Indian and global perspectives, it contributes to understanding how courts uphold constitutional principles while respecting legislative will across diverse legal systems.

Keywords: Judicial Review, Legislative Intent, Constitutional Law, Statutory Interpretation, Basic Structure Doctrine, Public Interest Litigation, Purposive Interpretation, Comparative Law, Indian Judiciary, Rule of Law, Artificial Intelligence, International Law.

Introduction

In the delicate balance of India's democratic system, the judiciary wears two hats: it safeguards constitutional values and respects the will of the legislature. Two key ideas drive this role—judicial review and legislative intent. Judicial review allows courts to check if laws and actions align with the Constitution or fundamental rights, ensuring they stay within legal boundaries. Legislative intent, on the other hand, captures the purpose or vision lawmakers had in mind when crafting a law. Together, these concepts shape how courts interpret and apply laws, striking a balance between holding the legislature accountable and honouring the choices of elected representatives. This chapter digs into the relationship between judicial review and legislative intent, exploring their theoretical roots, how they work in practice, and the tricky challenges courts face in maintaining this equilibrium.

The importance of judicial review and legislative intent is hard to overstate. Judicial review, famously cemented in the U.S. by *Marbury v. Madison* (1803)¹, is a cornerstone of constitutional democracy, giving courts the power to strike down laws or government actions that clash with higher legal principles. But this power isn't a blank cheque—courts must be careful not to overstep into the legislature's territory. Legislative intent acts as a compass, guiding courts to interpret laws in line with what lawmakers intended, whether by looking at the words of the law itself, parliamentary discussions, or the broader social context. This isn't just a technical task; it's a deep exercise in managing power, ensuring legitimacy, and staying accountable in a democracy.

This exploration brings up some tough questions. How do courts figure out what the legislature meant when laws are vague or records are incomplete? Should judicial review always defer to legislative intent, or do constitutional principles sometimes take priority? What happens when courts stretch too far or when laws are unclear? These challenges resonate across legal systems, whether it's the common law traditions of India and the U.S. or the civil law approaches elsewhere. From the strict, word-focused methods of American courts to the purpose-driven styles of Canadian and European judges, ways of understanding legislative intent vary, but the core issue remains: how to uphold the rule of law without sidelining the people's will.

2. Conceptual Foundations

To understand how judicial review and legislative intent work together, we need to dive into their theoretical roots, historical development, and practical roles in a democratic setup. This section explains what judicial review and legislative intent mean, traces their origins and importance, and places them in a comparative context, with a special focus on India's legal system. By laying this groundwork, we pave the way for exploring how courts balance their duty to uphold the Constitution with their respect for the legislature's intentions.

¹ *Marbury v. Madison*, (1803) 5 US (1 Cranch) 137 (US Supreme Court)

2.1 Judicial Review

Definition and Origins

Judicial review empowers courts to assess whether laws, executive decisions, or administrative actions align with the Constitution or other higher legal standards. When these violate core legal principles, courts can strike them down, acting as guardians of the rule of law to ensure all government actions stay true to foundational values. Globally, judicial review has diverse origins. In the United States, *Marbury v. Madison* (1803) established the judiciary’s authority to strike down unconstitutional laws, with Chief Justice John Marshall famously asserting that “it is emphatically the province and duty of the judicial department to say what the law is.” In the United Kingdom, judicial review traditionally focused on administrative actions due to parliamentary sovereignty, though the Human Rights Act 1998 introduced limited constitutional review. Canada’s adoption of the Charter of Rights and Freedoms in 1982 empowered courts to review legislation for rights violations.

In India, judicial review is a cornerstone of the constitutional framework, rooted in the Constitution of 1950. The Supreme Court of India has developed a robust tradition of judicial review, drawing inspiration from both American constitutionalism and indigenous legal principles. The concept gained prominence in *A.K. Gopalan v. State of Madras* (1950)², where the Court began asserting its authority to review preventive detention laws, though initially with deference to legislative power. The *Kesavananda Bharati*³ case of 1973 was a game-changer for Indian law. It brought in the “basic structure doctrine,” which is like a protective shield for our Constitution. Basically, it says that Parliament can tweak the Constitution under Article 368, but it can’t mess with its core pillars—things like judicial review, federalism, and our fundamental rights. Then, in 1980, the *Minerva Mills*⁴ case took it a step further. The Supreme Court said that judicial review itself is part of this untouchable “basic structure,” making it crystal clear that it’s a non-negotiable part of our democracy.

Role

Judicial review is like the umpire in a cricket match—it makes sure everyone sticks to the rulebook. Across the globe, it keeps laws in line with the constitution, protects our rights from government overreach, and ensures the legislature, executive, and judiciary don’t step on each other’s toes. In the U.S., cases like *Brown v. Board of Education*⁵ and *Obergefell v. Hodge*⁶ show how judicial review champions equality, like leveling the playing field for all. In Canada, their Charter lets courts strike down laws that mess with rights, as seen in *R v. Morgentaler*⁷,

² *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

³ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

⁴ *Minerva Mills v. Union of India*, AIR 1980 SC 1789

⁵ *Brown v. Board of Education*, (1954) 347 US 483 (US SC).

⁶ *Obergefell v. Hodges*, (2015) 576 US 644 (US SC).

⁷ *R v. Morgentaler*, (1988) 1 SCR 30 (SCC).

which sorted out abortion access. In South Africa, judicial review under their 1996 Constitution is like a watchdog, guarding post-apartheid goals of equality and dignity.

In India, judicial review is a proper game-changer, reflecting our Constitution's heart—social justice, equality, and democracy. Our Supreme Court has used it to tackle big issues, like caste discrimination in *Indra Sawhney v. Union of India*⁸, which sorted out reservation policies, or pollution in *M.C. Mehta v. Union of India*⁹ where the court cracked the whip on industries. It's also kept the government in check, like in *S.R. Bommai v. Union of India*¹⁰, which stopped the misuse of President's Rule under Article 356. And then there's our desi superstar—public interest litigation (PIL). It's like opening the court's doors to aam aadmi, letting judges dive into issues like education, healthcare, and human rights, shaping policies while keeping constitutional values rock-solid.

Scope and Limits

How far judicial review goes depends on the country. In “strong-form” systems like the U.S. and India, courts can outright cancel laws that don't vibe with the constitution. In “weak-form” systems like the UK or New Zealand, courts are more like polite advisors, suggesting changes without bossing the legislature around. There are checks too—courts often stay out of things like economic policies (called deference) or avoid “political questions,” like in the U.S. case *Nixon v. United States*¹¹. Procedural stuff, like who can file a case or when, also sets boundaries.

In India, judicial review is like a Swiss Army knife—versatile but not without limits. The basic structure doctrine, born in *Kesavananda Bharati v. State of Kerala*¹², is a unique desi feature, letting courts even review constitutional amendments. That's some serious power, yaar! But courts play it cool in areas like fiscal policy or national security, as seen in *BALCO Employees Union v. Union of India*¹³, where they let the government handle privatization. Still, the judiciary sometimes gets flak for overstepping, especially in PIL cases. Take *Vishaka v. State of Rajasthan*¹⁴, where the court laid down workplace sexual harassment guidelines—super move, but some say it felt like making laws rather than judging them. It's a delicate balance, ensuring judicial power doesn't overshadow the democratic will, which ties into the whole deal with legislative intent.

⁸ *Indra Sawhney v. Union of India*, (1992) Supp (3) SCC 217 (SC).

⁹ *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 (SC)

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¹³ *BALCO Employees Union v. Union of India*, (2002) 2 SCC 333 (SC).

¹⁴ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (SC).

Legislative Intent

Definition

Legislative intent is like the hidden tadka that makes a law work—it’s the “why” behind what our elected netas were trying to achieve when they passed it. Think of it as decoding the secret masala in a killer biryani recipe. Courts dig into this to make sure they’re reading the law in a way that respects the democratic vibe, delivering what the legislature had in mind. But it’s not about what one MP or MLA was thinking—it’s about the collective goal of the law, pieced together from its words, context, and supporting documents like parliamentary debates. For example, if a law is about tackling air pollution, its intent might be to keep us all breathing easy, and courts will keep that in mind when deciding how far the law stretches.

In India, legislative intent is a big deal because our Constitution is all about transformation—social justice, equality, and progress. Our laws often tackle heavy stuff like social reform, economic growth, or balancing state and central powers, so courts have to play detective to figure out the intent and deliver justice. Take *Maneka Gandhi v. Union of India*¹⁵, for instance. The Supreme Court took a close look at the Passport Act and gave it a broad, citizen-friendly spin, ensuring it respected procedural due process. This wasn’t just about passports—it was about upholding the Constitution’s promise to protect our fundamental rights, showing how courts use legislative intent to keep the system fair and square.

Theoretical Perspectives

Figuring out legislative intent is like trying to guess the chef’s secret recipe—different cooks (or judges) have their own ways of doing it, and each approach shapes how judicial review plays out.

Intentionalism . This school of thought says courts should dive into what the lawmakers were actually thinking when they cooked up a law. They’ll rummage through stuff like parliamentary debates or committee reports to get the full picture. In the U.S., they flip through Congressional Records for clues. In India, we see this in action in *State of West Bengal v. Anwar Ali Sarkar*¹⁶, where the Supreme Court dug into legislative debates to crack the intent behind a special courts act, making sure they got the law’s vibe just right.

Textualism: Textualists, such as Justice Antonin Scalia in the U.S., prioritize the statute’s plain text, arguing that it reflects the public meaning at the time of enactment. Textualism is less common in India, where courts often adopt a broader approach, but it appears in cases like

¹⁵ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

¹⁶ *State of West Bengal v. Anwar Ali Sarkar*, (1952) SCR 284 (SC)

¹⁷*Union of India v. Azadi Bachao Andolan* (2003), where the Supreme Court emphasized the literal text of a tax treaty.

Purposivism: Purposivism focuses on the statute's broader purpose or policy goals, allowing flexibility to adapt laws to contemporary needs. This approach dominates in Canada (e.g., the "living tree" doctrine in ¹⁸*Edwards v. Canada*, 1930) and is prevalent in India, where courts interpret statutes to advance constitutional objectives like equality and social justice. In ¹⁹*Olga Tellis v. Bombay Municipal Corporation* (1985), the Supreme Court interpreted slum eviction laws purposively to protect the right to livelihood under Article 21.

In India, purposivism aligns with the Constitution's directive principles (Articles 36–51), which guide legislation toward social and economic justice. Courts often blend purposivism with intentionalism, consulting legislative history while prioritizing the statute's transformative goals, as seen in ²⁰*Consumer Education and Research Centre v. Union of India* (1995) on workers' health rights.

Sources

Courts use various sources to ascertain legislative intent, each with strengths and challenges:

Statutory Text: The primary source, assumed to reflect intent through its plain meaning. In India, courts begin with the text but often go beyond it due to statutory ambiguity or constitutional imperatives.

Legislative History: In the U.S., courts consult Congressional debates; in the UK, ²¹*Pepper v. Hart* (1992) allows limited use of Hansard. In India, parliamentary debates, committee reports, and statements of objects and reasons (preambles to bills) are key. For example, in ²²*Kehar Singh v. Union of India* (1989), the Supreme Court used the statement of objects for the Anti-Defection Law to clarify its intent.

Contextual Materials: Explanatory memoranda, Law Commission reports, or government ²³white papers provide insight. In India, ²⁴Law Commission recommendations often guide interpretation, as in ²⁵*Shayara Bano v. Union of India* (2017), where the Court referenced historical reforms to strike down triple talaq.

Broader Context: Courts consider the statute's place within the legal system or societal conditions. In India, the Constitution's preamble and directive principles provide a normative

¹⁷ *Union of India v. Azadi Bachao Andolan*, (2003) 263 ITR 706 (SC).

¹⁸ *Edwards v. Canada*, [1930] AC 124 (Privy Council)

¹⁹ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

²⁰ *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42

²¹ *Pepper v. Hart*, [1993] AC 593 (UK House of Lords).

²² *Kehar Singh v. Union of India*, AIR 1989 SC 653.

²³ *The Protection of Women Against Triple Talaq* (2015), <http://lawcommissionofindia.nic.in/reports/Report262.pdf>.

²⁴ Law Commission of India, Report No. 262:

²⁵ *Shayara Bano v. Union of India*, (2017) 9 SCC 1;

framework, as seen in ²⁶*Navtej Singh Johar v. Union of India* (2018), where the Court interpreted Section 377 of the Indian Penal Code in light of constitutional values of equality and dignity.

The Dance Between Judicial Review and Legislative Intent

The relationship between judicial review and legislative intent is like a perfectly choreographed Bollywood number—it's all about balance and harmony. Judicial review gives courts the power to check if laws are playing by the constitutional rulebook, while legislative intent helps them figure out what our elected netas were trying to achieve with those laws. It's a delicate jugalbandi: courts have to uphold constitutional principles while respecting the democratic mandate of the legislature. Let's dive into how this works, especially in the Indian context, and unpack the tensions and challenges when judicial power meets legislative will. By looking at the role of courts and the complexities involved, we'll see what's at stake in this constitutional drama.

The Role of Courts

Purpose and Function

Courts are like the mediators in a family dispute, balancing constitutional mandates with what the legislature wanted. When a law's legality or constitutionality is questioned, courts use legislative intent as their North Star to interpret statutes during judicial review. They check if the law vibes with constitutional must-haves, like fundamental rights or federal principles, but they also try to stay true to the legislature's goals to keep things democratic. Legislative intent is like a guidebook for clearing up confusing bits in a law, ensuring courts don't just impose their own ideas but reflect what the lawmakers had in mind. This role shines brightest when a law is challenged for crossing constitutional lines or when its meaning sparks a courtroom debate.

Global Perspectives

In the United States, courts rely on legislative intent to interpret ambiguous statutes, especially in administrative law cases. The ²⁷*Chevron v. Natural Resources Defense Council* (1984) decision established the *Chevron* deference doctrine, whereby courts defer to reasonable agency interpretations of ambiguous statutes, presuming that agencies reflect legislative intent. For example, in ²⁸*FDA v. Brown & Williamson Tobacco Corp.* (2000), the Supreme Court examined legislative history to determine that Congress did not intend for the FDA to regulate tobacco, illustrating how intent shapes judicial review outcomes. In the United Kingdom, the shift toward

²⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

²⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 US 837 (US Supreme Court).

²⁸ *FDA v. Brown & Williamson Tobacco Corp.*, (2000) 529 US 120 (US Supreme Court).

purposive interpretation, as seen in ²⁹*Pepper v. Hart* (1992), allows courts to consult parliamentary debates (Hansard) to clarify legislative intent, though judicial review remains limited by parliamentary sovereignty. In Canada, the purposive approach under the Charter of Rights and Freedoms encourages courts to align statutory interpretations with both legislative goals and constitutional rights, as in ³⁰*R v. Big M Drug Mart* (1985), where the Court struck down a Sunday closing law by examining its religious purpose.

Indian Context

In India, the Supreme Court's approach to judicial review is deeply intertwined with legislative intent, reflecting the Constitution's transformative vision of social justice, equality, and democratic governance. Indian courts frequently employ a purposive interpretation to ensure statutes advance constitutional objectives, such as those enshrined in the Preamble and Directive Principles of State Policy (Articles 36–51). For instance, in ³¹*Maneka Gandhi v. Union of India* (1978), the Court reviewed the Passport Act's provisions restricting travel rights, interpreting the statute's intent expansively to include procedural due process under Article 21 (right to life and personal liberty). By aligning the statute's application with constitutional mandates, the Court preserved legislative intent while reinforcing fundamental rights.

The Indian judiciary also uses legislative intent to navigate federal tensions, a critical aspect of judicial review in India's quasi-federal system. In ³²*S.R. Bommai v. Union of India* (1994), the Supreme Court reviewed the imposition of President's Rule under Article 356, examining the intent behind the constitutional provision to prevent its misuse. The Court consulted the ³³*Constituent Assembly Debates* and the Sarkaria Commission Report to discern the framers' intent, limiting executive overreach and protecting federalism. Similarly, in ³⁴*Shayara Bano v. Union of India* (2017), the Court struck down the practice of triple talaq under the Muslim Women (Protection of Rights on Marriage) Act, using ³⁵legislative history and the Constitution's equality principles to infer that Parliament intended to protect gender justice. These cases illustrate how Indian courts integrate legislative intent into judicial review, balancing deference to the legislature with their constitutional duty to uphold justice.

The Balancing Act

The Balancing Act

²⁹ *Pepper v. Hart*, [1993] AC 593 (UK House of Lords).

³⁰ *R v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 (Supreme Court of Canada).

³¹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

³² *S.R. Bommai v. Union of India*, (1994) 3 SCC 1;

³³ *Constituent Assembly Debates*, Vol. 10 (10 October 1949).

³⁴ *Shayara Bano v. Union of India*, (2017) 9 SCC 1;

³⁵ Law Commission of India, Report No. 262:

Courts across the globe are like jugglers in a desi mela, trying to keep the ball of legislative intent in the air while ensuring laws don't crash against constitutional norms. It's a tough act, needing a close look at the law's words, its backstory (think parliamentary debates), and the vibe of the times it was written in. In India, our courts often put a purposive spin on things, tweaking laws to match constitutional values like equality and justice, even when the lawmakers' intent is as hazy as Delhi fog in winter. But here's the tricky bit: courts have to be careful not to rewrite the law while pretending to just interpret it. That's why we need clear, principled ways to figure out intent, which we'll dig into later.

Tensions and Challenges

Ambiguity in Legislative Intent

One major hurdle in this judicial review-legislative intent dance is that laws can be as confusing as a Mumbai local train timetable. Statutes often come out of political compromises, so you get provisions that are vague or even contradictory, making it hard to guess what the netas were aiming for. Legislative history—like debates or committee reports—can feel like scrolling through a chaotic WhatsApp group, with every MP saying something different. In the U.S., for instance, relying on legislative history has been called out as unreliable. Take *United States v. Locke*³⁶, where clashing Congressional records pushed the court to stick to the law's text rather than chasing lawmakers' intentions.

In India, things get even messier, especially with older or state-level laws that have records as patchy as a monsoon-damaged road. In *State of West Bengal v. Anwar Ali Sarkar*³⁷, the Supreme Court had a tough time figuring out the intent behind the West Bengal Special Courts Act because the documentation was so thin. Our Parliament's debates, with their mix of languages and viewpoints, are like a vibrant chaat stall—colorful but tough to pin down to one flavor. Courts often lean on the Constitution's big goals, like equality or social justice, to clear the fog, as seen in *Olga Tellis v. Bombay Municipal Corporation*³⁸, where they read slum eviction laws to protect the right to livelihood, tying it to Article 21's promise.

Judicial Activism vs. Judicial Restraint

The tension between judicial activism and restraint is a recurring challenge in judicial review. Activism occurs when courts interpret legislative intent expansively, potentially reshaping statutes to align with constitutional or societal values. Restraint, conversely, involves deferring to the legislature's intent, even if the outcome conflicts with judicial preferences. In the U.S., cases like ³⁹*Roe v. Wade* (1973, later overturned) sparked debates over activism, with critics arguing

³⁶ *United States v. Locke*, (1985) 471 US 84 (US SC)

³⁷ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75

³⁸ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

³⁹ *Roe v. Wade*, (1973) 410 US 113 (US Supreme Court).

that the Court imposed its own views on privacy rights rather than adhering to legislative or constitutional intent. In contrast, ⁴⁰*Chevron* deference exemplifies restraint, prioritizing agency interpretations reflective of legislative goals.

In India, the judiciary's activist tradition, particularly through public interest litigation (PIL), amplifies this tension. In ⁴¹*Vishaka v. State of Rajasthan* (1997), the Supreme Court issued guidelines on workplace sexual harassment, filling a legislative gap by invoking international conventions and constitutional rights. While lauded for advancing gender justice, the decision faced criticism for bypassing parliamentary intent, as no specific statute governed the issue. Take *Navtej Singh Johar v. Union of India*⁴², for example. In 2018, the Supreme Court decriminalized same-sex relations by trimming down Section 377 of the Indian Penal Code, giving it a modern, constitutional makeover. Instead of sticking to what the colonial-era lawmakers might've meant, the court leaned into values like equality and dignity from today's Constitution. Moves like this show how courts sometimes put constitutional ideals on a pedestal over what the legislature intended, sparking debates about whether they're straying too far from the democratic playbook.

Substitution of Judicial Views

Another sticky issue is when courts slip their own ideas into the mix, sidelining the legislature's intent and messing with the separation of powers. This happens especially when judges go all-in on broad, purposive interpretations or pick and choose extrinsic aids—like parliamentary debates—that match their own views. In the UK, after *Pepper v. Hart*⁴³, courts started using Hansard (parliamentary records) cautiously, worried about judges cherry-picking quotes to back up what they already think. In Canada, the purposive approach under the Charter has sometimes raised eyebrows for going too far. Look at *Vriend v. Alberta*⁴⁴ in 1998, where the court read sexual orientation into a human rights statute, filling a gap the legislature hadn't addressed. Critics called it judicial overreach, like the court was writing laws instead of just interpreting them.

In India, the judiciary's transformative approach often invites accusations of substitution, particularly in PIL cases. For example, in ⁴⁵*M.C. Mehta v. Union of India* (1987), the Supreme Court issued environmental protection directives, inferring a legislative intent to prioritize public health despite ambiguous statutory language. Critics argue such rulings reflect judicial policy-making rather than fidelity to legislative intent, prompting debates over the judiciary's role in a democracy. These challenges underscore the need for clear interpretive frameworks, as discussed in subsequent sections.

⁴⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 US 837 (US Supreme Court)

⁴¹ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

⁴² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁴³ *Pepper v. Hart*, [1993] AC 593 (UK House of Lords).

⁴⁴ *Vriend v. Alberta*, [1998] 1 SCR 493 (SCC)

⁴⁵ *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

Comparative Insights

Globally, the tensions between judicial review and legislative intent reflect shared concerns about judicial power and democratic legitimacy. In the U.S., the decline of ⁴⁶*Chevron* deference (e.g., ⁴⁷*Loper Bright Enterprises v. Raimondo*, 2024) signals a shift toward stricter textualism, reducing reliance on inferred intent. In India, the judiciary's purposive approach contrasts with the UK's restrained use of legislative history, highlighting diverse strategies for managing these tensions. These comparative insights inform the chapter's broader analysis of interpretive methods and reform proposals.

4. Methods and Tools for Ascertaining Legislative Intent

Ascertaining legislative intent is a cornerstone of statutory interpretation, enabling courts to align their rulings with the objectives of the legislature while exercising judicial review. This process is both an art and a science, requiring courts to navigate statutory text, historical records, and contextual factors to uncover the purpose behind a law. This section examines the primary methods and tools courts employ to discern legislative intent, with a particular focus on the Indian context and comparative perspectives from other jurisdictions. By exploring statutory interpretation techniques and their application across legal systems, we highlight the diverse approaches to balancing judicial authority with legislative will.

4.1 Statutory Interpretation Techniques

Textual Analysis (Plain Meaning Rule)

The starting point for ascertaining legislative intent is the statutory text itself, as it represents the legislature's formal expression of intent. The *plain meaning rule* assumes that the words of a statute, when clear and unambiguous, reflect the legislature's intent, requiring no further inquiry. This approach prioritizes objectivity, ensuring that courts adhere to the publicly accessible meaning of the law at the time of enactment. In the U.S., textualism, championed by Justice Antonin Scalia, emphasizes this method, as seen in ⁴⁸*Bostock v. Clayton County* (2020), where the Supreme Court interpreted Title VII's prohibition on sex discrimination to include sexual orientation and gender identity based on the plain text, eschewing legislative history.

In India, courts often begin with textual analysis but rarely rely on it exclusively due to the Constitution's transformative goals and the frequent ambiguity of statutory language. Take *Union of India v. Azadi Bachao Andolan*⁴⁹, for instance. Back in 2003, the Supreme Court played it straight, sticking to the literal words of a tax treaty to confirm it was legit. They went

⁴⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 US 837 (US Supreme Court).

⁴⁷ *Loper Bright Enterprises v. Raimondo*, (2024) 603 US 369 (US Supreme Court).

⁴⁸ *Bostock v. Clayton County*, (2020) 590 US 644 (US Supreme Court).

⁴⁹ *Union of India v. Azadi Bachao Andolan*, (2003) 263 ITR 706 (SC).

full-on textual, like following a recipe to the letter. But that’s not the usual desi style. Indian courts often spice things up, mixing textual analysis with contextual or purposive approaches, especially when laws touch on big issues like social reform or constitutional rights. It’s like adding a tadka of justice to match the judiciary’s broader mission.

Contextual and Purposive Approaches

When a law’s text is as unclear as a foggy morning in Delhi or says nothing at all, courts switch to contextual and purposive approaches to figure out what the lawmakers were getting at. The contextual approach is like zooming out to see the whole picture—checking how the law fits with other rules, its preamble, or the societal vibe when it was passed. The purposive approach digs into the law’s deeper goals, letting courts interpret it in ways that push the legislature’s aims forward, even if the words aren’t crystal clear. These methods give courts wiggle room to adapt old laws to today’s needs while still giving a nod to what the netas intended.

In Canada, the purposive approach is the star of the show under their Charter of Rights and Freedoms. In *R v. Big M Drug Mart*⁵⁰, the Supreme Court took a hard look at a Sunday closing law, sniffing out its religious roots. They ruled it clashed with the Charter’s promise of religious freedom, showing how purposive interpretation keeps laws in tune with modern values.

The Court’s “living tree” doctrine, articulated in *Edwards v. Canada* (1930), encourages purposive interpretation to ensure laws evolve with societal values.

In India, purposive interpretation dominates, aligning statutes with the Constitution’s objectives of social justice, equality, and human dignity. In ⁵¹*Olga Tellis v. Bombay Municipal Corporation* (1985), the Supreme Court interpreted slum eviction laws purposively, inferring a legislative intent to protect the right to livelihood under Article 21, despite the statute’s focus on municipal powers. Similarly, in ⁵²*Navtej Singh Johar v. Union of India* (2018), the Court read down Section 377 of the Indian Penal Code to decriminalize same-sex relations, emphasizing the statute’s purpose in light of constitutional values like equality and dignity. Indian courts often rely on the Constitution’s Preamble and Directive Principles of State Policy (Articles 36–51) as contextual guides, ensuring interpretations advance transformative goals.

Use of Extrinsic Aids

Extrinsic aids—materials outside the statutory text—play a critical role in ascertaining legislative intent, particularly when text and context are inconclusive. Common extrinsic aids include legislative history (e.g., parliamentary debates, committee reports), explanatory memoranda, government white papers, and, in some jurisdictions, scholarly commentary. These sources

⁵⁰ *R v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 (SCC).

⁵¹ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

⁵² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

provide insight into the legislature's deliberations, objectives, or the problems the statute aimed to address.

In the U.S., legislative history, such as Congressional Records, is widely used by intentionalist judges, though textualists like Scalia criticize its reliability. In ⁵³*Church of Lukumi Babalu Aye v. City of Hialeah* (1993), the Supreme Court consulted legislative records to determine that a city ordinance targeting religious practices lacked a neutral purpose, violating the First Amendment. In the UK, ⁵⁴*Pepper v. Hart* (1992) permitted limited use of Hansard (parliamentary debates) to clarify ambiguous statutes, marking a shift toward intentionalism, though courts remain cautious to avoid over-reliance.

In India, extrinsic aids are integral to statutory interpretation, reflecting the judiciary's purposive and contextual approach. Courts frequently consult *statements of objects and reasons* (preambles to bills), parliamentary debates, and Law Commission reports. For example, in ⁵⁵*Kehar Singh v. Union of India* (1989), the Supreme Court relied on the statement of objects for the Anti-Defection Law (Tenth Schedule of the Constitution) to clarify its intent to curb political defections. In ⁵⁶*Shayara Bano v. Union of India* (2017), the Court referenced Law Commission recommendations and historical reforms to interpret the Muslim Women (Protection of Rights on Marriage) Act, striking down triple talaq as contrary to gender justice. Indian courts also draw on Constituent Assembly Debates for constitutional provisions, as in ⁵⁷*S.R. Bommai v. Union of India* (1994), where ⁵⁸debates informed the Court's interpretation of Article 356 (President's Rule). However, challenges include incomplete or multilingual legislative records, particularly for state-level statutes, which may limit access to reliable extrinsic aids.

4.2 Comparative Perspectives

Approaches in Different Legal Systems

The methods for ascertaining legislative intent vary across jurisdictions, shaped by legal traditions, constitutional frameworks, and judicial philosophies. Comparing these approaches illuminates the diverse strategies courts employ during judicial review and their implications for the judiciary-legislature relationship.

United States: U.S. courts have oscillated between intentionalism and textualism. Intentionalist judges rely on legislative history to discern Congressional intent, as in ⁵⁹*United Steelworkers v. Weber* (1979), where the Court used legislative records to interpret Title VII's affirmative action

⁵³ *Church of Lukumi Babalu Aye v. City of Hialeah*, (1993) 508 US 520 (US Supreme Court).

⁵⁴ *Pepper v. Hart*, [1993] AC 593 (UK House of Lords).

⁵⁵ *Kehar Singh v. Union of India*, AIR 1989 SC 653.

⁵⁶ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁵⁷ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1;

⁵⁸ Constituent Assembly Debates, Vol. 10 (10 October 1949).

⁵⁹ *United Steelworkers of America v. Weber*, (1979) 443 US 193 (US Supreme Court).

provisions. Textualism has gained prominence in recent decades, particularly under Chief Justice John Roberts, with cases like *Bostock* prioritizing statutory text over historical intent. The ⁶⁰*Chevron* deference doctrine (*Chevron v. NRDC*, 1984), though recently limited by ⁶¹*Loper Bright Enterprises v. Raimondo* (2024), historically allowed agencies to interpret ambiguous statutes, presuming alignment with legislative intent. The U.S.'s strong-form judicial review amplifies the stakes of these interpretive choices, as courts can strike down laws outright.

United Kingdom: The UK's tradition of parliamentary sovereignty historically limited judicial review to administrative actions, with courts deferring to statutory text. The ⁶²*Pepper v. Hart* decision introduced cautious use of Hansard, marking a shift toward intentionalism, though courts remain restrained to preserve legislative supremacy. Post-Human Rights Act 1998, purposive interpretation has grown, particularly for statutes affecting rights, as in ⁶³*Ghaidan v. Godin-Mendoza* (2004), where the House of Lords interpreted housing laws to align with nondiscrimination principles. The UK's weak-form review, which allows declarations of incompatibility rather than invalidation, shapes a more deferential approach to legislative intent.

Canada: Canadian courts adopt a purposive approach, rooted in the "living tree" doctrine and reinforced by the Charter. In ⁶⁴*Reference re Same-Sex Marriage* (2004), the Supreme Court interpreted marriage laws purposively to include same-sex unions, balancing legislative intent with Charter rights. Legislative history, such as parliamentary debates, is used sparingly, with courts prioritizing statutory purpose and constitutional values. Canada's strong-form review under the Charter allows courts to strike down laws, necessitating careful alignment with legislative goals.

India: Indian courts employ a purposive and contextual approach, driven by the Constitution's transformative goals. The judiciary frequently consults extrinsic aids like statements of objects, parliamentary debates, and Law Commission reports, as seen in ⁶⁵*Maneka Gandhi v. Union of India* (1978), where the Court used legislative history to expand the Passport Act's procedural protections. The basic structure doctrine (⁶⁶*Kesavananda Bharati v. State of Kerala*, 1973) empowers courts to review even constitutional amendments, making legislative intent critical to assessing compliance with constitutional principles. Public interest litigation (PIL) further shapes India's approach, allowing courts to interpret statutes creatively, as in ⁶⁷*Vishaka v. State of Rajasthan* (1997), where the Court inferred a legislative intent to protect gender equality despite statutory silence. India's multilingual and diverse legislative process, however, poses challenges, as records may be incomplete or fragmented, prompting reliance on constitutional norms.

⁶⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 US 837 (US Supreme Court).

⁶¹ *Loper Bright Enterprises v. Raimondo*, (2024) 603 US 369 (US Supreme Court).

⁶² *Pepper v. Hart*, [1993] AC 593 (UK House of Lords).

⁶³ *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30 (UK House of Lords).

⁶⁴ *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 (Supreme Court of Canada).

⁶⁵ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁶⁶ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

⁶⁷ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

constitutional juggle. Strong judicial review bolsters democracy by checking abuse, but misreading legislative intent can dent legislative authority, shaking democratic trust. This dynamic shapes not just legal outcomes but also societal harmony, especially in diverse democracies like India, where rulings on gender or federalism hit deep.

Call to Action

The complexities of judicial review and legislative intent demand relentless research and dialogue, like a never-ending chai stall debate. Scholars should probe how tech like AI reshapes interpretive methods in India's multilingual legislative jungle. Comparing approaches—common law, civil law, and India's hybrid system—can spark smarter practices. Lawyers and policymakers should champion clearer laws and accessible records to cool interpretive disputes. By fostering teamwork among courts, legislatures, and academics, we can fine-tune this balance, ensuring judicial review upholds constitutional dreams while giving a big shout-out to legislative intent in our ever-evolving global landscape.

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JUDICIAL REVIEW IN ARBITRATION PROCEEDINGS

- Jeetender Gupta

Abstract

This chapter delves into the critical issue of judicial review in arbitration proceedings, focusing on the role of Indian courts within the framework of the Arbitration and Conciliation Act, 1996. It explores the delicate balance between minimal judicial interference or intervention, which is essential for upholding the autonomy & efficiency of arbitration, and the necessity of judicial oversight to ensure fairness, legality, and public interest. Special emphasis is placed on the scope and limitation of invocation of writ jurisdiction under Articles 226 and 227 of the Constitution of India by the High Courts, analysing when and how such powers should be exercised in arbitral matters. Through case law analysis and statutory interpretation, the chapter provides a comprehensive understanding of evolving judicial attitudes and their implications on the arbitration landscape, thereby helping India as a nation to emerge as an arbitration-friendly jurisdiction and ultimately the hub for international arbitration. This discussion aims to inform legal professionals, academic scholars, and stakeholders involved in arbitration about the scope, limits, and future trajectory of judicial review in India's arbitral regime.

Keywords: Judicial Review Arbitration, Judicial Interference Arbitration, Judicial Intervention Arbitration, Writ Jurisdiction Arbitration, India Arbitration Friendly, India Arbitration Hub, Enforcement of Arbitration Award.

One of the most important features of any arbitration-friendly jurisdiction would be minimal or zero judicial non-interference in the arbitral process. In the context of annulment proceedings. The Arbitral Tribunal passes the arbitral award based on the contract between the parties. However, the Arbitrator or the Arbitral Tribunal itself does not possess any authority of a state. In the absence of any institutional system for review, the aggrieved parties in India take recourse to approaching the Courts within the framework of the Arbitration and Conciliation Act 1996 (“Arbitration Act 1996”). In addition, parties at times also invoke the writ jurisdiction of Constitutional Courts like the High Courts and the Supreme Courts of India under Article 226 and 227 of the Constitution of India.

Thus, intervention by constitutional courts might arise in two situations. Firstly, in a situation where the Arbitration Act provides for a specific remedy. Secondly, in a situation where the Arbitration Act does not contemplate any remedy. As such, the constitutional court has the power to intervene in both stages. Though in the second case, constitutional courts can invoke judicial review in limited cases, more so in a situation involving a patent lack of inherent jurisdiction or gross abuse of the process of law.

The Indian Judicial system still believes in the maximalist approach, thereby the Courts retaining the power to decide the issues concerning public policy, which often involves revisiting the arbitral tribunal’s decisions. An equilibrium is needed between the finality of the awards and issues related to public policy. Therefore, even though the remedies may remain with various legal provisions, the prudent approach for the Courts would be to exercise their jurisdiction sparingly to review the orders and awards passed by the tribunal. The Hybrid Theory that has evolved in India strives to provide a constructive equilibrium between arbitration autonomy and judiciary engagement that supports justice and adherence to public policy.

Despite all the criticism against judicial intervention, the Judicial review of arbitral awards ensures that the arbitral awards are equitable, reasonable and in alignment with India’s public policy. At the same time, we also need to remain conscious that excessive judicial involvement could discourage global investors and businesses from selecting India for arbitration, potentially damaging India’s reputation as a favorable place for arbitration.

Global Scenario:

The scope of Judicial interference with an arbitral award, including its enforcement are itself derived from various universal norms. Section 34 of the Arbitration Act 1996, which lays down the procedure for the setting aside of an arbitral award, is itself modelled around Article 34(2) of the UNCITRAL Model Law. Article 34(2) enumerates the circumstances under which an arbitral award may be set aside by the court that include absence of valid agreement, the parties lacking capacity to sign binding arbitration agreement, parties not being provided the notice of arbitration or sufficient opportunity to present its case,

arbitration not conducted as per the procedure agreed upon between the parties, configuration of arbitral tribunal or procure not as per understanding of the parties, subject matter not arbitrable or the award conflicting with public policy of the State. On similar grounds, Article V of the New York Convention also lays down the provisions under which the recognition and enforcement of an arbitral award may be refused by a foreign court.

Article 34 (2) of the UNCITRAL Model Law furnishes that an arbitral award may be set aside by the court only if:

“(a) the party submitting the application furnishes proof that:

(i) there was no valid agreement or parties are lacking capacity to sign binding arbitration agreement;

(ii) the party was not provided the notice of arbitration or denied sufficient opportunity to present its case;

(iii) the arbitration was not happened in accordance with the parties’ agreed arbitral procedures or, failing such agreement, was not in accordance with this law;

(iv) the configuration of the arbitral tribunal or the arbitral procedure was not in accordance with the understanding of the parties,

or (b) if the court finds that:

(i) the subject-matter of the conflict is not possible to be solved by arbitration under the law of the State; or

(ii) the award is in conflict with the public policy of the State.”

New York Convention:

Article V of the New York Convention lays down the provisions under which the recognition and enforcement of an arbitral award may be refused.

“Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law

applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

Claiming itself to be one of the most arbitration-friendly jurisdictions, French courts have maintained the tradition of judicial non-interference in the arbitral process. However, recently on March 23, 2022, the French Cour de Cassation (France's supreme court of appeal on matters of law) upheld a 2017 Paris Court of Appeal decision vacating a US\$15 billion UNCITRAL award against Kyrgyzstan in *Belokon v. Kyrgyzstan Jus Mundi* based on international public policy of preventing an investor to profit from money laundering revenues. In some quarters, it is being seen as a welcome confirmation that French judges have full authority when reviewing the implications of enforcing an arbitral award on the grounds of international public policy due to allegations of corruption and money laundering.

The English Arbitration Act of United Kingdom also adopts an indispensable territorial approach to annulment actions similar to that of the Model Law, providing that an award may be set aside only if the arbitral seat was in England. The English High Court recently in “Alexander Brothers Limited (Hong Kong S.A.R.) v. (1) Alstom Transport SA (2) Alstom Network UK Limited [2020] EWHC 1584 (Comm).” upheld the enforcement of an arbitral award in England and Wales, despite corruption allegations.

Judicial Intervention within the provisions of Arbitration & Conciliation Act 1996

There are multiple stages during which the Courts in India frequently intervene within the ambit of the Arbitration Act 1996. Some of these stages are as follows:

(a) Appointment of Arbitrators (Section 11)

In the event of parties failing to appoint an arbitrator under the appointment procedure agreed upon by the parties, then the parties may approach the jurisdictional High Court or the Supreme Court of India under Section 11(6) of the Arbitration Act 1996, which are vested with the power to appoint an arbitrator, for a domestic and international arbitration respectively, as applicable.

Earlier, the Courts, while exercising their jurisdiction under Section 11 took the liberty of conducting a roving exercise across the length and breadth of the contract and also related issues. With the insertion of Sub-section (6A) of Section 11 by Act 3 of 2016 (“Amending Act 2016”), with effect from 23.10.2015, the legislature made its intention clear that the Courts shall confine themselves to the examination of the existence of an arbitration agreement. Subsequently, Act 33 of 2019 omitted sub-section (6A), but the amending Act 2019 has not been notified thus far. So, sub-section (6A) remains in force.

The Seven-Judge bench of the Supreme Court in “**Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, 2023 INSC 1066**” reaffirmed the statement of objects and reasons of the amending act 2016, while observing the following:

“The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an Arbitrator shall ‘examine the existence of prima facie arbitration agreement and not other issues’. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings.”

In “**Arif Azim Co. Ltd. v Micromax Informatics FZE (2024) 5 SCC 313**”, the Supreme Court clarified that Indian law could be applicable only if the Indian arbitration law applied to the case or if the seat of arbitration was India. However, in the instant case, the seat of

arbitration was Dubai and UAE law applied as per the agreement.

The Supreme Court in the case of **“Cox and Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1”** held that even non-signatories can be made parties to arbitration proceedings. It was held that if the conduct of the signatories and non-signatories indicates mutual intention that the latter be bound by the arbitration agreement, then the non-signatories can be considered as parties to the arbitration agreement.

The Supreme Court recently in the case of **“ASF Buildtech P Ltd Vs Shapoorji Pallonji & Co P Ltd 2025 INSC 616”** held that even in the absence of an express provisions in the Arbitration Act, 1996 empowering the arbitral tribunal to implead or join a party who is otherwise bound by the arbitration agreement, the arbitral tribunal does possess such power by virtue of the doctrine of implied powers, as long as the same is in tandem with the scheme of Act, 1996 i.e., as long as the parties had either expressly or impliedly consented to the arbitration agreement. In the prologue the Court has gone to the extent of urging the Department of Legal Affairs, Ministry of Law and Justice to take a serious look at the arbitration regime that is prevailing in India and bring about necessary changes while the Arbitration and Conciliation Bill, 2024 is still being considered.

Recently, the Hon’ble Supreme Court in the case of **“South Delhi Municipal Corporation of Delhi versus SMS Limited, 2025 INSC 693”**, expanded the scope of phrase “existence of arbitration agreement”. The Apex Court, after considering the global position on the validity of arbitration agreements and also the settled law in India, observed that the existence of an arbitration agreement necessarily postulates the presence of the following ingredients:

- (i) Clear Intent to Arbitrate: The parties reduce their intention of entering into an arbitration agreement into some tangible medium.
- (ii) Binding Adjudicatory Process: The result of the arbitral process should be final and binding on the parties.
- (iii) Compliance with Arbitration Norms: The agreement should allow for party autonomy in the appointment of arbitrators and procedural conduct, subject to statutory safeguards

(b) Interim Relief (Section 9)

Section 9 of the Arbitration Act 1996 deals with the powers of courts to grant interim reliefs before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced. The Arbitration and Conciliation (Amendment) Act 2015 inserted Subsections (2) and (3) to Section 9 of the Arbitration Act.

Much before the Amending Act 2015, the Supreme Court in the case of “Sundaram Finance v. NEPC India Pvt. Ltd. (1999) 2 SCC 479” had adjudicated upon the timelines commence arbitral proceedings. The Court held that that when a party seeks interim measures of protection under Section 9, it implicitly accepts that a final and binding arbitration agreement exists and that a dispute referable to the arbitral tribunal has arisen. Thus, when a Section 9 petition is filed before the commencement of arbitral proceedings, the applicant must demonstrate manifest intention to take effective steps in commencing the impending arbitral proceedings.

Annulment or Setting aside of Arbitral Award (Section 34 and Section 37)

In the case of “**Bhatia International v. Bulk Trading SA**” (“**Bhatia International**”), (2004) 2 SCC 105, the Indian Supreme Court settled the law with respect to Part I of Indian Arbitration Act to the extent that shall be applicable even to the international commercial arbitration, save and except, if the parties by express or implied agreement had decided to exclude the same. The decision was intended to deal with perceived lacunae in the statute and to empower the courts at India to grant interim injunction or such relief in a foreign-seated arbitration. However, difficulties arose as parties approached Indian Courts to apply other provisions / sections of Part I of the Act to foreign seated arbitration. The Court observations are as follows:

“... in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remedyless”.

A five-judge constitution bench of Indian Supreme Court in “**Bharat Aluminium Co. v. Kaiser Aluminium Technical Services (2012) 9 SCC 552**” (“**BALCO**”) was dealing with an issue arising out of an agreement containing an “arbitration” clause for dispute resolution. The Supreme Court overruled the decision in “Bhatia International” by adopting a ‘seat-centric approach’ and distinguished between the “domestic” and “foreign” arbitration under the framework of the Act. Part I applies only to domestic arbitration and not to foreign arbitration, seemingly even if both parties involved are Indian.

The Supreme Court in the case of TRF Ltd v. Energo Engineering Projects Ltd [2017] 7 SCR 409 held that the Managing Director of a company was ineligible to nominate a sole arbitrator because of Section 12(5) of the Arbitration Act. The Court further held that a

person who becomes ineligible to be appointed as an arbitrator cannot nominate another person as an arbitrator.

The Supreme Court in the case of *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, [2019] 17 SCR 275 held that the test to determine the possibility of bias is directly relatable to the interest the person appointing an arbitrator has in the outcome of the dispute. The Court held that a person having an interest in the dispute “cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator.”

In the case of ***“Reliance Infrastructure Ltd. Vs. State of Goa, (2024) 1 SCC 479”***, the Supreme Court held that “Scope of interference under Section 37 is all the more circumscribed keeping in view the limited scope of interference with an arbitral award under Section 34 of the 1996 Act. As it is, the jurisdiction conferred on courts under Section 34 of the 1996 Act is fairly narrow. Therefore, when it comes to scope of an appeal under Section 37 of the 1996 Act, jurisdiction of the appellate court in examining an order passed under Section 34, either setting aside or refusing to set aside an arbitral award, is all the more circumscribed.”

In the case of ***NHAI v. Hindustan Construction Co. Ltd, (2024) 6 SCC 809***, the Supreme Court held that the jurisdiction under Section 34 of the Arbitration Act is narrow, and courts therein cannot act as appellate bodies to correct factual errors or reinterpret contracts.

The Supreme Court in the case of ***“Consolidated Construction Consortium Ltd Vs Software Technology Parks of India 2025 INSC 574”*** considered the scope of Section 34 of the Act and observed the following:

“23. Scope of Section 34 of the 1996 Act is now well crystallized by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2A) of Section 34. It is the only remedy for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the arbitral tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the arbitral tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has perforce to limit its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such

cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement.

24. Therefore, the role of the court under Section 34 of the 1996 Act is clearly demarcated. It is a restrictive jurisdiction and has to be invoked in a conservative manner. The reason is that arbitral autonomy must be respected and judicial interference should remain minimal otherwise it will defeat the very object of the 1996 Act.”

The Supreme Court recently in the case of **“Somdatt Builders vs National Highways Authority of India 2025 INSC 113”** held that error in interpretation of contractual terms by arbitrator not a ground to interfere with an arbitral award.

In the case of **“M/s Gayatri Project Limited Vs Madhya Pradesh Road Development Corporation Limited, 2025 INSC 698”** a Five Judge bench of Supreme Court was constituted to determine whether the powers of the Court under Sections 34 and 37 of the Arbitration and Conciliation Act 1996 will include the power to modify an arbitral award. It was held that the Court has a limited power under Sections 34 and 37 of the 1996 Act to modify the arbitral award. This limited power may be exercised under the following circumstances

- (i) When the award is severable, by severing the “invalid” portion from the “valid” portion of the award
- (ii) By correcting any clerical, computational or typographical errors which appear erroneous on the face of the record.
- (iii) Post award interest may be modified in some circumstances
- (iv) Article 142 of the Constitution applies, albeit, the power must be exercised with great care and caution and within the limits of the constitutional power.

(c) Conditions for Enforcement of Foreign Award (Section 48)

The enforcement of foreign arbitral awards is liable to be refused if the said award falls under any of the reasons set out in Section 48 of the Act. One such reason is if the court finds that the enforcement of the award is contrary to the public policy of India.

In **“Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd (2024) 7 SCC 197”** the Supreme Court while dealing with a challenge against an arbitral award from the Singapore International Arbitration Centre observed that Indian courts followed a “minimal judicial intervention” policy with foreign arbitral awards. The Court also stated that foreign awards could only be set aside under the “exceptional circumstances” detailed under

Section 48.

The Supreme Court in the case of “*Vijay Karia v. Prysmain Cavi E Sistemi SRL Civil appeal no. 1544 of 2020*” held that to qualify as a conflict with the public policy of India, there must be a contravention of some legal principle or legislation that goes to the root of Indian law and shocks the conscience of the court. The Supreme Court further held that there ought to be minimalistic interference with foreign awards and thus took a stance of pro-enforcement of such awards.

(d) Extension of Time Lines (Section 29)

In the case of *TATA Sons Pvt. Ltd. v. Siva Industries and Holdings Ltd. (2023)* the relevance of Section 29A of the Arbitration Act, 1996 was examined in reference to international commercial arbitrations. The Supreme Court determined that the deadline set forth in Section 29A (1) of the Arbitration Act is not applicable to international commercial arbitrations.

Judicial Review Under Article 226/227 of the Constitution of India

High Court's review action of a wide range of bodies is under Article 226 of the Constitution of India (commonly known as the writ jurisdiction). Article 227 vests with the High Courts the power of superintendence over all courts and tribunals within its territory. Arbitral tribunals fall under the High Court's jurisdiction under both these provisions. The doctrine of “Basis Structure of Constitution” finds its genesis in the iconic “*Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225*”. This doctrine developed over time, and more categories were added to it. In “*L Chandra Kumar v. Union of India, (1997) 3 SCC 261*”, the Supreme Court ruled that Articles 226 and 227 were part of the constitution's basic structure.

The Supreme Court in the case of “*SBP & Co. vs. Patel Engineering Ltd. & Anr, (2005) 8 SCC 618*” defined scope of intervention of High Courts under Article 226 or 227 of the Constitution of India”

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under

Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."

Notwithstanding provisions like Section 5 of the Arbitration Act 1996 that restrict the intervention of any judicial authority except as provided under the Act, the High Courts are competent to exercise judicial review. The availability of this unfettered power does not mean that the High Courts can judicially review all aspects of arbitration.

The Supreme Court in **“Deep Industries Ltd. Vs. ONGC & Anr. (2020) 15 SCC 706”** has held that the High Court under Article 226 and 227 should be extremely circumspect in interfering with orders passed under the Arbitration Act, such interference being only in cases of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction. The Hon’ble Supreme Court has recently reiterated this view in **“Navayuga Engineering Company Vs Bangalore Metro Rail Corporation Limited (Civil Appeal No. 1098-1099 of 2021 decided on 05.03.2021)”**

The Supreme Court in the case of **“M/s India Glycols Limited and Anr. v. Micro and Small Enterprises Facilitation Council, Medchal – Malkajgiri and Ors. (Civil Appeal No. 7491/2023 decided on 06.11.2023)”** was considering the interplay of arbitration proceedings under the Arbitration Act 1996 and statutory arbitration under the Micro, Small and Medium Enterprises Act 2006. The apex court held that petitions filed under Article 226/227 of the Constitution of India ought not to be entertained in view of Section 18 of the MSMED Act, which provides for a recourse to statutory remedy for challenging the Award under Section 34 of the Act of 1996.

Conclusion:

The Indian legal framework must evolve to maintain a balance between honoring the party autonomy in line with the principle of competence-competence, independence of arbitration panels while also ensuring the fairness and justice of arbitration decisions. The recent approach of the Courts looks aligned towards limiting the scope for judicial interference. Maintaining this balance is essential for upholding the effectiveness of arbitration as a method of alternate dispute resolution and for fulfilling India’s aspiration to be the global hub for international arbitration.

JUDICIAL REVIEW OF INTELLECTUAL PROPERTY RIGHTS

-Diya Sharma & Dr.Versha Vahini

Abstract

The dynamic nature of Intellectual Property Rights demands a legal framework that not only protects private innovation but also upholds public interest. This chapter delves into the vital role of judicial review in shaping the contours of Intellectual Property Law. the chapter starts with laying down the scope of IPRs and examining how it strives to strike a balance between protecting &rewarding creators and safeguarding societal needs. The chapter explores the origin and development of judicial review, outlining the foundation on which it operates mainly, illegality, irrationality, proportionality, and procedural impropriety. It then traces the development of IPR jurisprudence and reflects on the ongoing tension between judicial activism and restraint, especially in cases where national interests intersect with international obligations.

With the advancement in technology Courts face increasing challenges, ranging from technical intricacies which become more complex due to lack of specialized expertise, to forum shopping, delays, and conflicts between economic policy and legal rights. The conversation prospers with a comparative account of the judicial behavior of India, the USA, the UK and Indian EU. It also reveals the significant impact of inter-governmental bodies like WIPO and WTO in the synchronization of international IP norms. The chapter ends with reasonable recommendations on the creation of designated IP tribunals, and improved training of judges. It maintains that there must be a balance which encourages innovation, but at the same time the public interest is also safeguarded.

Key Words: IPR and Judicial Review, Judicial Behaviour, IPR Jurisprudence

Introduction

Intellectual Property Rights provide authors and original work owners with rights that create legal obligations for others to refrain from copying their creations. Intellectual Property Rights stand as the legal entitlement which prevents unauthorized copying and commercialization of works and inventions. IP Laws protects creative works by giving authors and inventors exclusive rights to their original creations. World Intellectual Property Organisation (WIPO) defines Intellectual Property as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce¹.

¹ World Intellectual Property Organisation, <https://www.wipo.int/en/web/about-ip>

The exclusive rights provided to creators of intellectual works have become fundamental in supporting innovation and creative endeavors. Intellectual property combined with judicial review acts as a constitutional defense mechanism that prevents the legislative and executive branches of government from taking arbitrary actions. The legislature and executive branches must operate under constraints that guarantee their laws and actions comply with both the fundamental rights and rule of law standards.

This chapter explores intellectual property's intersection with judicial review by analyzing court evaluations of legislative and administrative actions concerning intellectual property rights. The chapter reveals how the judiciary maintains legal standards and rational decision-making to protect the public interest while interpreting Intellectual Property laws.

Scope of Intellectual Property Rights

Intellectual property regime is some 150 year old system. The first patent law in India came in the year 1856 and the existing one is the Patent Act 1970. A wide range of creative works are protected as Intellectual Property Rights under the domain of different statutes. These statutes grant exclusive rights to the person or enterprise, who become monopolistic owner of his protected creations. Some of the different IP laws are as under:-

a. Copyright Law

Copyright is a right given to the author or owner of original creative work and a privilege given to such person to enjoy monopoly over such work for specified period of time. It is governed by the Copyright Act, 1957² in India that protects the original expression of ideas in literary, artistic, musical, and dramatic works³ and grants the exclusive rights to reproduce, distribute, perform in public, and adapt their work for a specific period⁴. However, ideas are not protected per-se, ideas must produce tangible results to get protected under the Copyright. Copyright, hence, protects only independent expressions of an idea⁵ and as a result, fosters creativity and cultural and intellectual growth.

b. Patent Law

A patent is given to new and novel inventions⁶, allowing inventors of such invention to make, use, sell, or license the invention for a fixed term, typically 20 years⁷. It is regulated under the

² The Copyright Act, 1957, Act No. 14 OF 1957

³ The Copyright Act, 1957, s. 13

⁴ The Copyright Act, 1957, s. 14

⁵ R.G. Anand v. M/s Delux Films, 1978 AIR 1613, AIR 1978 SUPREME COURT 1613

⁶ The Patents Act, 1970, Act No. 39 of 1970, s. 6

⁷ The Patents Act, 1970, Act No. 39 of 1970, s. 53

Patents Act, 1970⁸ in India which provides that for grant of patent to any invention it must be novel, involve an inventive step, and be capable of industrial application. The concept of POSITA, i.e., Person Ordinarily Skilled in the Art, is ordinarily adopted in patent law to find an answer questions on patentability and infringement. This hypothetical person is presumed to have the average knowledge, skill, and expertise in the relevant technical field at the time the invention was made. Hence, it can be said that any invention cannot be protected by Patent Law if it is obvious to POSITA.

c. Trademark Law

Trademarks are given to distinctive signs, logos, names, or symbols used in trade to protect brand identity, value, and market integrity by securing exclusive rights to the trademark holder in order to help consumers identify and distinguish goods or services of one enterprise from another, thereby preventing confusion and deception. It is governed by the Trade Marks Act, 1999⁹ in India which provides that trademark subsists with the owner for 10 years¹⁰ and can be renewed indefinitely if they remain in use and retain distinctiveness.

d. Designs Act

In India, design rights are provided under the Designs Act, 2000¹¹ which protect the visual aspect or aesthetics of the product including shape, configuration, or pattern, as opposed to functional features, for 10 years initially and renewable for another 5 years¹². The purpose of such rights is to protect the uniqueness of industrial designs and to enhance their viability in the market.

e. Geographical Indications (GIs)

Geographical Indications as the name suggests intend to provide uniqueness to products that belong to certain place and bear qualities, reputation, or characteristics essentially attributable to that place¹³ such as Darjeeling tea. The protection is attributed to only registered GIs for 10 years¹⁴ under the Geographical Indications of Goods (Registration and Protection) Act, 1999¹⁵ in India.

f. Trade Secrets

⁸ The Patents Act, 1970, Act No. 39 of 1970

⁹ The Trade Marks Act, 1999, Act No. 47 OF 1999

¹⁰ The Trade Marks Act, 1999, s. 25

¹¹ The Designs Act, 2000, Act No. 16 OF 2000

¹² The Designs Act, 2000, s. 11

¹³ The Geographical Indications of Goods (Registration and Protection) Act, 1999, s. 8 & 11

¹⁴ The Geographical Indications of Goods (Registration and Protection) Act, 1999, s. 18

¹⁵ The Geographical Indications of Goods (Registration and Protection) Act, 1999, Act No.48 of 1999

Trade secrets protect confidential business information, such as formulas, processes, or strategies that provide a competitive advantage to protect common rights of the producers in that region and promote their traditional knowledge and rural economy. Unlike other IP rights, trade secrets are not registered but protected through contracts and legal remedies against unauthorized disclosure or use¹⁶. While India lacks a specific statute for trade secrets, courts recognize and enforce their protection under principles of equity, contract, and tort law.

IP Laws balance Private Rights vis-à-vis Public Interest

The question that often creates complications is how do we protect the creator's rights but also keep things fair for everyone else? However, it is not piece of a cake. Imagine there is a person or company that put in time, money, and effort to create something new and creative. They deserve to benefit from it. But it is worth noting that there's the general public who should be able to use knowledge, access medicines, or enjoy art without being chained with too many restrictions.

This tension shows up in a lot of real-world situations. For example, by granting patents for medicines, sometimes a drug company gets exclusive rights and monopoly over such drug for years, which helps them recoup the money they spent on research. But if they charge too much or keep others from making affordable versions, people who really need the medicine suffer. That's when the idea of "public interest" comes into play. The legislature or judiciary might step in and make balancing provisions between Public Interest and Private Rights.

Similarly, Copyright laws are meant to protect authors and owners of original creative works, so they get paid for their work. But if copyright laws are too strict, it can put restrictions on teachers and students from using those works for education purposes. For example, schools need access to textbooks, videos, or music clips for classes. If they had to pay a lot or get permission every single time, education would become harder and more expensive. So, laws allow some exceptions, like fair use, so people can use creative work without asking, but only for certain reasons like research or teaching.

This whole balancing act isn't about ignoring creators or letting anyone use their work freely. It's about making sure that rights don't get in the way of bigger social needs. Courts usually try to find a middle ground where creators get enough protection to encourage them to create more, but the public also gets access to important stuff.

An interesting point is how this balance applies to legal information too. Court rulings, laws, and government info are supposed to be public. If someone tried to copyright those or make them hard to find, it would be a big problem because everyone needs access to the law to understand their rights and duties.

¹⁶ Indian Contract Act, 1872, s 27

So, the balance between public interest and private rights keeps changing. New technologies, social needs, and economic conditions all affect how strict or flexible the laws should be. IP laws can't be too rigid; they have to adjust so that progress continues without unfairly hurting anyone.

In short, this balance is what makes intellectual property law fair and useful. It protects creators enough to keep them motivated but also ensures the public benefits from innovation, culture, and knowledge. If we lose this balance, IP rights become just barriers, stopping people from accessing things they need or enjoy.

Judicial Review: Concept and origin

As the name suggests, judicial review is the review of legislative, executive, and administrative functions, done by judiciary. It can be said that Judicial Review refers to the authority of the judiciary to examine the constitutionality of legislative enactments and the legality of administrative decisions and acts as a check on abuse of power and a tool to preserve the supremacy of the Constitution. In India, Judiciary derives this power from the Indian Constitution specifically from Articles 13, 32, and 226 of the Indian Constitution¹⁷.

These constitutional provisions form the foundation for judicial review as Article 13¹⁸ empowers courts to strike down any law including intellectual property rights laws that violates fundamental rights, ensuring that statutes like the Patents or Copyright Act remain constitutionally valid. Judicial review is also a key to ensuring balance between private intellectual property rights and public interest.

Judicial review is an assurance of protection against unreasonable actions and unconstitutional legislation in the context of intellectual property rights. Courts intervene not to replace their judgements with those of specialist bodies, but for guaranteeing legality, equity, and respect for constitutional norms.

The Judicial Review doctrine traces back its roots from the seminal U.S. case of *Marbury v. Madison*¹⁹, in which Chief Justice John Marshall held that the Judiciary may review and declare legislation and executive acts void if they violate any of the provisions of Constitution.

The concept of judicial review has advanced over time, however, there are some landmark judgements such as *A.K. Gopalan v. State of Madras*²⁰ and *Kesavananda Bharati v. State of Kerala*²¹, that enlarged the scope of judicial review by holding that its power to test validity extends to constitutional amendments against the basic structure doctrine. In the domain of

¹⁷ The Constitution of India, arts. 13, 32, 226

¹⁸ The Constitution of India, art. 13

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

²⁰ *A.K. Gopalan v. State of Madras*, 1950 AIR 27, AIR 1950 SUPREME COURT 27

²¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SUPREME COURT 1461, 1973 4 SCC 225

Intellectual Property Rights, judicial review has evolved key mechanisms for scrutinizing IP legislation and decisions by administrative bodies to ensure they conform to constitutional mandates, especially to protect public interest, fundamental rights, and access to knowledge and innovation.

Grounds for Judicial Review

The judiciary may invalidate administrative decisions or statutory provisions related to intellectual property if and when they violate established legal principles. The key grounds include:

i. **Illegality**

Authorities must work within and in accordance with the powers and functions vested in them. When any decision-making authority, acts beyond its legal powers or contrary to statutory provisions, the court may strike down such actions.

ii. **Irrationality**

The principle of irrationality, also known as Wednesbury unreasonableness principle²², applies when a decision is so outrageous or lack logic that no reasonable authority would have made it.

iii. **Procedural Impropriety:**

This covers violation of the principles of natural justice, such as not giving a fair hearing to the affected party, or failing to follow mandatory procedural steps prescribed by law.

iv. **Proportionality:**

It is a European doctrine that is increasingly being invoked in India, especially in matters affecting fundamental rights. Courts examine whether the means adopted are excessive or disproportionate to the aim to be achieved²³. For instance, a copyright injunction that disproportionately affects access to education or health related information may be reviewed on the basis of principle of proportionality.

Development of Intellectual Property Rights Jurisprudence

The Indian Judiciary has played an instrumental role in evolving and adjudicating Intellectual Property Rights (IPR) issues by exercising powers of judicial review under the constitutional

²² Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947), [1948] 1 KB 223, [1947] EWCA Civ 1

²³ Om Kumar v. Union of India, AIR 2000 SUPREME COURT 3689, 2001 (2) SCC 386

framework and creative interpretation. Courts have to deal with the challenge of interpreting multifaceted legal frameworks and balancing the given statute's private and public aspects.

Judicial Activism vs. Judicial Restraint

Judiciary's activism and restraint approaches have been practiced in equal proportion for intellectual property rights cases within Indian Courts. The Supreme Court, for instance, made an activist approach in *Novartis AG v. Union of India*²⁴ and upheld Section 3(d)²⁵ of The Patents Act, according to which new forms of known substances are prevented from patenting unless it demonstrates the enhanced therapeutic efficacy. The decision narrowed the scope of patent evergreening. The subject matter of this decision was the Novartis' application for patenting a beta-crystalline, which is a form of imatinib mesylate (Glivec). The court held that it does not meet the threshold for patentability under section 3(d).

In most of these disputes of trademarks and copyright, courts exercised judicial restraint and deferred to the IP specialists. The decision-making of the judiciary is contextualized and balances the enforcement and impact of intellectual property rights on the public and legal adherence to precedents.²⁶

The court has been critical with respect to the monopolistic behavior of the companies in making available the inventions. The intellectual property rights judiciary is critical in the prevention of monopolistic behavior with regards to access to innovation inventions. For example, in patent law concerning pharmaceuticals, the judiciary has wondered whether issuing monopolistic licenses actually fosters innovation or preserves them for inconsequential reasons.²⁷ Likewise, in copyright, Indian courts have focused on fair use policies, particularly in teaching, in order to allow for access without unreasonably restricting the author's rights. This context illustrates the logic and social equity responsibility when IP protection is provided. In *Amar Nath Sehgal*²⁸ Case, the Apex court clarified that section 57 purports to protect not only the moral rights of an author but also the cultural heritage of the nation. It observed, "*Knowledge about authorship not only identifies the creator but also identifies his contribution to national culture.*"

Interplay between National Interest and International Obligations

²⁴ *Novartis AG v. Union of India*, AIR 2013 SUPREME COURT 1311

²⁵ The Patents Act, 1970, s. 3(d)

²⁶ Jacques de Werra, *Specialised Intellectual Property Courts – Issues and Challenges*, CEIPI-ICTSD Publication Series: Global Perspectives and Challenges for the Intellectual Property System, Issue No. 2, 15–41 (2016), <https://ssrn.com/abstract=2761209>

²⁷ *Bayer Corp. v. Union of India* (2013) W.P.(c) No. 1323

²⁸ *Amar Nath Sehgal v Union of India*, (2005) 30 P.T.C. 253 (India)

While India remains a signatory of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁹, the judiciary keeps overriding the strict implementation of TRIPS-compatible laws to ensure national interest and priority. Courts have underlined repeatedly that International Treaties cannot supersede constitutional entailments unless domesticated into legislation. This displays the practical jurisprudence rationale that tries to merge international obligations and local interests.

Constitutional Limits of IP Rights

Judicial decisions have not only interpreted controversial sections of the IP laws but have also determined the constitutional limits of intellectual property rights in India.

R.G. Anand v. M/s Delux Films³⁰ (1978)

This judgement still stands as a pioneering example in the chronology of copyright intellectual property rights when the Hon'ble Supreme Court of India established the criteria for the infringement of copyright in dramatic works. Moreover, it ruled that similarity in theme or subject matter does not result in infringement unless there is considerable copying of expression, particularly in film and literature. Copyright is said to protect only the expression and not the idea.

Eastern Book Company v. D.B. Modak³¹ (2004)

The appellant Eastern Book Company publishes cases decided by the Supreme Court along with analysis, headnotes and short notes, to make judgment understandable. The respondent launched software and published the judgment database in CD ROMS. The appellant challenged and claimed that there exists copyright in those judgments. The case reached upto the apex court, which held that the appellant does not copyright in judgments but do have in headnotes, footnotes and other inputs given in their journal and paraphrasing of the judgment.

Bajaj Auto Ltd. v. TVS Motor Company Ltd.³² (2009)

This was a case under the controversy of infringement of a twin-spark technology which is based on a spark plug, therefore, this copyright case dealt with. This highlighted the problem of courts

²⁹ Trade-Related Aspects of Intellectual Property Rights (TRIPS),
https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

³⁰ R.G. Anand v. M/s Delux Films, 1978 AIR 1613, AIR 1978 SUPREME COURT 1613

³¹ Eastern Book Company & Ors v D.B. Modak & Anr, (2004) Civil Appeal No.6472 (India)

³² Bajaj Auto Ltd. v. TVS Motor Company Ltd., 2009 AIR SCW 6018, 2009 (9) SCC 797

granting interim injunctions in patent disputes when the validity of the patent is suspected or ambiguous. The Madras High Court underlined the importance of the balance between the patents holder's rights and competition and innovation within the market. This case changed Indian courts approach in evaluating prima facie case, balance of convenience, and injury in establishing intellectual property rights injunctions.

Novartis AG v. Union of India³³ (2013)

In this landmark judgement, the Hon'ble Supreme Court upheld the decision to disallow the application for a patent for the cancer drug 'Glivec.' The court applied Section 3(d) of the Patents Act and interpreted it to mean evergreening, which is the practice of obtaining several patents for small alterations to already existing drugs, is prohibited. This ruling highlighted the Indian judiciary's devotion to ensuring public health and access to medicines by stating that intellectual property laws cannot supersede the right to life granted under Article 21.

Bayer Corporation v. Union of India³⁴ (2013)

In this case, applicant filed an appeal against Bombay High Court order challenging the compulsory licensing for a life-saving drug named 'nexavar.' Concept of compulsory licensing evolved through Doha declaration, to which India is a signatory. Under this principle, the government is authorized to compel the company to share the patented products/ technology for use by others, of course, on royalty sharing basis. It, however, takes away the discretion of the company to refuse to share. Compulsory licensing can be ordered after 3 years of grant of patent and on fulfilment of the conditions laid down in section 84 of the Act. In this case, Bayer's patented drug was given compulsory license to NATCO, who was required to sell the drug at 8,800 INR with @6% royalty sharing. Bombay High Court upheld the decision of IPAB in the writ petition filed before it. The Supreme Court later dismissed the SLP challenging the high court order.

Shreya Singhal v. Union of India³⁵ (2015) – Judicial Review and Fundamental Rights

This landmark judgement of the Supreme Court, although not an Intellectual Property Rights (IPR) matter, is relevant for its stringent application of judicial review regarding intellectual property rights. The Hon'ble Supreme Court has concretized that any law violating fundamental rights must be reasonable, necessary, and proportional. Writs of this nature feature prominently in the intellectual property rights jurisprudence examination of actions undertaken by the

³³ Novartis AG v. Union of India, AIR 2013 SUPREME COURT 1311

³⁴ Bayer Corp. v. Union of India (2013) W.P.(c) No. 1323

³⁵ Shreya Singhal v. Union of India, AIR 2015 SUPREME COURT 1523, 2015 AIR SCW 1989

government, or legislative overstepping into control unreasonably infringe fundamental freedoms such as free speech or access to knowledge, innovation in technology.

Challenges of Judicial Review of Intellectual Property Laws

Disregarding its dramatic importance, the limits of judicial intervention in the intellectual property rights system is constrained by a number of reasons which impact the coherence, efficacy, and equity of adjudicative processes.

Technical Complexity and Judicial Expertise

The relevant fields of the intellectual property rights capstone entail complex interrelations in science, technology, and the arts that fundamentally require expert knowledge. While judges are trained in law, they may not have the relevant skills to grasp the nuances of patent claims or originality in design and artistic works. This lack of specialized technical personnel following the disbandment of the Intellectual Property Appellate Board (IPAB)³⁶ worsened this problem³⁷, these skilled advisors and more training could rationalize the judiciary's approach to decision making. It is true that judges are rarely trained to understand and appreciate the nuance of technical ideas, scientific terms and intricacies. So the scientific advisors play important role in assisting the courts in IP litigations. For instance in *Bilski v. Kappos*³⁸ over 60 amicus curiae filed their briefs, to assist the court in adjudication.

Forum Shopping and Delays

Parties frequently engage in forum shopping³⁹ filing cases in jurisdictions perceived to be more favorable leading to conflicting decisions and procedural delays. The multiplicity of forums and inconsistent application of legal principles disrupt the uniform growth of intellectual property rights jurisprudence. Although the Delhi High Court now houses an IP division to streamline adjudication⁴⁰, systemic issues of backlog and procedural complexity continue to hamper timely justice.

Conflict between Economic Policy and Legal Rights

Intellectual Property Rights laws are shaped by economic imperatives such as promoting foreign investment and incentivizing R&D. However, judicial review often pits these goals against fundamental rights and social equity. For example, excessive IP protection may favor

³⁶ Trade Marks Act, 1999, s. 83

³⁷ Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021

³⁸ *Bilski et al. v. Kappos*, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office 561 U.S 593 (2010)

³⁹ International Bar Association, <https://www.ibanet.org/forum-shopping-Italian-experience>

⁴⁰ World Intellectual Property Organisation, <https://www.wipo.int/wipolex/en/legislation/details/21496>

multinational corporations at the cost of local access, raising questions about the ethical dimensions of enforcement. Courts are required to constantly reconcile the tension between promoting economic growth and upholding equitable access and legal justice.

Enforcement Issues

Even when courts pass progressive or balanced judgments, enforcement remains a weak link. Infringement of copyrights, trademarks, and even patents continue to be rampant due to ineffective enforcement mechanisms, inadequate awareness, and lack of coordination among agencies. Moreover, delays in executing injunctions or awarding damages dilute the deterrent value of judicial decisions. Strengthening enforcement infrastructure and judicial follow-up is crucial for effective IP protection.

Comparative Analysis of India, USA, UK, and EU

Looking at how different countries handle judicial review in the context of intellectual property rights (IPR) can actually tell us great deal about legal structures, but also about the priorities and values behind them. For India, this kind of comparison helps highlight both strengths and possible gaps in its existing framework.

In India, judicial review is tightly connected to constitutional principles mainly Articles 13, 21, and 226⁴¹. Indian courts have a clear tendency to weigh public interest heavily, particularly in patent cases. It is not unusual to see them set aside decisions if they feel the outcome would harm access to medicines or affect broader social welfare. Courts here are also quite active in checking administrative decisions, especially when there is a clash with TRIPS obligations.

In contrast, the United States (US) takes a more patentee-friendly approach. The judiciary, backed by the “progress clause” in the Constitution, often leans towards protecting innovation and private rights⁴². Courts especially the Federal Circuit usually respect decisions made by the United States Patent and Trademark Office (USPTO)⁴³, but they do not hesitate to step in when due process has been violated or when there is a clear misreading of the law.

The United Kingdom (UK) follows a more restrained model. Judicial review there mostly looks at procedural flaws or situations where a decision-maker has gone beyond their legal powers. UK courts rarely get into the nitty-gritty of whether a patent should or should not have been granted

⁴¹ The Constitution of India, arts. 13, 32, 226

⁴² United States Constitution, Article I, Section 8, Clause 8

⁴³ United States Patent and Trademark Office (USPTO), <https://www.uspto.gov/>

unless something clearly unreasonable has happened. There is also a strong focus on interpreting laws clearly and in line with how the European Patent Office⁴⁴ views things.

As for the European Union (EU), the setup is more institutionalized. Courts like the General Court and the Court of Justice of the EU⁴⁵ handle intellectual property rights disputes, and their decisions shape how rules are interpreted across member states. Even though countries retain a degree of autonomy, there is a noticeable push for harmonized standards. Over time, the EU has also started paying more attention to digital rights, copyright exceptions, and how data protection intersects with intellectual property rights.

Role of International Organizations

Globally, two institutions play a major role in shaping how intellectual property laws are enforced and interpreted: the World Trade Organization (WTO)⁴⁶ and the World Intellectual Property Organization (WIPO)⁴⁷.

At the WTO, disputes between member countries over compliance with TRIPS are handled by the Dispute Settlement Body (DSB)⁴⁸. One case that really left a mark was the India, Patent Protection for Pharmaceutical and Agricultural Chemical Products dispute.⁴⁹ The outcome did not just resolve a specific issue it ended up pushing India to revisit and reform parts of its patent law. Cases like this show how the DSB works not just to enforce rules, but to maintain a delicate balance between protecting intellectual property and ensuring fair trade practices.

Meanwhile, WIPO focuses more on fostering international cooperation and setting global standards. Treaties like the Berne Convention⁵⁰ and the Patent Cooperation Treaty (PCT)⁵¹ may not directly enforce judicial review, but they shape the expectations countries have around how IP should be handled. Recently, WIPO has also taken up some of the more pressing modern issues, such as how to treat AI-generated works and how copyright applies in the digital age. These conversations are slowly influencing how courts and lawmakers think about IP in the 21st century.

⁴⁴ European Patent Office, <https://www.epo.org/en>

⁴⁵ Court of Justice of the European Union (CJEU), https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en#:~:text=Role%3A%20Ensuring%20EU%20law%20is,judges%20from%20each%20EU%20country

⁴⁶ World Trade Organization (WTO), <https://www.wto.org/>

⁴⁷ World Intellectual Property Organization (WIPO), <https://www.wipo.int/portal/en/index.html>

⁴⁸ World Trade Organization (WTO), Dispute Settlement Body, https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm

⁴⁹ **DS50:** India — Patent Protection for Pharmaceutical and Agricultural Chemical Products 1998

⁵⁰ Berne Convention for the Protection of Literary and Artistic Works, <https://www.wipo.int/treaties/en/ip/berne/>

⁵¹ Patent Cooperation Treaty, <https://www.wipo.int/pct/en/>

Suggestions and the Way Forward

Judicial review is a critical part of making sure intellectual property laws are applied fairly. Here are a few areas that could use more attention:

Establish Specialized IP Benches

IP disputes often involve highly technical issues that go beyond regular legal questions. That is why having dedicated benches in High Courts and even in the Supreme Court could help. The Delhi High Court's decision to set up an IP Division is a great start, and it is something other jurisdictions should seriously consider replicating.

Strengthen Judicial Capacity in IP Law

As science and technology evolve, so do the kinds of disputes that land in court. Judges need ongoing education to stay updated on global IP trends, digital innovations, and scientific advancements. Regular workshops, partnerships with universities, and involvement of technical experts in court proceedings can really strengthen the judiciary's ability to make well-informed decisions.

Clarify the Law and regular Updates

Some legal terms in Indian IP law like “inventive step,” “originality,” and “fair use” remain vague and open to multiple interpretations. Greater clarity through legislative amendments would not only help courts but also reduce unnecessary litigation. It is equally important to keep reviewing these laws periodically so they stay in sync with emerging technologies and international best practices.

Maintain the Balance between Innovation and Public Interest

At its core, intellectual property law should reward innovation but not at the cost of public access to knowledge, healthcare, or culture. Courts must continue to use judicial review as a tool to make sure this balance is preserved. Especially in areas like pharmaceuticals and copyright, public interest should remain a guiding principle.

Conclusion

Judicial Review helps keep Intellectual Property rights in check. It makes sure they do not end up serving only commercial interests at the cost of the fundamental rights and equitable development. In India, courts have generally leaned toward protecting access and fairness, especially in the field of medicine, education, and traditional knowledge.

That said, there is a lot to learn from how other countries handle these issues too. The U.S. and U.K., for instance, place more emphasis on protecting creators and giving them strong legal certainty. India does not need to copy that model, but it should keep an eye on global changes and adjust where it makes sense without letting go of what makes its legal system work for its people.

Going forward, what matters most is keeping IP laws clear, fair, and grounded in the real-world needs of both innovators and the public. Judicial review will continue to be essential in holding that balance not just as a legal mechanism, but as a tool to make sure the law stays connected to the people it is meant to serve.

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THE DYNAMICS OF JUDICIAL ACTIVISM AND OVERREACH IN INDIA'S SOCIAL JUSTICE JURISPRUDENCE

-Tanni Ganguli

Abstract

This chapter critically examines judicial overreach in relation to social justice issues in India's legal system. While judicial activism has traditionally played a transformative role in furthering social fairness, safeguarding fundamental rights, and combating legislative or executive stagnation, there is growing worry that the judiciary may occasionally exceed its constitutionally mandated limits. Judicial overreach occurs when courts encroach on the legislative or executive branches, usually by issuing orders with policy or administrative ramifications. This chapter investigates the conceptual distinction between judicial activism and judicial overreach, tracing the historical trajectory of judicial intervention in India and looking at major cases that demonstrate both the positive and bad sides of court involvement in social justice. The topic focuses on how judicial overreach affects the doctrine of separation of powers, democratic legitimacy, and the effective implementation of social justice goals. The chapter concludes by proposing regulations and reforms to ensure that the court continues to play a constructive role in advancing social justice while adhering to the constitutional balance of powers. This chapter, intended for law students, provides a comprehensive and critical framework for understanding the judiciary's evolving role in India's quest of social justice.

Keywords: Judicial activism, Social justice, Fundamental rights, Administrative ramification, Democracy

1. Introduction

The judiciary in India has a unique and powerful role within the constitutional system, defending the rule of law, protecting fundamental rights, and acting as a check on the excesses of the other branches of government. Indian courts, particularly the Supreme Court and High Courts, have long been at the forefront of revolutionary legal change, particularly in the realm of social justice. The judiciary has widened the scope of rights and provided relief to marginalized and vulnerable elements of society via historical decisions and new legal concepts.¹ The principle of social justice is deeply embedded in the Indian Constitution, as evidenced by the Preamble and the Directive Principles of State Policy.

¹ M.P. Jain, *Indian Constitutional Law* 98 (Kamal Law House, Calcutta, 5th edition, 1998).

These principles require the state to promote people's welfare, reduce disparities, and provide equal opportunities for all.² However, legislative inaction, executive apathy, and institutional hurdles have frequently hampered the achievement of social justice. In such circumstances, the judiciary has stepped in, often going beyond its traditional role of interpreting laws to actively create policies and enforce rights. This is commonly referred to as judicial activism.³ Judicial activism has been extensively praised for its ability to rectify social injustices, close legislative gaps, and hold the government responsible. Cases such as *Maneka Gandhi v. Union of India* (AIR 1978 SC 597)⁴, *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011)⁵, and *Olga Tellis v. Bombay Municipal Corporation* (AIR 1986 SC 180)⁶ are frequently cited as examples of judicial intervention resulting in significant advances in human rights and social welfare.

The emergence of Public Interest Litigation (PIL) democratized access to justice and gave courts the authority to address issues impacting vast segments of the population.⁷ However, the judiciary's aggressive approach has not been without controversy. Concerns have grown regarding judicial overreach, which occurs when courts are believed to go beyond the scope of their constitutional duty, invading into policy-making and administration sectors typically designated for the legislative and the executive.⁸ Judicial overreach is sometimes defined as the issuance of specific policy directives, administration of administrative issues, or the enactment of new rights and obligations without legislative approval.

Critics argue that such actions contradict the concept of separation of powers, reduce democratic legitimacy, and may even cause governance challenges.⁹ The distinction between judicial activism and judicial overreach is nuanced and frequently debated. While activism is commonly viewed as a necessary and beneficial response to government failure, overreach is criticised for disrupting institutional balance and accountability. The challenge is to guarantee that the judiciary remains a guardian of rights and social justice without usurping the powers of elected bodies.¹⁰ This chapter investigates judicial overreach in the context of social justice issues in India. It seeks to give law students a thorough and critical knowledge of the judiciary's changing function, the conceptual boundaries between activism and excess, and the ramifications for constitutional governance. The chapter will look at key cases,

² Upendra Baxi, "On how not to judge the judges: Notes towards evaluation of the Judicial Role" 25 *Journal of Indian Law Institute* 211 (1983).

³ *Ibid*

⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁵ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

⁶ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

⁷ M.P. Jain, *Indian Constitutional Law* 98 (Kamal Law House, Calcutta, 5th edn., 1998)

⁸ *Ibid*

⁹ Upendra Baxi, "On how not to judge the judges: Notes towards evaluation of the Judicial Role" 25 *Journal of Indian Law Institute* 211 (1983).

¹⁰ "Judicial Activism: Origin and Development," *International Journal of Reviews and Research in Social Sciences*, Vol. 6, Issue 3 (2018)

doctrinal breakthroughs, and scholarly debates, as well as offer comparative viewpoints from other jurisdictions. Finally, it seeks to foster a comprehensive knowledge of the judiciary's functions and limitations in the ongoing struggle for social justice.

2. The conceptual framework

2.1 Judicial Activism: Beginnings and Rationale

In India, judicial activism refers to the judiciary's aggressive and proactive role in interpreting the Constitution and statutes, particularly in defending and expanding rights in the face of legislative or executive inaction.¹¹ This phenomenon derives from the Indian judiciary's unique function as constitutional guardian, especially in a country with considerable social disparities and ongoing governance issues. The origins of judicial activism are intrinsically linked to the expansion of judicial review and the courts' proclivity to intervene in situations of public interest, often through the liberalisation of locus standi and the introduction of Public Interest Litigation (PIL)²³.

The post-Emergency era represented a watershed moment. The Supreme Court's response to state excesses during the Emergency (1975-77) resulted in a deliberate shift from judicial restraint to activism, as evidenced by landmark cases such as *Maneka Gandhi v. Union of India*, AIR 1978 SC 597¹², which expanded the interpretation of Article 21 to include a range of rights essential to human dignity¹⁶. This period also witnessed the creation of PIL, which enabled socially aware individuals and groups to seek judicial redress for collective wrongs, as demonstrated in *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 13693.¹³

Constitutional provisions such as Articles 32, 226, and 142 authorise the Supreme Court and High Courts to issue writs and grant decrees required for the enforcement of fundamental rights and "complete justice"¹⁷. Article 142, in particular, has been called as one of the most magnificent sections supporting judicial activism, permitting the Supreme Court to devise remedies in the lack of parliamentary action.¹⁴ While judicial activism has helped to remedy social inequities and bridge legislative gaps, it is still debated. Proponents see it as critical for promoting progressive change and protecting rights, particularly in developing countries where the legislature and administration may be reluctant or hesitant to act.¹⁵ Critics, however, warn that

¹¹ Rishi Pandey, "Judicial Activism in India," SSRN 2021.

¹² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹³ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.

¹⁴ "Judicial Activism in India," Manupatra IJLPP (2014-15) Vol.1.1

¹⁵ M. Abdul Mujeef & R. Mamtha, "Judicial Activism in India – A Critical Study," International Journal of Research Publication and Reviews, Vol. 5, No. 4, pp. 187-191

activity can sometimes go beyond judicial authority, confusing the separation of powers and threatening judicial overreach.¹⁶

As a whole, judicial activism in India has grown in reaction to the country's serious socioeconomic challenges and the judiciary's constitutional obligation to deliver justice. Its beginnings lie in necessity and principle, and its reasoning is based on the goal of social transformation, constitutional fidelity, and the protection of the marginalized.¹⁷

2.2 Definition and Features

Judicial overreach occurs when the court goes beyond its constitutionally mandated boundaries and intrudes on the powers of the legislature or the administration. Unlike judicial activism, which is often regarded as a good and essential intervention to defend rights and close legislative gaps, judicial overreach is frequently criticised for upsetting the balance of power among the three branches of government. The phenomenon of judicial overreach is marked by instances where courts issue directives or guidelines that are legislative or administrative in nature, or when they create new rights and obligations not expressly provided for in the Constitution or statutes.

statutes. This could include comprehensive policy prescriptions, continual oversight of administrative tasks, or the overturning of legislative or executive decisions based on broad or subjective grounds. For example, in *Indra Sawhney v. Union of India*, AIR 1993 SC 477,¹⁸ the Supreme Court not only interpreted constitutional provisions regarding reservations, but also established the "creamy layer" principle and imposed a 50% reservation cap, which some critics argue constituted policy-making rather than mere interpretation. Judicial overreach is also obvious when courts, under the pretence of preserving fundamental rights, meddle in areas where the legislature or administration are better qualified to act, such as economic policy, administrative appointments, or regulatory frameworks. For example, in *Bandhua Mukti Morcha v. Union of India*, (1984)¹⁹, the Supreme Court gave specific orders for the release and rehabilitation of bonded laborers, thus taking on the role of the executive. The distinction between activism and overreach is subtle and context-specific. Judicial overreach is frequently characterized by:

- There is no clear constitutional or statutory mandate for the court to intervene.
- The assumption of continuing administrative or legislative functions

¹⁶ Columbia Law School, "Addressing Judicial Activism in the Indian Supreme Court," 2009.

¹⁷ "Judicial Activism: Origin and Development," *International Journal of Reviews and Research in Social Sciences*, vol. 6, no. 3 (2018)

¹⁸ *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

¹⁹ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

- The publication of policy recommendations that extend beyond the conclusion of the current issue
- The granting of new rights or obligations without legislative authority.

While judicial overreach might occasionally stem from a sincere desire to improve social justice, it calls into question the judiciary's legitimacy, accountability, and knowledge in policy areas. As noted in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461,²⁰ the Supreme Court recognised the necessity of preserving the Constitution's core framework, which includes the separation of powers as a fundamental principle.

The theory of separation of powers is a fundamental idea in constitutional law that aims to prevent power consolidation and ensure a system of checks and balances between the three branches of government: the legislative, the executive, and the judiciary. While the Indian Constitution does not officially establish the idea in a formal form, its structure and many historic decisions confirm its importance to constitutional governance. The theory assigns unique and autonomous roles to each branch.

- The legislature is empowered to make laws.
- The executive is responsible for enforcing laws and running the government.
- The judiciary interprets laws and resolves disputes.

In *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461,²¹ the Supreme Court declared that the division of powers is part of the Constitution's "basic structure" and cannot be altered even by constitutional amendment⁷. The Court emphasised that, while some overlap is unavoidable in a working democracy, each institution must respect the domain and expertise of the other. Landmark cases have strengthened this theory in practice. For example, in *SR Bommai v. Union of India*, (1994) 3 SCC 1,²² the Supreme Court underlined the boundaries of judicial review of the President's authority to impose President's Rule, emphasising the importance of judicial restraint in political matters.

Similarly, in *Indra Sawhney v. Union of India* (AIR 1993 SC 477)²³, The Court acknowledged its interpretative role but warned against entering into policymaking. The separation of powers is vital for preserving democracy, ensuring accountability, and protecting individual rights. Judicial overreach, which blurs these

²⁰ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

²¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

²² *SR Bommai v. Union of India*, (1994) 3 SCC 1.

²³ *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

borders, risks undermining the legitimacy of all branches and may result in institutional conflicts or governance paralysis. The Supreme Court has consistently declared that the judiciary must exercise its authority with prudence, humility, and regard for the constitutional context.

The Evolution of Judicial Intervention in Social Justice

The Indian judiciary's attitude to social justice has evolved as a result of a complex interplay of constitutional interpretation, landmark decisions, and responses to shifting societal requirements. This tendency indicates the judiciary's transition from prudence to assertive intervention, especially when legislative or executive inaction threatened fundamental norms. In the first few decades after independence, the court generally adhered to a restraint doctrine, respecting the separation of powers and frequently submitting to the legislature and president's decisions. The Supreme Court's decision in *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549,²⁴ is instructive. 3. The Court acknowledged that, while the Constitution defines the roles of the three organs, it does not require complete separation, recognising that some overlap is inherent in a complex, modern state. Justice Mukherjee said that the Indian Constitution does not exactly adhere to the doctrine of separation of powers, but rather distinguishes each organ's functions and expects them to operate within their respective boundaries.

The Court's willingness to restrain legislative power was further demonstrated in *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643,²⁵ which decided that Parliament could not restrict fundamental rights through constitutional modifications. This decision was a significant assertion of judicial authority and paved the way for further activism. 7. The aftermath of the Emergency (1975-77) and the contentious disqualification of Prime Minister Indira Gandhi in *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1,²⁶ emphasised the judiciary's responsibility in protecting the rule of law and the separation of powers. The Supreme Court's decision in this case emphasised that no one is above the law, even the Prime Minister, and reinforced the judiciary's independence as a check on executive overreach. The late 1970s and 1980s saw a radical shift in the judiciary's attitude, with the liberalisation of locus standi and the emergence of Public Interest Litigation. The Supreme Court broadened the interpretation of Article 21 in instances such as *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, and *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369,²⁷ making justice available to the marginalized and disadvantaged. PIL became an effective instrument for tackling issues such as bonded labour, environmental

²⁴ *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

²⁵ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

²⁶ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

²⁷ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.

degradation, and custodial brutality, indicating a shift from adjudication to judicial governance.

Over time, the judiciary's interventions became more muscular, perhaps bordering on overreach. In *Indra Sawhney v. Union of India*, AIR 1993 SC 477,²⁸ the Supreme Court not only interpreted the constitutional provisions on reservations, but also developed the "creamy layer" notion and enforced a 50% cap, thereby participating in policymaking. In recent years, there has been further debate about the limitations of judicial action. A notable example is the 2025 Supreme Court decision in *State of Tamil Nadu vs Governor of Tamil Nadu*, in which the Court declared that bills that had been pending with the Governor for an extended period of time were deemed to have received assent and established specific timelines for gubernatorial action.²⁹

The historical progression of judicial action in social justice shows a shift from restraint to activism, and, at times, excess. Landmark decisions have both empowered the judiciary to safeguard constitutional ideals and raised concerns about the right scope of judicial power. The difficulty remains balancing the need for judicial intervention in the pursuit of social justice while respecting the separation of powers and democratic governance.

3. Case Studies and Social Justice

The debate about judicial overreach is most apparent when individual cases are examined in which the Indian judiciary has been accused of exceeding its legitimate jurisdiction in order to advance social justice or defend constitutional ideals. While the intentions behind such interventions are generally laudable, the outcomes can be complex, causing disputes amongst institutions of government and raising concerns about democratic legitimacy.

3.1 The "Creamy Layer" in Reservations

A notable example is the Supreme Court's intervention in reservation laws, specifically the application of the "creamy layer" theory to Scheduled Castes (SCs) and Scheduled Tribes (STs). Given their distinct historical disadvantage, SCs and STs have always been excluded from reservation advantages under the creamy layer idea, which was designed to exclude the more progressed parts of Other Backward Classes (OBCs).³⁰ However, the Court's subsequent decisions have instructed governments to develop systems for detecting and rejecting the creamy layer even inside SCs and STs, stating that only this can attain the true equality envisioned by the Constitution 39. Critics contend that this is a clear example of judicial overreach, as such policy

²⁸ *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

²⁹ *State of Tamil Nadu vs Governor of Tamil Nadu*, Supreme Court of India, 2025; Law Trend (2025)

³⁰ "Up to legislature, executive to decide on barring creamy layer from SC/ST quota: SC," Times of India, 2025

judgement necessitate detailed socioeconomic data, parliamentary discussion, and administrative skill, all of which belong more appropriately in the domains of the legislature and executive.³¹ The courts has sometimes accepted these constraints, saying that "it is a call to be taken by the executive and legislature".³²

3.2 National Anthem in Cinema Halls: *Shyam Narayan Chouksey v. Union of India*.

In 2016, the Supreme Court required that all cinema theaters in India play the National Anthem before the commencement of each film, and that all attendees stand to show respect. The ruling went even further, mandating that entry and exit doors stay closed throughout the song and that the National Flag be displayed on the screen. This directive was widely criticized as judicial overreach for a number of reasons. It established obligations that did not exist in the Prevention of Insults to National Honour Act of 1971, which does not require the anthem to be played in cinemas.³³ It overlooked prior Supreme Court precedent, such as the *Bijoe Emmanuel* decision, which safeguarded individual rights to the anthem on religious or conscientious grounds. It generated practical and safety concerns, such as the risk of an emergency when doors are locked, as well as implementation challenges with enforcement and exceptions for people who are unable to stand. This case demonstrates how judicial determination for promoting patriotism and national values can extend to policy-making, potentially compromising on human liberty and legislative prerogatives.³⁴

3.3 Ban on Alcohol Sales Near Highways

Another contentious example is the Supreme Court's 2016 decision prohibiting booze sales within 500 meters of national and state highways. While the goal was to minimise drunk driving accidents, critics said that the Court had stepped into policy by extending a government suggestion (which indicated a 100-meter limit) to a blanket prohibition of 500 meters.³⁵ The Court supported its ruling by citing expert recommendations and the government's zero-tolerance policy on drunk driving, but the decision had far-reaching economic and administrative consequences, affecting thousands of enterprises and state revenues. Some legal scholars and state governments saw this as judicial overreach, as the Court effectively established policy without legislative support.

³¹ "Creamy layer and judicial overreach: Without caste census, social justice is a dream," *The News Minute* (2024)

³² "5 examples of Judicial Overreach by the Indian courts," *iPleaders* (2019)

³³ *Ibid*

³⁴ Ananya Jain, "Judicial Overreach in India: Disrupting the Balance of Power in Policy-Making," *Lawful Legal* (2024)

³⁵ "Supreme Court bans Alcohol on Highways: Analysis," *RajRAS* (2017)

3.4 Public Interest Litigation and the Risk of Judicial Policymaking

In terms of social justice, public interest litigation (PIL) has proven to be a double-edged sword. While PILs have allowed the judiciary to address critical issues like bonded labour, environmental preservation, and marginalised groups' rights, they have also raised concerns about the courts' engagement in specific policy matters.³⁶ Notable instances are:

The Supreme Court's judgement forcing the conversion of Delhi's public transport fleet to CNG, while environmentally progressive, has far-reaching economic and administrative implications.³⁷ The dangers of "Publicity Interest Litigation," in which frivolous or sensationalist petitions occupy judicial time and blur the distinction between genuine activism and overreach.

3.5 Vishaka's Guidelines and the Thin Line

The Supreme Court's decision in *Vishaka v. State of Rajasthan* (1997) is widely seen as both a watershed moment in judicial activism and a potential case of overreach¹⁶. In the absence of legislation addressing sexual harassment in the workplace, the Court established extensive rules, essentially legislating until Parliament passed legislation. While the move was highly praised for closing a significant gap and improving women's rights, it also sparked concerns about the judiciary's involvement in lawmaking and the possibility of exceeding constitutional limits.

4.6 Implications and Critiques

Judicial overreach, especially in social justice cases, can have various unintended consequences:

- It may erode the separation of powers by consolidating authority in the court and undermining legislative and executive duties.
- Decisions viewed as politically motivated or lacking expertise can undermine public trust in the judiciary.
- Courts may struggle to monitor the ongoing implementation of complex policies, leading to governance concerns.
- Judicially imposed restrictions that lack credible data or take into account local circumstances may unintentionally harm marginalised populations.

4. The Effect of Judicial Overreach on Social Justice and Governance

³⁶ Vajiram & Ravi, "Judicial Activism and Overreach, 2025

³⁷ Ibid

Judicial overreach, although its often noble pursuit of social justice, can have major ramifications for constitutional governance and power balance.

4.1 Undermining the separation of powers

When courts take on legislative or administrative tasks, such as issuing policy directives or administering administration, they undermine the separation of powers, resulting in institutional conflicts and eroding democratic checks and balances.³⁸

4.2 Weakening Legislative and Executive Authority

Judicial intervention in policy-making can undermine elected authorities' authority, accountability, and legitimacy.³⁹ This may erode public faith in the legislature and executive branches, which are constitutionally required to develop and implement policy.⁴⁰

4.3 Lack of Accountability and Expertise

Judges, unlike legislators and administrators, are unelected and may lack the expertise to make complex policy decisions.⁴¹ Judicial overreach raises concerns about democratic deficits and the suitability of courts to manage socio-economic policies.

5.4 Overburdening the Judiciary

Assuming policy and administrative roles diverts judicial resources from core adjudicatory functions, contributing to case backlogs and delays, thereby affecting access to justice.⁴²

4.5 Erosion of Public Trust

Perceptions of judicial overreach can damage the judiciary's legitimacy and impartiality, essential for maintaining public confidence in the legal system.

4.6 Implementation Challenges

Court-mandated policies may face practical difficulties due to lack of administrative capacity or political will, leading to ineffective governance.

³⁸ "Judicial Overreach in India," *Journal of Law and Justice*, 2023

³⁹ "Understanding PILs: Impact on Society and Judicial Overreach," 2025

⁴⁰ *Ibid*

⁴¹ Vajiram & Ravi, "Judicial Activism and Overreach," (2025)

⁴² *Ibid*

In sum, while judicial activism has advanced social justice, unchecked overreach risks destabilizing constitutional governance. Judicial restraint and respect for institutional boundaries are essential to preserve democracy and effective administration.

5. Criticisms and challenges

Scholars, legislators, and legal practitioners have all expressed concern about judicial overreach, particularly in social justice cases. Several major issues are usually mentioned:

5.1 A lack of democratic legitimacy

Judges are unelected and not directly accountable to the public. When courts adopt or implement policy decisions, it raises concerns about democratic legitimacy and the circumvention of representative institutions created for such purposes.⁴³

5.2 Inadequate expertise

Courts may lack the technical or administrative skills needed to make complicated policy decisions, particularly in fields like economics, public health, and social welfare.⁴⁴ This might lead to impractical or ineffectual orders that are difficult to enforce.

5.3 Risks of Institutional Conflict

Frequent judicial interference in legislative or executive realms can strain ties between the organs of government, causing institutional friction and, in some cases, open conflict.⁴⁵ This goes against the ethos of cooperative federalism and good government.

5.4 Overburdening and Judicial Populism

As courts take on more non-adjudicatory tasks, their dockets grow congested, causing delays in justice delivery. The emergence of Public Interest Litigations (PILs) has often encouraged "judicial populism," in which courts act on popular feeling rather than legal basis, resulting in frivolous or dramatic litigation.⁴⁶

5.5 Unintended Consequences of Social Justice

⁴³ S.P. Sathe, "Judicial Activism: The Indian Experience," Washington University Journal of Law & Policy, Vol. 6 (2001).

⁴⁴ *ibid*

⁴⁵ "Judicial Overreach: President Invokes Article 143(1), 2025

⁴⁶ *Ibid*

Judicially created laws, particularly when not based on solid facts or parliamentary discussion, may unintentionally harm the very groups they seek to protect or generate new kinds of exclusion and inequality.

6. Parallel Perspectives

6.1 United States

In the United States, the theory of judicial review was firmly established in *Marbury v. Madison*, 5 US 137 (1803),⁴⁷ which empowered courts to overturn legislation that contradicted the Constitution. American courts have exercised both activism and restraint, with major decisions such as *Brown v. Board of Education*, 347 US 483 (1954),⁴⁸ which ended racial segregation in public schools and advanced social justice. However, the US Supreme Court is often wary of entering the policy sphere, frequently invoking the "political question" doctrine to defer to the legislative and government in matters involving complicated policy choices or national security (*Baker v. Carr*, 369 US 186 (1962)).⁴⁹ A solid tradition of separation of powers, public scrutiny, and constitutional changes all serve to limit judicial overreach.

6.2 United Kingdom

The United Kingdom, which has a written constitution, operates on the basis of parliamentary sovereignty, with judges typically deferring to Parliament's wishes. Judicial review is limited, and activism is constrained by respect for legislative authority. However, the Human Rights Act of 1998 increased the judiciary's involvement in preserving individual rights by permitting courts to issue "declarations of incompatibility" when law clashes with the European Convention on Human Rights. Nonetheless, UK courts refrain from overturning basic legislation, establishing a clear distinction between judicial and legislative tasks.⁵⁰

6.3 South Africa

South Africa's post-apartheid Constitution clearly authorises courts to enforce a wide variety of civil, political, and socioeconomic rights. The Constitutional Court has taken an interventionist attitude in judgements such as *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC),⁵¹ which recognised the right to housing and required the government to take reasonable steps to realise it. However,

⁴⁷ *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803).

⁴⁸ *Brown v. Board of Education*, 347 US 483 (1954).

⁴⁹ *Baker v. Carr*, 369 US 186 (1962).

⁵⁰ Aileen Kavanagh, "The Role of the Courts in the Political Constitution," 14 *Oxford Journal of Legal Studies* 199 (1994).

⁵¹ *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC).

the Court has also emphasised judicial restraint, deferring to the executive's policy choices where reasonable and focussing on ensuring that rights are gradually realised rather than dictating specific policies.⁵²

6.4 Canada

Canada's Charter of Rights and Freedoms (1982) established a comprehensive system of judicial review, with courts empowered to nullify laws that violate Charter rights. The "Oakes test" (from *R v. Oakes*, [1986] 1 SCR 103)⁵³ requires that any limitation on rights be fair and demonstrably justified. Canadian courts have occasionally been activist, particularly in terms of advancing equality and minority rights, but they are also restrained by the "notwithstanding clause" (Section 33),⁵⁴ which empowers legislators to overturn certain judicial rulings for limited time.

6.5 Lessons for India

According to comparative experience, while judicial activism can be an effective weapon for social justice, unrestrained judicial overreach threatens the separation of powers and democratic legitimacy. To ensure balance, most mature democracies have institutional checks in place, such as parliamentary override processes, strong judicial restraint traditions, and vibrant public debate. In India, the lack of such formal checks places a higher burden on the court to exercise self-restraint, while the legislative and government must be more responsive and accountable.

7. Regulatory and Reform Measures

To address the risks and repercussions of judicial overreach, a variety of regulatory and reform initiatives have been proposed and argued by scholars, legislators, and constitutional experts.

7.1 Judicial Self-Restraint and Protocol

Strengthening the culture of judicial restraint is crucial. The judiciary should establish clear internal rules and guidelines, particularly for the use of extraordinary powers under Article 142, to ensure that such interventions are limited to rare and really exceptional circumstances. Establishing a judicial protocol for the exercise of Article

⁵² Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism," 2 *International Journal of Constitutional Law* 1 (2004).

⁵³ *R v. Oakes* [1986] 1 SCR 103.

⁵⁴ The Constitution Act, 1982 (Canada).

142 and other related powers can assist prevent routine judicial lawmaking while also respecting constitutional boundaries.⁵⁵

7.2 Improved Legislative and Executive Efficiency

Legislative and executive delays or inaction are major causes of judicial overreach. Improving the efficiency, responsiveness, and transparency of these branches may lessen the need for judicial involvement.⁵⁶ Maintaining a balanced democratic environment requires timely lawmaking, fast policy execution, and strong legislative oversight.

7.3 Parliamentary Oversight and Constitutional Clarity

Parliament may consider enacting clarifying legislation or amendments—such as under Article 142(1)—to define the scope and limits of judicial powers, ensuring checks and balances are maintained. Regular dialogue among the judiciary, legislature, and executive can foster mutual respect and prevent institutional friction.⁵⁷

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7.4 Promoting Dialogue and Cooperative Federalism

Healthy consultation and collaboration between all parts of government is critical. Mechanisms such as inter-institutional committees or regular consultative forums can help resolve disagreements and clarify roles, so reducing unnecessary court intervention.

7.5 Judicial Training and Accountability

Continuous judicial education on constitutional principles, the separation of powers, and the limits of judicial intervention can help to strengthen restraint. Furthermore, increased transparency and accountability in judicial functioning, such as reasoned decisions and public scrutiny, might boost institutional credibility.⁵⁸

8. Conclusion

The Indian judiciary's transition from post-independence conservatism to forceful activity and, on occasion, overreach has been both transformative and contentious. The courts have played an important role in fulfilling the constitutional promise of social justice, notably for marginalised and disadvantaged communities, through landmark decisions and the creative use of Public Interest Litigation (PIL). Judicial

⁵⁵ “Article 142: The Supreme Power or Judicial Overreach?”, 2025

⁵⁶ Vajiram & Ravi, “Judicial Activism and Overreach,” Vajiram & Ravi 2025

⁵⁷ Ibid

⁵⁸ Sujit Choudhry, “The Lochner Era and Comparative Constitutionalism,” 2 International Journal of Constitutional Law 1 (2004)

activism has frequently filled legislative and executive gaps, broadened the scope of fundamental rights, and sparked social reforms in areas such as environmental protection, gender justice, and poor rights (*Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011).

However, the increasing frequency and scope of judicial interventions have provoked a heated discussion about the proper bounds of judicial power. Judicial overreach, in which courts enter the spheres of policy-making and administration, raises major questions about the separation of powers, democratic legitimacy, and the effective operation of government.⁵⁹ When the court takes on legislative or executive tasks, it risks weakening the authority of elected lawmakers, generating implementation issues, and diminishing public trust in the legal system.

The effects of judicial overreach are numerous. It can cause institutional conflict, delays in justice delivery, and a democratic deficit because unelected judges make decisions with far-reaching social and economic consequences. Furthermore, courts may lack the competence and resources to establish or oversee complicated policies, resulting in ineffective or unsustainable outcomes. The rise of PILs and the propensity for "judicial populism" further complicate the scene, occasionally diverting judicial attention from serious rights abuses to spectacular or politically heated problems.⁶⁰ However, it is crucial to recognize that judicial overreach is frequently the result of legislative and executive delay or failure. The judiciary acts not out of ambition, but out of necessity, to preserve constitutional ideals and citizens' rights. This emphasises the importance of more responsive, accountable, and effective governance across all departments of government. Moving forward, the Indian constitutional system must strive for a balanced approach. The courts should exercise self-control, guided by precise protocols and a keen understanding of institutional constraints. The legislative and executive branches must carry out their constitutional tasks with thoroughness and transparency, limiting the necessity for judicial oversight. Greater inter-institutional interaction, judicial training, and public participation can all serve to define roles and build mutual respect.

⁵⁹ S.P. Sathe, "Judicial Activism: The Indian Experience," *Washington University Journal of Law & Policy*, Vol. 6 (2001).

⁶⁰ Dr. Anil Kumar, 'Judicial Overreach vs. Judicial Activism: Evaluating the Role of Indian Courts', (2025) 28 IJRTS 59

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CONSTITUTIONAL DEMOCRACY AND LIMITATIONS OF JUDICIAL REVIEW

-Anmol Arora

Abstract

Nevertheless, Judicial review is a bulwark of Indian constitutional democracy as it serves as a check against legislative and administration excesses. The Constitution of India does not use the term, and the requirement for judicial review has been inferred from the fundamental rights of individuals, precedence and reasoning in the landmark case of *Kesavananda Bharati v. State of Kerala*. But this is not just unrestrained power. The chapter traces the many constraints placed on judicial review to sustain the fragile equilibrium of power between the legislative, executive, and judiciary.

Constitutional text— such as Art 361, emergency provisions (Arts 352–60), and doctrines— such as separation of powers, judicial restraint, and the doctrine of the “strict necessity”— makes for a structural and conceptual straitjacket. Secondly, procedural bars such as locus standi, res judicata, laches, and exhaustion of other remedies guard against premature or unmeritorious access to the judicial process. The essay also discusses real-world constraints, such as the scarcity of resources, and deficits in domain-specific expertise and risk of judicial excess, which can compromise the judiciary’s credibility and democratic legitimacy.

In addition, the chapter highlights that too much judicial activism can destroy public confidence and undermine democratic accountability. But, through the PIL route also, the courts have developed a broader comprehension of access to justice. In the end, the essay suggests that the restrictions on review - limited though they may be - are needed to serve the rule of law, to preserve institutional comity, and to ensure that judicial power is used with a sense of responsibility and modesty in a system of constitutionalized government.

Keywords:- Judicial Review, Constitutional Democracy, Separation of Powers, Public Interest Litigation (PIL), Judicial Restraint, Rule of Law, Democratic Accountability

Introduction

The gravamen of constitutional government in India is the judicial review.¹ It is the exercise by the judiciary to review the legislative action and the executive orders for the constitutionality and legality. The power of judicial review is a salutary check on the possible misuse of power by the other two organs of the state—the legislature and the executive. While there is no express reference to the doctrine of judicial review in the Indian Constitution, the same is implicit in terms of few articles such as 13, 32 and 226. These articles allow Supreme Court and High Courts to nullify any decree, law or administrative order which is found repugnant to the Constitution, especially with regard to fundamental rights.

It is a doctrine that has grown and developed through judicial construction and is a part of the basic structure of the Constitution [See, the celebrated judgment of *Kesavananda Bharati v. State of Kerala (1973)*]². The judiciary, by such adjudications and others, so assumed its position of sentinel of the Constitution that no legislation and no executive action would cross the bounds fixed by the scheme of the Constitution.

However, the employment of judicial review is not without constraint. It is constrained by a number of legal, institutional and conceptual brakes. Those are necessary to keep the delicate balance of power between the three branches. While judicial review is indispensable in securing the supremacy of the Constitution and the inviolability of individual rights, it cannot be invoked to replace the power of policy-making or formulation of rules, nor can it be used to sanction official action outside the sphere of policy-making and rule-formulation that belongs to the domains of the legislature and the executive.

One of the main checks on judicial review is found in the separation of powers doctrine. While the Indian Constitution does not have a rigid separation like that in USA, it has a functional distribution of powers. The judiciary is not designed to legislate or administer (by virtue of its judicial review of policy and legislation)."³ Extra-constitutional interference only leads to judicial activism⁴, which erodes the democratic framework by peeping into the realms of both legislature and executive.

And even the courts themselves have tended to be hesitant about using this power. The courts have emphasized in countless cases that the legislature and the executive have extraordinary discretion in this, as in the international or military field. The reason for this doctrine of judicial restraint rests upon the understanding that the running of government ought to be via democratic process which is less so when the courts intervene unless there is an patent breach of the Constitution.

Furthermore, there are restrictions due to procedural impediments like that of locus standi, slow nature of litigation and the colossal pendency of our courts. Such considerations automatically circumscribe the limits and force of judicial review.

To conclude, while judicial review is an integral part of Indian constitutionalism, it is not unlimited, its coverage and enforcement are finely tuned to a void abuse and promote institutional comity. In this essay we will look at the doctrine, constitutional provisions and the emerging judicial practice that make the power of judicial review in India as well as its scope, so that we, as lawyers understand where this authority comes from and how much can we do under this head.⁵

¹ Larry Alexander, "What is the Problem of Judicial Review?" (2006) 31(1) Australian Journal of Legal Philosophy 1.

² Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461.

³ Jeremy Waldron, "The Core of the Case Against Judicial Review" (unpublished manuscript, 2005, on file with author)

⁴ S.P. Sathe, "Judicial Activism: The Indian Experience," (2001) 6 Washington University Journal of Law & Policy 29.

⁵ Jeremy Waldron, Law and Disagreement (Oxford: Clarendon Press, 1999)

I. Constitutional Scheme of Judicial Review in India

The Indian Constitution, the Law of the Land in the country.. Each act of the legislature, the executive, and the administration is associated with it (or them) and any deviation from its (or their) provisions can be checked by the instrument of judicial review. The phrase “judicial review” appears nowhere in the Constitution, but it pervades the structure of the Constitution in multiple articles. These provisions authorise the Supreme Court and the high courts to scrutinise state acts and state legislation for upcharge on the ground of constitutionality. An independent judiciary is essential for upholding supremacy of the Constitution and the rights of citizens.

1. Article 13 The basic principle invalid

The constitutional basis of the judicial review is clearly stated in Article 13, by which all laws which are against the Fundamental Rights be declared as void. It consists of four clauses:

- **Article 13(1)** provides that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- **Article 13(2)** prohibits the State legislature to make any law that takes away or abridges the provisions of Part III i.e. Fundamental Rights.
- **Article 13 (3)** The expression "law" in Article 13 (3) includes ordinances, orders, by Laws, rules, regulations, notifications and customs or usages having in the territory of India the force of law.
- **Article 13(4)** says that laws under Article 368 are not 'law' for the purpose of this article, as in force before the 24th Amendment Act of 1971.

Judiciary at Article 13 can declare a law as unconstitutional if it contravenes the Fundamental Rights of the citizen under Part III of the Constitution. This was done mainly through a series of two landmark judgments i.e., Maneka Gandhi v. Union of India (1978)⁶ and Minerva Mills v. Union of India (1980),⁷ by which the courts struck down the laws and actions which infringed personal liberty and basic structure doctrine.

2. Article 32 - Right to Constitutional Remedies

Under Article 32, citizens can directly approach the Supreme Court to seek the enforcement of Fundamental Rights. This provision grants the Court power to issue orders or writs, including writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, to enforce these rights.

This article explains about the mission of Supreme Court the First Protector of Fundamental Rights. Mukhia Das does not only believe that the right is one of the basic rights also a right which can maintain all other rights. That is what Dr. B.R. Ambedkar considered to be the “heart and soul” of the Constitution, as it enables judicial scrutiny of the violation of constitutional safeguards.

The reach of the article was also settled by the judicial pronouncements in Prem Chand Garg V. Excise Commissioner (1963), where the Court held that even procedural laws must guarantee constitutional remedies. This clause confers on the courts an expanded power of judicial review that will prevent any legislation or act infringing individual liberties from escaping constitutional scrutiny.

⁶ Maneka Gandhi v. Union of India, AIR 1978 SC 597; (1978) 1 SCC 248.

⁷ Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789; (1981) 1 SCR 206.

3. Articles 131-136 - Jurisdiction and Powers of the Supreme Court

These provisions establish the Supreme Court's original, appellate, and discretionary jurisdiction, and affirm its authority to engage in judicial review.

- The original jurisdiction of the Supreme Court in any dispute between the Centre and States is provided under **Article 131**. These conflicts may have constitutional implications so we need to review them.

- **Article 132** permits the Supreme Court to hear appeals from orders of the High Court in case involving a substantial question of law as to the interpretation of this Constitution.

- **Article 133** allows civil appeals to the Supreme Court if the case involves a 'substantial question of law of general importance'.

- Criminal appeals, in some instances use of **Article 134** to the Supreme Court.

- **Article 135** confers upon the Supreme Court the jurisdiction of the former Federal Court in any matter which was not covered by the Constitution.

- **Article 136** confers on the Court a very wide power to grant special leave to appeal from any order, judgment, decree, determination, sentence or decision passed by any Court or the Tribunal in the territory of India other than Courts or Tribunals subordinate to the armed forces of the Union.

These provisions have enabled the Court to review the constitutionality and legality of orders and judgments passed by courts, departmental tribunals, and quasi-judicial tribunals, which has extended the spectrum of judicial review.

4. Article 143 Advisory opinion of the Supreme Court

Under Article 143, the President of India is constitutionally empowered to refer a matter of law or fact to the Supreme Court for a consideration of its opinion on the question protested when such question is an issue of public importance to the crisis prevailing in the country. Although these judgments are not legally binding, they are of the highest political and legal significance. This part serves as a prophylactic form of review by the courts. For instance, in the case of **Re Berubari Union (1960)**⁸, the Court's advisory opinion, on the other hand, explained the constitutional process to implement the Indo-Pak agreement on cession of territory). Article 143 enables a constitutional question to be resolved prior to its implementation, it is a means for the resolution of potential contention.

5. Article 226 – Power of High Courts to issue Writs

Article 226 gives High Courts power to issue writs for not only the enforcement of Fundamental Rights but for “**any other purpose.**” This provision gives more liberal jurisdiction to the High Courts than the Supreme Court has under Article 32 and this enables the High Courts to be a more effective protector of both the legal rights and the constitutional rights of the people.

Article 226 has played a significant role in enlarging the dimensions of justice and judicial exposure of administrative measures. It is often referred in service matter cases, administrative matters and in cases of public interest litigation. The power under article 226 is discretionary and can be used by Courts, notwithstanding the availability of alternative remedies, having regard to the facts and circumstances of a particular case or the urgency thereof.

⁸ In *Re: Berubari Union and Exchange of Enclaves*, Presidential Reference under Article 143(1) of the Constitution of India, AIR 1960 SC 845; [1960] 3 SCR 250 (Supreme Court of India, decided on March 14, 1960)

The Supreme Court held in *L. Chandra Kumar v. Union of India (1997)*⁹ that the power of judicial review under Articles 32 and 226 forms part of a basic structure of the Constitution of India, and thus cannot be abolished even by amending the constitution.

6. Article 245. 246- Distribution of Legislative Powers

The federal legislative organisation in India is based upon the two articles i.e. Article 245 and Article 246.

- Article 245: Power of Parliament to Make Laws for the Whole or any Part of the Territory of India, and the Power of the Legislature of a State to Make Laws for the Whole or any Part of Such State But this is with the caveat of the constitution.

- Article 246 distributes legislative powers between the Centre and the States of a Union in three Lists: Union List, State List, and a Concurrent List.

Where a legislature encroaches upon its power—like a State when it passes a law on a subject in the Union List—courts can strike down the law. This separation of powers and legislative competence are frequently questioned by way of judicial review. Thus, in *Hoechst Pharmaceuticals v. State of Bihar (1983)*, the Supreme Court struck down a state legislation which trespassed the central field.

7. Article 254 – Inconsistency Between Laws Made by Parliament and Laws Made by the Legislatures of States

Article 254 relates to the case where both Parliament and a State Legislature legislate on an item provided in the Concurrent List. In the event of a conflict, the federal law trumps. Such law will be void to the extent of the contrary unless it is also approved by the President.

The repugnancy is usually then challenged in court under the judicial review mechanism. Courts test for direct conflict, stated and penetrated occupation of the field, and an object of the state law which frustrates the purpose of the central law.

The interpretation of Article 254 paid an important role in cases like *M. Karunanidhi v. Union of India (1979)*, wherein the Supreme Court highlighted tests to decide the legislative repugnancy.

8. Article 137 – Revision of Judgements of the Court of Cassation

The Supreme Court may, in its discretion, review any judgment pronounced or order made by it. Though the Court invokes this authority seldom, it is integral to review, online onscreen to assist the Court in correcting issues which are clear on the record.

In criminal cases, these reviews can be life-saving and crucial. For instance, in *Mohd. Arif v. Supreme Court of India (2014)*, as a result the Court opened death penalty review petitions to public hearings to increase the transparency and dignity of the process.

This article creates internal accountability mechanisms within the judiciary, to correct an oversight, miscarriage of justice and maintain discipline and ethics within the judiciary.

9. Articles 251 and 252 – Disclosure Agreement: Parliament Supremacy in Specific Areas

Article 251 states that due to repugnancy with a parliamentary law made under Article 249 (which relates to national interest), a State law can be declared void. Parliament may make laws for a state on a subject if resolutions to that effect are supported by not less than two- third of all the members of the legislative assembly of the state.

⁹ L. Chandra Kumar v Union of India, AIR 1997 SC 1125.

Judicial review under these provisions validates the legislative procedure to be in harmony with constitutional requirements, especially where there is an allegation of central invasion into state fields. These provisions strike a balance between federal independence and the national interest, and the courts have a critical role in preserving that balance.

General constraints of judicial review in India

Judicial review in India is a part of basic structure of Constitution, which means no legislation can be in force if it is against the basic structure of the Constitution. Although its function is vital to the protection of basic rights and the supremacy of the Constitution, it is neither a free rein nor an exclusive right. There are many different and general constraints imposed on the practice of judicial review, whether by constitutional stipulations, judicial rules, or sheer practicality. These confinements are discussed in this section in more detail, highlighting the daunting act of balance the judiciary is forced to perform by respecting constitutional values without treading outside its powers.

A. Procedural Review Only

Perhaps the most basic problem with the very idea of judicial review is that it is a procedural mechanism. The role of the courts is not to determine the quality of laws, and to second guess their unintended consequences, but to determine whether there were respects in which the legislature has not respected proper process of law-making, whether through process in the making of the law itself or in its implementation. This constraint is based on the perception of judges that the judicial branch is neither equipped nor intended to assess the wisdom or efficacy of legislative and executive actions.

For example, if a law comes under challenge in a court, whether it has been made in accordance with the due constitutional process i.e. passage through both houses of Parliament, assent of the President, and does conform to legislative entries in the federal List (**Schedule VII**) the court will not go into why the law was made and for what reason; it will not question the policy of the legislature, the merits of the enacted law, or the socio-economic objectives which gave rise to the felt need for it. This distinction promotes judicial self-restraint and comports with the separation of powers.

This limitation has been confirmed by several judicial pronouncements. It has been repeatedly stated by the courts that they are not to assume the role of an appellate authority over the judgement of the legislatures or the executives simply because they feel so, in the absence of patent constitutional violation. For example, the Supreme Court in *State of Andhra Pradesh v. McDowell and Co. (1996)* said that "a law cannot be struck down by just calling it arbitrary or unreasonable, if any statute is on the anvil, whether it is reasonable or unreasonable is a matter to be decided on the anvil of Just and the Court cannot annul the law only because it deems to be arbitrary."

The procedural constraints are necessary to protect institution integrity and keep the "courts" from turning into super-legislative institutions.

B. Having its Application only for the Supreme Court and High Courts

Secondly, a major limitation is that the power of judicial review rests in the higher judiciary. The power to perform this function is vested only in the Supreme Court or the High Courts. This power is specifically provided for in the Constitution of India (*Articles 32 and 226*) which grants Supreme Court and High Court (s) the authority to issue directions in the form of writs to carry out their constitutional function of securing individuals rights, and to check the excesses of authority.

Lower courts namely District Courts and the sub-ordinate Judiciary are not empowered with judicial review. Their job is to enforce laws as they are defined by higher courts. Such centralization of power serves to ensure uniformity in the interpretation of constitutional law, and ensures against the possibility of conflict or disagreement between state courts on matters of basic law.

But this also suggests a restriction of accessibility. What this means is that the ordinary citizens needs to go to High Courts or the Supreme Court, which could be difficult in terms of logistics, finance and procedure. While PIL and legal aid services have expanded the reach, the structural constraint is enormous.

Also, with as much work-load that is pending before the Supreme Court as well as the High Courts, the fact that judicial review could only vest with these two courts may at times lead to delay in justice and improper case management ultimately affecting the concept of review in a more indirect, than a direct, way.

POSSIBLE DIMINISHMENT OF PUBLIC CONFIDENCE

In so far as the judicial review is a power to defend constitutional rulings, but an excessive use or perceived overuse of that particular power can result in undermining the trust of the people in the judiciary and democratic institutions as a whole. If courts more regularly involve themselves in the duties of the executive or legislative branches, is there a risk of being charged with judicial overreach or activism?

Such an appearance might erode the judiciary's legitimacy as a neutral decisionmaker and threaten the separation of one branch from another. Critics maintain that when courts act to invalidate so many laws or to enjoin so many executive actions, they may be undermining the democratic will as expressed by the elected branches of government.¹⁰

In democratic polity it is the legislature and executive that are answerable to the people in their own right. When judicial decisions have appeared to obstruct or overturn popular mandates or welfare policies, it can encourage public sourness. The judiciary must be circumspect in deploying the power of review, as it stands on moral authority and confidence of the public.

The trade-off between judicial independence and democratic accountability is a tricky one. The Supreme Court in Divisional Manager, Aravali Golf Club v. Chander Hass(2008), held that interference by the courts in administrative matters would normally be avoidable and that the judiciary should refrain from trespassing into policy matters.

This balance is necessary to ensure the integrity of judicial review without losing the respect of the institutions and populations for which it is designed to serve.

D. Separation of Powers Challenges

The liberal use of the power of judicial review might tend to destroy the demarcation between the three arms of the State -- the legislature, the executive and the judiciary. While the doctrine of separation of powers is not strictly adhered in India, it is a basic structure of the constitution. Overly aggressive judicial activism can upset this equilibrium and raise constitutional and institutional worries.

According to the separation of powers doctrine¹¹, every organ should operate on its own turf. Although the judiciary interprets the law, it is not supposed to make or enforce policy. But such cases of the courts sledding the government policy on administrative issues, prescribing formulas

¹⁰ T.K. Tope, Constitutional Law of India 412 (Eastern Book Company, Lucknow, 3rd edn., 1982)

¹¹ S.P. Sathe, "Constitutional Amendment: Limitations and Judicial Review" 18 JILI 1 (1976)

(beyond those provided in the statutes) on administrative issues and adjudicating political questions, have come to be seen as breach of the same.

A classic case of this is the **Vishaka v. State of Rajasthan (1997)** case, in which the Supreme Court itself laid down sexual harassment guidelines for the workplace in the absence of a legislation. The decision was liberal, it filled a vacuum in the law, but it could be said to have invited “judicial law making” and over-reach.

The other examples are on the environment, education policy and the police—the way police is run are largely executive decisions being made by judges. While these interventions may be motivated in part by the public interest, they certainly result in establishing a precedent for invasion of the turf of other estates as ordained by the constitution.

Otherwise, the exercise of judicial review must have a tempering engagement with restraint and to demarcate with metes and bounds of the constitution least one encroaches into the domains earmarked for the other branches of the governance.

E. The Principle of the Strict Is The principle of the strict is 369.

The court adheres to the "**doctrine of strict necessity**" or the "**doctrine of avoidance**" under which "constitutional issues are [to be] decided no more than is necessary for the disposition of the case at hand." The courts will not decide hypothetical, academic or abstract issues and will not declare the law where there is no actual case or controversy presented.

This limitation has several functions:

- It saves the courts from deciding non-justiciable issues.
- It honors the independence of the other branches to deal with problems in their sphere.
- It helps to concentrate judicial resources on real cases in need of being adjudicated.

The dogma of impelling necessity is also an instrument of judicious economy. To be sure, this court frequently refuses to consider petitions involving available alternative remedies or the premature nascent stage. For example in **State of Rajasthan v. Union of India (1977)** the court refused to consider political judgements into the imposition of President's Rule.

If applied it will reaffirm that judicial review is “a remedy to be used conservatively, only after all other reasonable methods of interpretation have been exhausted, rather than as a tool for routine review of government action.

F. States Do Not Have Standing To Challenge Central Laws

A key constraint in the federal system of India is that state governments do not have the power to challenge central legislation as such. This limitation constrains the possibility for states to unilaterally invoke the federal scrutiny of parliamentary laws.

States can challenge the constitutionality of central laws but as political organs the standing of a state government is limited. Alleviating this imbalance is an important step in preventing judicial review from being a mere constitutional loser as a source of checks upon the central legislative process which is such a crucial mechanism for federalism.

Also, And central law will have the power to supersede or modify the state laws contradicting central laws in the Concurrent List under Article 254. Although a state law may be saved by the President’s approval, in fact this protection is rarely utilized. The result, then, is that the federal balance may too readily lean toward the Union, and that judicial review does little to counterbalance this tilt.

The Supreme Court in **State of West Bengal v. Union of India (1963)** held that a state has no locus standi to dispute a central law on the ground of it infracting the legislative competence of the state.

The above backs the restriction that judicial review is essentially a person-oriented solution and fails to effectively empower federal units to challenge the constitutionality of central acts. This limitation of structure requires a more calibrated model of federalism and a mechanism within the institution to counter balance a situation where the central government sits on the states autonomy with legislate ad with below evaluation legislation.

Antecedent restraint on the judicial review in India: an survey

As we have seen, 'judicial review' is a grave creature of constitutional jurisprudence which operates under the tender nurture and the strict guidance of the Constitution, the Charter, or the Bill of Rights, it is one of the great truths of modern democratic government that Courts have the right and the duty of judicial review of all legislation, or administrative action, which comes before them for adjudication." It is a necessary vehicle for implementing legislative acts and executive orders and various legal systems which conform to the constitution. Judicial review in India is primarily justified by various provisions of the constitution of India— particularly Articles 13, 32, 226 and 136—as the judicial arm of the state has the ability to negate laws and executive orders that contravene constitutional principles. This doctrine protects the supremacy of the constitution and rule of law by not allowing any wing of the state to do anything that is ultra vires. But as potent and widely encompassing as the judicial-review machinery is, the practice is not all-powerful or unbridled. It is hedged about with implicit restrictions -- judicially developed standards for the exercise of this authority.

These unstated boundaries are not contained in the language of the constitution but have been established by implication from orthodox constitutional jurisprudence — they are traditional common law constructions and judicial deductions. They are there as bulwarks to ensure that the judiciary does not violate the constitutional boundaries and disturb the delicate balance between the three organs of the state: the legislature, the executive and the judiciary. Though the purpose of judicial review is to safeguard citizens' rights and protect constitutional honour, judges should be circumspect and restrained in this regard. There are chances that without such checks the judiciary will interfere with the duties of the legislature and the executive, which would be contrary to democracy and administration of the polity.

As one of the essential implied restrictions on judicial review, the principles of locus standi, res judicata, laches or undue delay and exhaustion of alternative remedies are laid down¹². These have the basis to screen out frivolous or immature petitions, prevent abuse of process of the court and uphold the principle of hierarchy and jurisdiction of other legal and administrative entities. Both promote the efficiency and credibility of the judiciary, and both preserve the institutional balance intended by the framers of the Constitution.

The first of these limitations, or concepts rather, was Locus standi on which I shall have more to say presently. In the past, Indian courts demanded that an auditor should have direct personal injury, so that only the party whose personal interest is affected by the operation of the law, has the locus standi to assail the validity of that law by way of judicial review. This was to avoid rising tide of litigation and afford access to court only to those whose rights are infringed .

But the above principle has now undergone a change with the evolution of Public Interest Litigation (PIL) in which the courts have relaxed the rules of standing designed to ensure technical sufficiency of interest or its personal nature and have accepted the filing of writ petitions by public spirited persons and social voluntary organizations for judicial enforcement of the interest of public,

¹² S. Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, (Oxford University Press, 2009) 211

people and disadvantaged/voiceless groups. However, in ordinary (that is, non-PIL) judicial review, the locus standi requirement still counts as an important gate keeping mechanism to guard against abuse of the judicial process and to ensure that courts entertain only genuine and substantial disputes.

The second principle, **Res judicata**, precludes prelitigation of matters that have been decided by an appropriate court. This principle, which is principle based, enshrined in Section 11 of the Code of Civil procedure and read through to constitute law by the judiciary to the field of constitutional law is designed to implement and effectuate the decision of the Court, to give finality to the litigation and to save the misuse of judicial manpower. In challenges by way of judicial review, once the constitutionality of an enactment or anything done under it has been considered and decided by a court, it cannot be opened up again in another application on the same issue by the same applicant or others claiming through them. The reason, it is said, is that endless litigation undermines the authority of the judiciary and erodes public confidence in the justice system. To the extent our legal system enforces the principle of res judicata, courts uphold the credibility of their findings, and deter litigants from taking two bites of the apple through inventive legal theories or manoeuvres.

An additional major understood rule here is the **Doctrine of laches or inexcusable delay**. This principle of justice prevents a petitioner from obtaining relief if it has waited too long to come to court without a good reason. “The remedy of judicial review must be sought with reasonable dispatch,” or else the delay will prejudice the rights of others, disturb settled expectations, and make judicial intervention more disruptive than corrective. Indian courts often test the delay in constitutional challenges and refuse relief where there is an excessive and unexplained delay. This limitation is especially relevant to areas of government policy, public administration and service-related litigation where the post hoc interventions by courts can engender confusion, financial waste or institutional stasis. On the other hand, the courts will also have discretion and may condone delay and not insist on the facts if the matter involves patent illegality and violation of fundamental rights. The defence should therefore be applied in a pragmatic manner, and not slavishly, so as to not allow the form of justice to defeat the substance of it.

Last, but not least, the **Doctrine of exhaustion of alternative remedies** is an essential constraint on judicial review. This doctrine states that constitutional courts such as High Courts under Article 226 do not entertain petitions unless the petitioner has pursued the statutory or administrative remedies provided by the law. This rule deters litigants from bypassing established avenues of legal remedy to exercise unnecessary jurisdiction of the higher tribunal in arrears. It serves to also promote efficiency in the judicial system by avoiding that constitutional courts are overwhelmed by cases that can be decided sufficiently in other courts. But the principle is not a universal one. Writ petitions can be entertained by the courts even if, in the alternate, remedy has not been exhausted, if alternate remedy is not effective or if the violation of fundamental rights has occurred or if the authority has acted without jurisdiction or in contravention of principles of natural justice. These exceptions are prevent the doctrine being used harmfully to prevent the access to the justice, yet at the same time they do not permit a misuse of the legal system.

Together the four doctrines-**locus standi, res judicata, laches, and exhaustion of remedies**-serve to maintain and enhance the integrity and effectiveness of a judicially supervised system of review. They allow courts to direct their attention to real saying violations of the constitution, save courts time and energy, and advance the separation of powers and the constitutional separation of powers that itsagan envisioned. The ongoing development and use of the writs also exemplifies how constitutional law in India breathes and that the judiciary is actively engaged in modulating a diverse range of demands on the judiciary, ranging from the demand for judicial intervention to the role of the judiciary in exercising institutional self-restraint.

Locus Standi

Meaning and Development through Time

Locus standi is a Latin term that means "place to be standing"; in the legal context, it means the capacity of a party to bring an action before the court. It's a basic legal standard that who has standing to file a lawsuit. In judicial review, locus standi constitutes an implied restriction, excluding petitions in which the petitioner has no direct or tangible interest in the subject-matter. The conventional doctrine of locus standi was thus rigidly enforced, with access to the Court granted only to those who were able to show that they had been wronged in law by the impugned act which they wished to challenge.

The Indian courts had, until the introduction of PIL, adopted a strict doctrine of locus standi. Petitioners had to demonstrate a personal interest in the case. This was a narrow standard to prevent inundating courts with speculative or academic issues and to allow courts to use their time to address problems of a legal nature. But it also meant that untold social wrongs and constitutional abuses - the experience of many people who did not have the knowledge or resources or wherewithal to take themselves to court - were not remedied.

The most radical change in this doctrine came in the beginning of 1980s with the advent of PIL. The turning point was the path-breaking judgment in S.P. Gupta v. Union of India (1981). In this instance, Patkar's locus standi was broadened by **Justice P.N. Bhagwati** to include all public-spirited citizens who instituted legal action in good faith and in the interest of the public, for the protection of persons who were unable to protect themselves or unable to secure their rights. This ruling would form the precursor for a value-driven judiciary system, in tendency an active protectorate of constitutional rights and public accountability.

Locus standi was drastically liberalized which widened the scope for court access and popularized judicial review. It provided a means for environmental harm, custodial abuse, bonded labor, gender inequality, and other social ills to be redressed in court by activists, NGOs, journalists, and the public at large. In this manner, judiciary has transformed from mere dispute resolver to protector of constitutional morality and public good.

Nonetheless, while the judiciary took a more liberal approach in PILs, for ordinary litigations, they were sticking to the locus standi rule of the British era. This "dirty standards", will allow on the one hand, courts to be open to public interest causes while on the other, not allowing them to be abused for political or conjecture litigation. In numerous cases, the courts have issued warnings against the abuse for personal and political ends of PILs, and have insisted on the requirement of bona fide motive.

Modern Scope and Challenges

In India, despite the widened reach of access to justice made possible by Public Interest Litigations (PILs), the classic judicial review—particularly under Articles 32/226 of the Constitution—still considers locus standi as a bastion in non-PIL cases. The courts strike a very difficult balance between promoting bona fide constitutional claims and inundating the courts with unwarranted claims. This is vital in order for the courts to concentrate on real disputes and not be flooded with matters that are not legally sustainable or directed towards an interest.

In non-PIL cases, petitioner still has to establish direct, personal legal injury. The object thus is not to allow the judicial forums being made sale-marts by persons who have no concern with the subject-matter of the litigation and are making moneys' worth of litigation. This limited approach is

necessary to safeguard the effectiveness of the courts, and the integrity of the judicial review process.

A strong assertion of this principle is to be found in **Jasbhai Motibhai Desai v. Roshan Kumar (1976)** SC While laying down the law on the subject, after exploring the case-law on the point, the Supreme Court ruled that the right to move the court for issuing an appropriate writ or direction should be restricted to a person with a GRIEVANCE resulting from an act complaining of, and directly and substantially affecting him. In that case the petitioner questioned the granting of cinema license to his competitor without having any legal right to do so. The Court rejected the petition, stating that the petitioner had no locus standi and that entertaining such challenges could result in a floodgate in administrative decisions at the hands of the Court.

This decision underscored the risk of administrative gridlock should the courts receive every challenge brought by those who lacked a direct concern in the challenged action. While enforcing a rigorous locus standi in non-PIL cases the judiciary ensures that judicial review is neither reduced to a device of the past nor turned into some variety of PIL which is invoked only to achieve a desired end, be that private or competitive.

Judicial Balancing Act

The need to promote access to justice is balanced by the requirement to prevent abuse of the court system, and the judiciary has a central role to play in that regard. It is this balance that is maintained through the means of locus standi, which decides who is eligible to approach the court in order to get a case filed. Locus standi was previously considered to involve a direct and substantial interest in the subject in question. But the contemporary judicial trends demand this principle with a flexible approach and that too in cases that impinge upon strong public interest or gross encroachments of human rights.

With those involving the rights of a large segment of the community or public interest at large, the courts have assumed a more liberal approach to the doctrine of locus standi. This ensures that matters of PIL and social justice can continue, even if the petitioner is not the aggrieved party. It is this elasticity that keep the court in the reach of the downtrodden and that safeguard the public interest.

Cases that have no direct bearing on a petitioner or are frivolous, on the other hand, are typically dismissed to prevent the strain on the courts. When courts screen out nonessential matters, they conserve judicial resources for parties with real grievances. Locus Standi and Justice delivery Therefore the judiciary's liberal application of locus standi is a safety valve to keep the wheels of justice turning without abuse and ensure that the system is efficient and effective.

Evolving Dimensions

The recent era of digital media and ecological consciousness has left an indelible mark on the doctrine of locus standi, prompting a new, broader interpretation. Under the old rules of locus standi, petitioner had to establish a real recognizable interest in the subject matter Lord Denning observed that the rule that only a person who had suffered a legal grievance had a right to apply for judicial review, as laid down in law was outdate. But today's courts increasingly understand the fact that wicked problems—ranging from environmental destruction and human rights abuses, to public health crises—do not have responses in the same neat and tidy terms. This has led to every complaint from NGOs to civil rights organizations to even anonymous whistle-blowers being taken note of, provided their charges are backed by real and tangible complaints.

This developing hermeneutic of inclusion mirrors a radical shift towards a more inclusive justice, where more vested persons have a say in the judicial process. So, by allowing the public interest litigations, courts enable civil society to act as the watch dog especially where the parties whose

interests are at stake do not know or are unable to approach court. For example, environmental litigation often arises from diffuse harms that affect entire communities or future generations, precluding any one individual from asserting standing. NGOs and activists are therefore the ones who are playing a crucial role in putting forth the issues and moving the judiciary to intervene.

There are, however, downsides to this broader locus standi. The courts need to guard against any possible misuse, or vexatious filing, which could inundate the system. The availability of digital platforms has facilitated online activism, as social media movements have been able to foment public outrage and create legal petitions. While this makes justice participation a more egalitarian idea and painted over pain points, courts have always ruled that it is impossible for digital outrage to constitute locus standi. A party must show itself to be "injured in fact" to have standing to make a petition. The fact that something is "trending" on Twitter, or that many people are deeply concerned about something does not rise to the level that would justify us getting involved today.

This delicate balance maintains courts connected to real injustices created by contemporary social and environmental conditions, while also safeguarding judicial resources from being sapped by speculative and unproven grievances. The interestingly nuanced position taken by the judiciary on locus standi in this digital age bears testimony to its resolve to ensure justice that while accessible, must come with responsibility, even if it means tweaking traditional ideas to keep pace with the present times without diluting the rigour of law.

Res Judicata

Conceptual Understanding

Res judicata is a Latin word meaning "*a thing already judged*" and is a principle of Equity or Law that determines that an issue legally determined by a judge or court is final and may not be re-litigated. Enshrined under Section 11 of the Civil Procedure Code (CPC), 1908, the doctrine is based on public policy considerations, to support finality of judgments, prevent vexation at law and to allow for judicial independence. It is a principle that one cannot twice approach the court for the same relief - that is to say, whether the claim once adjudicated, whether the same cause fought out, or the same parties with the same issues litigate a second time or produce new evidence.

Section 11 CPC provides for the tests of applicability of res judicata -that the matter directly and substantially in issue must have been a matter directly and substantially in issue in a former suit between the same parties or their representatives decided by a court of competent jurisdiction. Together, these circumstances combine to prevent abuse of the court system.

In terms of the judicial review and constitutional adjudication, res judicata functions as the instrument for upholding the sanctity of judicial decisions and for serving the purpose of the certainty in the constitutional law. While the Indian Constitution does not expressly state the principle of res judicata, the Supreme Court, in cases of constitutional matters, has invoked it so as to maintain consistency and stability in the interpretation of law.

The doctrine becomes of great importance as PIL and writ petitions under Articles 32 and 226 of the Constitution. It is settled in law that the principle of res judicata is not limited to civil suits but extends to writ proceedings as well, though with a certain amount of flexibility. In those matters involving constitutional rights and as a matter of public interest, courts will consider a second petition if new facts are discovered or where the previous ruling was given without the merit of the matters in dispute.

In the other Supreme Court case of *Daryao v. State of U.P. (1961)*, it was held that the plea of res judicata applied to writ petitions under Article 32 and that once a question had been decided by the proper High Court in a proceeding under Article 226, a petitioner could not re-agitate that question before the Supreme Court by invoking article 32.

Therefore, res judicata in the interest of finality, uniformity and economy of judgment, prevents conflicting rulings in constitutional litigation. It helps to prevent court anarchy and make parties obey the courts and respect the court orders and have faith in administration of justice. Yet, its use in constitutional cases remains moderate and allows for exceptions such as justice-in-the-cause requiring review in view of recent developments or overpowering public interest.

Judicial Interpretation

Res Judicata in Constitutional Law: Daryao v. State of U.P. (1961) Res judicata is a cornerstone of our jurisprudence, protecting society by preventing re-litigation of disputes which have been definitively resolved on their merits by a competent court. Enacted as Section 11 of the Civil Procedure Code (CPC) 1908, it aims at achieving judicial finality and preventing vexatious litigations and respecting of the judicial decisions by the parties. Although a concept developed for civil cases, it has an application also in constitutional adjudication, including writ petitions. The landmark judgment of Daryao v. State of U.P. (AIR 1961 SC 1457) was a significant evolution in Indian constitutional law, holding that the doctrine of res judicata also applies to writ petitions under Articles 32 and 226 of the Indian Constitution.

In the case of Daryao, the petitioners had invoked the jurisdiction of the Allahabad High Court earlier under Article 226 of the Constitution on the ground that their eviction was not finally made and was in the process of being so made and that they were entitled to the enforcement of fundamental rights. The High Court rejected the petition on merits. Thereafter, the petitioners had come before the Supreme Court under Article 32, alleging the said grievances. The main question which arose before the Supreme Court was whether the inconvenience judgment of the High court operated as a bar to a new petition under Article 32.

Held that where a High Court had decided a matter under Article 226 on merits, the same question cannot be re-agitated under Article 32 before this Court. The Court laid stress on the fact that while Article 32 is a basic right, it does not confer an absolute right all that having been put to rest, may be canvassed. WHEREFORE, res judicata is invoked in cases like the ones at hand to further the public policy by maintaining judicial decorum and by preventing conflicting decision.

Two important points were emphasized in this decision. *First, the writ jurisdiction under Article 32 is not exempt from the well settled procedural requirements of finality and conclusiveness applicable to all judicial proceedings. Second, efficiency and uniformity in judicial process should not be compromised even with respect to fundamental rights. The Court also stated that if multiple petitions were allowed to be filed on the same grounds, there would be utter chaos in the court and rule of law would become a casualty.*

Crucially the Supreme Court also made a distinction between decree on merits and decree denuded of its merit. If the writ is disposed of or for technical reasons without going into the merits, then second petition would not be res judicata. But when the issue is decided by the court on the merits, it is res judicata for all time.

As such Daryao did create a precedent that still stands for the application of res judicata in constitutional cases. It "sewed" the principle that constitutional remedies must not upset the finality of judicial determinations while simultaneously balancing individual rights and judicial economy. This decision will continue to be a leading case in the jurisprudence of res judicata which is now treated not as a mere procedural rule of the court but a fundamental rule of procedure which cannot be departed from its due observance and is designed to bring about consistency of decisions and coherence in the system.

Scope and Exceptions

The principle of res judicata, embodied in 11 of the Code of Civil Procedure, 1908, serves a vital public interest, namely, the finality of judicial decisions, and of preventing the arbitrary reopening of cases, which have been decided by competent authority. Although the rule is fundamental to the procedure, indispensable to the preservation of order and to the enforcement of rules of decision and uniformity, it is not without limitation. Indian courts have held the doctrine must give way if held in tension with justice, fair play or due to changed legal and factual situations.

The basic rule is that a judgment can only be invoked as res judicata where a question has been decided on merits by a court of competent jurisdiction. Where an action is dismissed based on technical or procedural deficiencies, such as lack of jurisdiction, improper form of action, or failure to comply with certain procedural requirements, the dismissal does not bar another action. This is because the outcome does not finally decide the claims of the litigants. So a petition afresh on the same matter can be entertained if it is presented in the proper way and under the parameters of law. Furthermore, courts have recognized that it may be unjust to strictly apply res judicata where new and material facts have developed or where there is a change in the legal landscape. For example, a reconsideration of statutory interpretation by the Supreme Court or the development of new constitutional principles could have made former decisions obsolete or irrelevant. In these type of cases, courts may permit re-litigation to vindicate substantive justice over procedural finality.

The Supreme Court judgment in *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara (AIR 1964 SC 1013)* highlights the dichotomous nature of the doctrine. The Court reiterated the value of res judicata as a means of avoiding the inconsistent decisions of the courts, achieving finality and discouraging the parties from litigating the same issues over and over. The Court did, however, stress, that courts may not apply the doctrine mechanically when such application would result in injustice or deny meritorious claims because of changed conditions. The decision recognized the need for flexibility in constitutional and administrative law, where considerations of the public interest and the changing nature of legal principles often require a re-examination of past decisions.

Such nuanced approach is well- demonstrated in writ jurisdiction under Articles 226 and 32 of the Constitution -where fundamental rights are involved. In such cases, courts are less likely to apply res judicata too rigidly. Although judicial comity requires final decisions to be accepted, exceptions exist in situations of public concern, ongoing injury, or developing constitutional norms.

Functional Significance

The concept of finality in judicial determinations is an essential element of any sound legal system. It serves to ensure the effective utilization of limited judicial resources, create legal predictability and enhance the credibility of the administration of justice. While the challenge of prejudice resulting from non-party joinder is relatively unproblematic with respect to multiple parties who have already been suit and successfully defended themselves – the preclusive effect says the matter has been fully given a hearing by a valid tribunal and is closed for relitigation.

In the absence of the principle of finality, the courts would be forced to process redundant petitions and appeals, for the parties would be free to contest a decision unceasingly merely in the hope of obtaining a different one. It would be a recipe for chaos and gridlock in the courts. Judges would have to divert their limited time and energy from handling new cases to reopening and reconsidering cases that long ago had been concluded. This backlog would have a spillover effect on many other litigants, and undermine the power of the court to do justice in a timely manner. Justice delayed is frequently justice denied, and lack of finality would undermine the legal system itself.

Finality also provides a very important benefit in terms of legal certainty. So long as disputants can trust, if they lose in court, that is the end of the matter, they can go about their business, either personally, commercially, or politically, with confidence. Certainty in the law permits people and institutions to structure their conduct and relationships based on the law. Such certainty is vital to the orderly conduct of a civil society. A world in which legal decisions can be revisited on a whim, however, is one where risk and doubt predominate, investment is discouraged, development is impeded and opportunism flourishes.

Also, the finality principle serves to enhance the power and dignity of the courts. A court that second-guesses itself on its own decisions can end up looking inconsistent or tentative. When, however, it is considered that decisions are to be final and conclusive, it testifies to the independence of the judicial process and encourages the public confidence in court*. Additionally, populations are more likely to accept and follow legal determinations—precisely as is intended—as long as the system feels fair, uniform, and immune from manipulation or endless stalling.

Safeguards, however, must exist to remedy miscarriages of justice. Appeals and reviews exist within legal systems specifically to correct mistakes and maintain fair justice. But where all possible options for review have been exhausted, that decision has to be respected. This tension between fairness and finality is crucial. It enables justice to be both thorough and expedient, and to the courts perform their function as ultimate arbiters not as forums of endless relitigation.

Unreasonable Delay or Laches

NATURE AND BASIS OF LACHES

The laches doctrine is an equitable doctrine that precludes a plaintiff from asserting a claim when the plaintiff has unreasonably delayed in asserting the claim, and this delay has resulted in prejudice to the defendant. Based on the axiom "Equity aids the vigilant, not those who sleep upon their rights," this principle says that it is not just the merit of the issue but also the timing of making them right.

Laches expedites resolution of contemporary disputes by the courts, as opposed to prosecution of stale claims "where evidence has been lost, memories have faded, and witnesses have... disappeared" or where the passage of time has made a change in position in-expedient or caused reasonable claims of ownership to be abandoned. foreground not only the interest of the party against whom the claim is made by ensuring it is not subject to a claim by the state barred by res judicata in the future, but also the interest of society in preventing the relitigation of matters which have long been considered at an end. In this way, it stresses on the one hand legal certainty, procedural economy and in general the expeditious conduct of proceeding.

JUDICIAL APPLICATION AND CASE LAW

That being said, Indian courts have interpreted and applied the doctrine of laches in a fine-tuned, context specific manner. Here are the factors to which they pay particular attention:

- i.** How long the proceeding has been delayed, and whether the delay was good reason.
- ii.** Whether the other party has been prejudiced by the delay.
- iii.** The types of relief requested, and its urgency and right for the relief.
- iv.** The presence or absence of a superseding public interest.

The Supreme Court, in *State of M.P. v. Nandlal Jaiswal* (1986) declined to consider a challenge to industrial policy of the state government after there had been long delay in maintaining the

contentions. The Court stressed that in matters of policy 'the interference by the judiciary after the rights and expectations crystallized' would be 'extremely disruptive and unjust.

On the contrary, in **Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur (1992)**, the Court entertained the petition despite the delay since it is a case of a major infraction of law. This illustrates the extent of the elasticity of the doctrine —caution about delay is real, but it does not always trump substantive justice when rights are seriously violated.

Context- and Subject-dependent Uses

Laches is not inflexible, but must be applied with considerable dependence on the facts of the case. There are even more relaxed standards of positive evidence in Courts for:

- Abuses of fundamental rights
- Gross miscarriage of justice
- PIL stands for Public Interest Litigation.

But not in all cases, in matters relating to service, promotion or administrative actions where the promptness of the assertion of right is important for the maintenance of procedural integrity it is more prevalent of the Courts to dismiss the writ petition on the ground of laches. This would keep to management certainty and avoid reopening decided governance for possible chaos and clumsiness.

Doctrine of Alternative Remedies Exhaustion

Doctrinal Basis

The theory of exhaustion of remedies is a fundamental concept in the field of administrative and constitutional law. Besides, the court held that it would be necessary for a party invoking the jurisdiction of a Constitutional court under Articles 32 and 226 to have exhausted all the statutory and alternative remedies provided by any statute before filing the writ petition. This rule preserves the hierarchy of legal fora with a view to see that cases are taken first to those who could handle them more aptly, like tribunals, appellate authorities or departmental forums.

Legal Rationale and Subsequent Judicial Approval

The faculty has never enjoyed such robust judicial support for this principle. The Supreme Court reiterated in **Than Singh Nathmal v. Superintendent of Taxes (1964)** that High Courts should not exercise the jurisdiction of the appellate authorities where statutory remedies are provided. Again in **Union of India v. T.R. Varma, (1957)** the Court reiterated that it is not desirable to use the writ jurisdiction to circumvent well-defined statutory procedures.

The purpose of the doctrine is to encourage judicial efficiency, to prevent litigants from hopping between forums, and to keep the specialized machinery created by a statute intact.

Judicial Economy and Specialization Effects

This doctrine serves an important function to simplify the judicial process. It promotes the adjudication of disputes by specialized bodies (*tax tribunals, service commissions, consumer forums, environmental courts, etc*) in which greater technical expertise will be brought to bear on the adjudicating process. By sieving routine or specialized disputes away from constitutional courts, it enables them to concentrate on systemic, constitutional and rights manifestations.

Contribution in Reinforcing Federalism and Confidence of the Institutions

Promoting use of statutory forums first furthers federalism—by recognizing the part played by legislatively-created institutions—and fosters institutional confidence. It is a sign of the maturity of a legal system in which all forums, including those filled with more or less minor criminal matters, have a limited and defined role they can respect themselves for having played.

Another reason for the rule is that it enables the higher judiciary to devote time to constitutional jurisprudence and to the judicial review of executive action and the defence of basic human rights, unencumbered by run-of-the-mill disputes that belong elsewhere.

Constitutional Limitations

Judicial review in India as the bedrock of constitutional governance is required to keep legislative and executive measures in line with the mandates of the Constitution. But this power is not unlimited. Even the Constitution itself limits and immunizes-- at times with a view to balancing the judiciary's power against the structural requirements of other branches as an inevitable exigency of statecraft.

a) Immunities and Privileges

One of the important constitutional restrictions upon judicial review stems from the privileges and immunities these functionaries enjoy, especially the President of India and the Governors of States. The Constitution of India under Article 361 provides them immunity from prosecution and civil suits while in office. Such privilege is necessary to allow high officials of state to carry out their constitutional functions without being brought to heel by what would otherwise be frivolous or vexatious suits.

The purpose of these immunities would be to safeguard the dignity and independence of those constituent authorities, thereby allowing them to discharge their functions effectively, without being undermined by excessive judicial scrutiny, which would interfere with the functioning of the state. For example what public conduct can't a sitting President be sued for and can't be otherwise hauled into court, post his or her departure from office?

These limitations on judicial review, however, must be balanced with the legitimate concern about the respect for and validity of constitutional rights. Once in a while, it mistakenly thinks that matters of legality or Constitutionality are its business, but it doesn't affect them while the President or a Governor is in office. Such immunity is temporarily-based; i.e., only after the officer leaves the office can the judiciary step in and investigate the officer's conduct.

b) Emergency Provisions

A further constitutional restriction on judicial review is with respect to the emergency provisions in the Constitution (*i.e. those of Part XVIII*), such as Articles 352, 356, and 360 expressly limit the powers of judicial review. When the President announces national, state, or financial emergencies, the norms informing how constitutional government operates may come to bear less strongly.

In such situations, the Constitution authorises the central government to overrule or derogate some of the fundamental rights including of speech, protection against preventive detention, and of access to courts for enforcing certain fundamental rights in *Articles 19 and 21*. This deprivation of rights, as a matter of course, limits the potential grounds for judicial review, for the courts will be unable to address matters that would normally be protected by the constitution.

For instance, when the *national emergency was declared in 1975*, the power of the judiciary to question preventive detention orders or executive decisions was drastically reduced. The courts

frequently had to defer to the executive evaluation of the emergency, which involved acceptance of the necessity for prompt, decisive action by the government when the country was threatened. This constitutional restriction is a recognition that some crises demand extra powers and less judicial review to protect national security and public peace. But it also raises serious questions about the risk of executive excess and abuse, exposing the thin line between security and liberty in a constitutional democracy.

Practical Constraints

Apart from the lack of formal constraints in the constitution, the practice of judicial review encounters a few real barriers of its own. These restrictions influence effectiveness - but also legitimacy - in terms of judicial interventions.¹³

a) Judicial Overreach

Judicial activism is used as a pejorative term to describe judicial decisions that are considered to be at odds with the ideology of the appointing authority, particularly decisions that overturn existing or prior legislation or enhance judicial power. Judicial review is primarily about preventing unconstitutional actions, but occasionally courts decide policy, administrative or political matters that have traditionally been the responsibility of other branches of government.

Such interventions can also invite institutional tensions and concerns about the judiciary's role in a democratic system. Critics of Judicial Activism Critics of the use of judicial activism contend that it can undermine the separation of powers and the principle of democratic accountability, because judges are not elected nor are they best positioned to make policy judgments of a technical or complex nature.

Cases of judicial overreach have sparked debates about the proper scope of judicial review, and advocates of judicial restraint. And it is essential to do so in order to maintain the legitimacy of the judiciary and to keep it as a Constitutional guardian, not a politician.

b) Lack of Domain Expertise

A further limitation on judicial review is that judges are not particularly expert in some areas such as economics, environmental science, public health, technology, or financial markets. There are so many current legal disputes that hinge upon complex data, or scientific proof, or policy implications.

Courts may experience difficulty in quantifying or understanding such data, with an impact on judicial decision-making in terms of quality and relevance. Such a problem becomes more severe in regulatory, environmental protection, intellectual property and public administration decisions.

Expert committees and *amicus curiae* can do their bit in helping the courts, but the onus is on judges, who may not be formally trained in these areas. But incompetence is a boundary to judicial effectiveness as well, and leads sometimes to deference or reluctance to step into technical issues and so to limit by default the range of such review.

c) Resource Limitations

¹³ P.P. Craig, "Judicial Review, Intensity and Deference: A Comparative Analysis," (2012) 34 Hong Kong Law Journal 1.

Indian judiciary has serious resource constraints: not enough judges, not enough infrastructure, and an overburdened workload. These constraints compromise not only the expediency of the process of justice, but also the meticulousness with which the judicial review of matters may proceed.

There is such a backlog for at least two years which makes the effectiveness of the judicial remedy less effective and its public eye less a deterrent. Resource barriers further restrict the ability of courts to hold real hearings or to engage in serious fact-finding that is so frequently needed by courts desiring to analyze complex administrative policies.

In addition, inadequate technological infrastructure and procedural delays render access to justice and the exercise of judicial authority ineffective. Resolution of these resource constraints is essential to enhance the judiciary's authority as a constitutional umpire.

Conclusion

Judicial review in India continues to be an effective and essential vehicle for enforcing the paramountcy of the Constitution and the preservation of the basic structure. But there is method to its madness, and the court dwells within a complex skein of limitations and constraints that are as pragmatic as they are necessary to the overall balance of power between the three branches of the government.

The constitutional immunities conferred on the President and Governors, as also the temporary special dispensations during emergency, emphasize the obligations to honour certain institutional prerogatives and political exigencies. These articles shield the executive from undue judicial intervention, while maintaining constitutional balance.

It does, however, identify practical limitations such as judicial activism, lack of technical expertise and resource constraints that the judiciary confronts in hearing its constitutionally ordained role effectively and equitably. The debate of the dichotomy of judicial activism and restraint continues to be played out in courtrooms across India, forcing to question the role of the Indian judiciary in a functioning democracy.

Indeed, far from being weaknesses, the various constraints on judicial review are bulwarks that serve to protect democratic values, the separation of powers, and the rule of law. The judiciary can thus preserve constitutionalism even while respecting the role of the legislature and the executive if it constrains judicial review within these limits. Such an equilibrium is necessary to guarantee that judicial oversight reinforces the health and stability of India's constitutional democracy, rather than undercutting it.

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JUDICIAL OVERREACH IN ECONOMIC GOVERNANCE: A CONSTITUTIONAL APPRAISAL

-SK Kavitha

Abstract

In the past, judicial review has provided a definitive check on unconstitutional measures by enforcers and lawmakers. However, the expansion into the field of economic governance has sparked important debates about the role of justice in constitutional democracy. In this chapter, the fields of constitutional and administrative law deal with and analyze how judicial intervention in economic policy leads to the presentation of judicial stake. In the Indian context, he becomes an important case such as the ¹**Swiss Ribbons Pvt. Ltd. V. Union Of India** and judicial intervention in issues of bankruptcy and bankruptcy codes, spectrum allocation and natural resource management. Comparative knowledge from the US and UK explains how judicial involuntariness is held in economic issues. While this chapter aims to argue that case trials are inherently important to maintain the rule of law, disproportionate interference in economic management can ultimately hinder the delicate balance between the three government agencies that affect the economic stability and trust of the people. This discussion also addresses legal framework conditions such as bankruptcy and repeal code 2016 and 2013 businesses to certify cases of widespread economic impacts by judicial decisions. Through this analysis, this chapter proposes a coordinated approach to judicial review. Judicial review considers constitutional restrictions without affecting fundamental rights and democratic government.

Key words: Economics governance, judicial review, constitutional democracy, bankruptcy code, judicial intervention

1. Introduction:

Judicial review, as a fundamental pillar of constitutional governance, has been crucial in upholding the rule of law, holding public officials accountable, and safeguarding the fundamental rights of citizens. In India, the judiciary has traditionally been seen as a protector of the constitution, intervening when the executive or legislative branches seem to be overstepping legal or constitutional limits. In recent times, especially with the emergence of intricate economic reforms and liberalization, the judiciary's involvement in shaping or intervening in economic governance has faced heightened scrutiny. The increasing scope of judicial review in areas that

¹ Swiss Ribbons Pvt. Ltd. V. Union of India, (2019) 4 SCC 17.

were previously considered the exclusive domain of the executive or legislature has sparked debates about the boundaries of judicial authority and the principle of separation of powers.

Economic governance encompasses policy choices related to public finance, taxation, industrial regulations, banking, investment laws, infrastructure projects, and natural resource management. These choices are frequently marked by intricate technical details, extensive strategic planning, and the need for political responsibility. In a democratic system, these functions are usually entrusted to elected representatives and executive authorities, who are assumed to have specialized knowledge in their respective fields and are accountable to the public. Judicial intervention in these areas, therefore, creates a complex dynamic—on the one hand, it may serve to uphold constitutional values such as transparency, equity, and accountability, on the other, it risks overstepping boundaries that safeguard the institutional autonomy of the executive and legislature.

The Idea of judicial overreach arises when courts, pretending to interpret or enforce laws, start to take on responsibilities that are typically handled by the other branches of government. In economic matters, this issue becomes more challenging due to the technical and policy-driven nature of economic decisions. For example, courts have delved into matters such as the allocation of spectrum, environmental approvals for infrastructure projects, pricing of crucial goods and services, and the operational guidelines of the ²insolvency and bankruptcy code (ibc), 2016. In these situations, the judiciary has not only interpreted the law but also played a role in shaping or changing economic policies.

A prominent example In this context is Swiss Ribbons Pvt. Ltd: In 2019, the supreme court affirmed the constitutionality of the ibc, but also examined the complexities of its execution and structure. Although the judgment was widely praised for its fair and balanced approach, it also highlights the judiciary's increasing role in evaluating policy matters. In a similar vein, legal disputes concerning the distribution of natural resources, like the 2g spectrum case and coal block allocations, demonstrate the judiciary's readiness to step in and influence major economic choices, resulting in substantial changes in the way power is wielded and markets operate.

In countries like the United States and the United Kingdom, courts generally exercise caution when dealing with economic issues, following the principles of judicial minimalism and institutional competence. In the United States, doctrines such as the “political question” doctrine are employed to prevent the resolution of matters that are better suited for the decision-making of elected officials. In the United Kingdom, the scope of judicial review is primarily focused on assessing the legality, rationality, and procedural fairness of economic policies, rather than delving into the merits of those policies. These examples provide valuable insights into the

² Insolvency and Bankruptcy Code, 2016.

frameworks that aim to strike a balance between judicial accountability and democratic governance in mature constitutional democracies.

This chapter aims to investigate whether the involvement of the judiciary in economic governance is both legally permissible and feasible in practice. It examines whether the judiciary, in its efforts to uphold constitutional principles, inadvertently leads to an imbalance in institutions and economic instability. By examining significant court rulings and legislative changes, such as the ibc, 2016 and the ³companies act, 2013, this chapter assesses the legal and economic consequences of judicial decisions on various stakeholders, including investors, industries, and consumers.

1. The constitutional framework: separation of powers and judicial review.

1.1 Legal foundation for division of powers.

Although the Indian Constitution does not explicitly state the doctrine of separation of powers, it clearly and distinctly assigns the functions of the three main organs—legislature, executive, and judiciary—to each of them. ⁴Article 50 of the directive principles of state policy urges the state to ‘separate the judiciary from the executive in the public services of the state.’ Moreover, ⁵articles 121, 122, 211, and 212 protect the autonomy of each branch from judicial or legislative encroachment in their respective procedural affairs.

In ⁶**kesavananda bharati v. State of kerala (1973)**, the supreme court held that the separation of powers is part of the basic structure of the constitution, implying that no constitutional amendment could disturb this balance. The doctrine guarantees that the branches of government remain within their boundaries and acknowledge each other’s responsibilities. This equilibrium is crucial in a democratic system to prevent the emergence of autocracy or tyranny.

1.2 Judicial Review: Constitutional Power.

Judicial review is the authority of the courts to assess the constitutionality of laws and executive actions. This authority is implicit in ⁷article 13, which states that any law that violates the fundamental rights is considered null and void. ⁸Articles 32 and 226 grant the supreme court and high courts with the authority to issue writs in order to ensure the enforcement of these rights.

³ Companies Act, 2013.

⁴ Indian Const. art. 50.

⁵ Indian Const. arts. 121, 122, 211 & 212.

⁶ Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

⁷ Indian Const. art. 13.

⁸ Indian Const. arts. 32 & 226.

The landmark case of ⁹**Marbury v. Madison (1803)** in the United States established the global framework for judicial review. In India, the case of ¹⁰**A.K. Gopalan v. State of Madras (1950)** was a significant early example, but judicial review became more prevalent following the landmark decision of **Kesavananda Bharati**. The court assumed the responsibility of safeguarding the constitution.

1.3 Logical Justification.

In a nation like India, which has a written constitution, judicial review serves the dual purpose of protecting fundamental rights and upholding the supremacy of the constitution. Nevertheless, this position does not entail unlimited judicial power. Judges are meant to decipher legislation, not create it. **Justice R.S. Pathak in the ¹¹Bandhua Mukti Morcha v. Union of India case correctly pointed out that the judiciary cannot take on the responsibilities of the executive or legislature.**

Crossing this boundary results in judicial overreach, where courts exceed their authority by attempting to influence policy or administrative matters that are not within their constitutional jurisdiction.

1.3 Safeguards and equilibrium.

The constitution includes several mechanisms to ensure institutional harmony:

The president has the authority to appoint judges, but only after seeking advice and input from the judiciary (post-second judges case).

Parliament has the power to impeach judges, but the judiciary can invalidate laws that are deemed unconstitutional.

The executive enforces laws, but the judiciary ensures they align with constitutional requirements.

Each organ serves as a check on the others, preventing the concentration of power in a single institution. The growing prevalence of judicial activism—where the judiciary takes an active role in shaping administrative or legislative changes—should be clearly distinguished from judicial overreach, where courts replace the decision-making power of elected bodies with their own.

2. . ¹²**The extent of judicial intervention in economic policy: delineating the limits.**

⁹ Marbury v. Madison, 5 U.S. 137 (1803).

¹⁰ A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

¹¹ Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

¹² S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, Oxford University Press (2003).

What is the term for when a court exceeds its authority or jurisdiction?

Judicial overreach happens when the judiciary goes beyond its constitutional boundaries and intrudes into the responsibilities of the legislature or executive. While judicial activism is often praised for protecting the rights of the marginalized and upholding justice, overreach is criticized for interfering with democratic and administrative procedures.

In the economic realm, this may manifest as:

Dismissing policy choices founded on personal viewpoints.

Implementing orders that establish new regulatory responsibilities.

Suspending or invalidating licenses, contracts, or public-private agreements without legal justification.

2.2 economic policy: a intricate field.

The process of formulating economic policies is heavily influenced by political, social, and market factors. It necessitates finding a balance between different priorities, handling public money responsibly, and adapting to changing global and domestic circumstances. The executive, with its access to data, experts, and administrative resources, is ideally suited to handle the intricacies involved.

In contrast, courts are decision-making bodies that are guided by previous rulings and logical arguments. They do not possess the necessary organizational structure and economic understanding to effectively develop or adjust economic policies.

2.3 legal constraints on judicial action.

The constitution requires judges to exercise restraint in matters that involve policy or discretionary powers of the executive branch. In the case of ¹³**Punjab v. Ram Lubhaya Bagga (1998)**, the supreme court stated that courts should not meddle in policy decisions unless the policy is deemed unconstitutional, arbitrary, or irrational.

In the case of ¹⁴**Balco employees union v. Union of India (2002)**, the court emphasized that economic policies are not subject to judicial review unless they infringe upon constitutional or statutory provisions.

This rule has been acknowledged in various rulings:

In the case of ¹⁵**R.K. Garg v. Union of India (1981)**, the court upheld a contentious economic law by asserting that economic legislation should be given more deference due to its reliance on experimental and trial-and-error approaches.

¹³ Punjab v. Ram Lubhaya Bagga, (1998) 4 SCC 117.

¹⁴ Balco Employees' Union v. Union of India, (2002) 2 SCC 333.

In the case of ¹⁶**Federation of railway officers v. Union of India (2003)**, the court cautioned against replacing judicial expertise with executive judgment in economic matters.

2.4 When does intervention become excessive?

Intervention becomes excessive when:

The economic choices made by the government are determined by the judiciary.

It invalidates government contracts or policies without a solid legal foundation.

It makes administrative decisions, such as appointments or resource allocations.

For instance, in the 2g spectrum case (¹⁷**Centre for Public Interest Litigation v. Union of India, 2012**), the court revoked 122 spectrum licenses that had been issued by the executive. Despite the intention to combat corruption, critics contend that the court's decision to implement an auction method and disrupt the telecom industry resulted in economic losses and investor apprehension.

The effect of stretching the boundaries of authority on the management of a country.

2.5. Judicial overreach in economic governance can lead to various negative consequences:

Investor uncertainty: businesses tend to avoid investing in sectors where legal and policy unpredictability is the norm.

Policy paralysis: the executive becomes reluctant to make decisive actions due to concerns about potential judicial intervention.

The erosion of democratic legitimacy: elected representatives lose their ability to shape policies, undermining the strength of democratic institutions.

¹⁸**Justice d.Y. Chandrachud**, in multiple speeches, has stressed the importance of the **judiciary acknowledging institutional boundaries to safeguard the integrity of constitutional governance**.

2.6 establishing a harmonious method.

The court must perform a balancing act:

¹⁵ R.K. Garg v. Union of India, (1981) 4 SCC 675.

¹⁶ Federation of Railway Officers Association v. Union of India, (2003) 4 SCC 289.

¹⁷ Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.

¹⁸ D.Y. Chandrachud, Speech on “Judicial Restraint and Institutional Integrity,” delivered at National Judicial Conference (2023).

It should only intervene when policies infringe upon constitutional rights, such as equality, fairness, or due process.

It should avoid suggesting policy or administrative guidelines.

It can consult with experts in complex economic matters to prevent overstepping boundaries.

The most effective approach is a “**constitutional appraisal**”—an assessment that examines laws and policies within the boundaries of the constitution, without excessively interfering with economic governance.

3. Noteworthy instances demonstrating the expansion of judicial authority in economic issues.

1.:¹⁹Swiss Ribbons Ltd: V. Union of India (2019).

In this significant case, the supreme court scrutinized the constitutionality of several provisions within the ²⁰ Insolvency and bankruptcy code (Ibc), 2016. The petitioners contested the distinction made between financial and operational creditors, asserting that it infringed upon article 14 of the constitution.

The court affirmed the Ibc’s provisions, highlighting that the classification was founded on intelligible differentia and had a logical connection to the code’s objectives. It acknowledged the ibc as a valuable legislation designed to revitalize corporate debtors and guarantee prompt resolution of insolvency. The judgment emphasized the judiciary’s responsibility in interpreting economic laws while refraining from interfering with policy choices, thus preserving the equilibrium between judicial review and economic governance.

2: ²¹Centre for public interest litigation v. Union of India (2G spectrum case, 2012).

This legal dispute centered around the distribution of **2g spectrum licenses**, with the supreme court overturning 122 licenses given out in 2008, highlighting the absence of fairness and openness in the process. Although the decision was intended to uphold principles of fairness and prevent corruption, it had substantial economic consequences, such as investor uncertainty and disruptions in the telecom sector.

Critics contend that the court’s ruling strayed from its usual role in policy-making, which is typically handled by the executive branch, by mandating auction as the sole method for allocating spectrum. This particular case serves as an example of the judiciary’s significant role in economic regulation and prompts inquiries about the limits of judicial authority.

¹⁹ Swiss Ribbons Pvt. Ltd. V. Union of India, (2019) 4 SCC 17.

²⁰ Insolvency and Bankruptcy Code, 2016.

²¹ Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.

3: ²²**Manohar Lal Sharma v. Principal Secretary (Coal Block Allocation Case, 2014).**

In this particular instance, the supreme court revoked 214 coal block allocations, considering them unlawful because they lacked a transparent procedure. In an attempt to tackle corruption and arbitrariness, the decision resulted in **substantial economic disruptions**, impacting industries reliant on coal and raising concerns about energy security.

The court's involvement, intended to address procedural shortcomings, had significant economic ramifications, underscoring the potential dangers of judicial overreach in economic domains.

4. A Comparison of Judicial Exertion in Economic Regulation.

1: The Indian scenario: dynamic legal participation.

India's judiciary holds a significant and influential position in interpreting laws and safeguarding constitutional principles. Unfortunately, this activism has sometimes spilled over into economic governance, causing worries about the judiciary overstepping its boundaries.

Characteristics of Indian Methodology:

Line breaks are essential in the output, and we will not tolerate any method that does not include them

Although these interventions are often based on the constitutional principles of article 14 (equality) and article 21 (right to life), they sometimes blur the distinction between judicial review and policy-making.

Key cases:

In 2012, the Supreme Court revoked 122 telecom licenses, claiming that the allocation process was arbitrary. Although the judgment emphasized the importance of transparency and fairness, critics contend that the decision to require auctions was a matter that should have been left to the executive branch.

In the **coal block allocation case of 2014**, the court ruled against the allocations, citing a lack of transparency. This resulted in economic disruptions, particularly in the energy and manufacturing sectors.

In the case of **Swiss ribbons v. Union of India (2019)**, the court affirmed the ibc's classification of creditors, showcasing its support for economic reforms that align with the constitution.

Criticism:

²² Manohar Lal Sharma v. Principal Secretary, (2014) 9 SCC 516.

Unlike courts in many democracies, Indian courts have not consistently followed a standard of restraint when it comes to economic issues.

Unnecessary interference from the judiciary, especially through public interest litigations (PILS), frequently undermines investor confidence, regulatory independence, and market equilibrium.

2: United States: the principle of judicial restraint.

In the United States, courts generally refrain from getting involved in economic policy matters unless there is a clear violation of constitutional rights or the law appears to be arbitrary.

Characteristics of American Method:

U.S. Courts use the ‘rational basis test’ for economic legislation—only if a law is illogical or not connected to a legitimate government interest will it be invalidated.

The judiciary recognizes that the legislative and executive branches are more suited to address economic matters.

Key cases:

In 1905, the court made a controversial decision in ²³**Lochner v. New York**, invalidating labour laws based on the principle of ‘freedom of contract,’ which sparked debates about the role of the judiciary in shaping public policy.

Nevertheless, in the new deal era, the U.S. Supreme court changed its approach to one of deference towards legislative economic decisions (e.g., ²⁴**west coast hotel co. v. Parrish, 1937**). The author of this paper (Parrish, 1937)

The current U.S. Courts adhere to the ²⁵chevron doctrine, which grants deference to administrative agencies’ interpretations of statutes in intricate policy domains.

Effectiveness::

This model minimizes the influence of political factors on economic policy decisions.

Establishes a stable legal framework for investors and regulators.

Courts generally refrain from substituting their own economic policy views for those made by elected officials or regulatory experts.

3: United Kingdom: Parliamentary Dominance and Regulatory Assessment.

²³ Lochner v. New York, 198 U.S. 45 (1905).

²⁴ West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

²⁵ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The UK adheres to the principle of parliamentary supremacy, and courts typically refrain from questioning the validity of economic policies unless they infringe upon established legal standards.

Characteristics of UK Methodology:

Judicial review is limited to verifying the legality, fairness, and proportionality of actions.

The UK courts use the ²⁶**Wednesbury unreasonableness test**, which means they will only step in if a decision is so illogical that no reasonable person could have made it.

Key cases:

In the ²⁷**Council of civil service unions v. Minister for the civil service (GCHQ case, 1985)**, the court established the boundaries of judicial review in administrative matters but acknowledged limitations in policy or national security matters.

In the **Belmarsh detainees case (2004)**, even though it involved human rights, the court did not get involved in the economic justifications provided by the state unless there was clear illegality.

²⁸**Economic governance:**

The UK possesses robust and autonomous regulatory bodies (e.g., fca, ofcom), which oversee economic regulation with minimal involvement from the judiciary.

Courts step in to guarantee that agencies have adhered to the law, rather than questioning their choices in policy-making.

5. Implications for India

Based on the comparative models:

Similar to the United States, Indian courts should establish clear guidelines on when and how they will intervene in economic governance.

Strengthen regulatory frameworks: granting sector-specific regulators, as in the uk, can minimize the necessity for judicial intervention.

Encourage judicial restraint: Indian courts can draw inspiration from the judicial restraint demonstrated by their counterparts in the United States and the United Kingdom, refraining from intervening in economic matters unless explicitly mandated by the constitution.

²⁶ Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation, [1948] 1 KB 223.

²⁷ Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374.

²⁸ Financial Conduct Authority (UK), <https://www.fca.org.uk> (last visited May 2025).

Foster institutional dialogue: structured collaboration between courts and policymakers (e.g., expert testimony, economic tribunals) can enhance decision-making without encroaching on judicial authority.

6. Consequences of Judicial Expansion in Economic Regulation.

1: Financial instability.

When the judiciary gets involved in economic matters, it can cause confusion and doubt among investors and other parties involved. Unforeseen alterations in rules or revocation of licenses, as witnessed in the 2g and coal block cases, can discourage investment and disturb market dynamics.

2: Undermining democratic accountability.

When courts take on responsibilities typically assigned to elected bodies, it can weaken the accountability of democratic systems. Decision-makers, who are responsible to the people they represent, may face challenges when their choices are challenged by judges who are not elected, causing conflicts between different branches of government.

3: Resource distribution difficulties.

Economic choices frequently entail intricate compromises and distribution of resources. Judicial overreach can disrupt these processes, resulting in inefficiencies and outcomes that are not ideal.

These implications emphasize the importance of striking a balance in judicial intervention in economic matters, ensuring that courts respect constitutional principles while refraining from interfering with policy-making and administrative functions.

By analyzing these significant cases and comparing different legal systems, we develop a comprehensive understanding of the judiciary's involvement in economic regulation. While judicial review is crucial for safeguarding constitutional principles, venturing into economic policy can lead to unforeseen outcomes, underscoring the importance of judicial restraint and maintaining respect for institutional boundaries.

7. A calibrated approach to judicial review is necessary to address the issue of judicial overreach in economic governance.

A carefully calibrated approach to judicial review in economic governance is essential to maintain a balance between the rule of law and the democratic mandate of policymaking. While judicial review is a fundamental aspect of constitutional governance, its excessive application in economic matters can lead to unforeseen economic repercussions, policy stagnation, and a decline in democratic institutions. This section suggests a well-balanced and organized framework that enables effective judicial review while ensuring that economic decision-making and policy autonomy are not hindered.

1: Acknowledging the extent and boundaries of judicial review.

Judicial review should not be used to assess the wisdom or effectiveness of economic policy choices unless they directly violate constitutional requirements, fundamental rights, or procedural fairness. Courts must:

Minimize disturbance to guarantee compliance, not effectiveness.

Understand that the legislature and executive are the main platforms for making economic policies.

Avoid substituting judicial opinions for economic knowledge unless the policy is arbitrary, discriminatory, or goes against the public interest.

This principle is evident in cases like ²⁹**Balco employees union v. Union of India (2002)**, where the court ruled that economic policy decisions are the responsibility of the government and courts should not interfere unless the policy is deemed unconstitutional.

2: Upholding the doctrine of judicial restraint in economic issues.

Judicial restraint ensures that the judiciary does not assume the role of a 'super-legislature.' The Indian Supreme Court has repeatedly emphasized this principle in various cases.

In the case of **R.K. Garg v. Union of India (1981)**, the court affirmed the constitutionality of special bearer bonds, noting that courts are not equipped to assess intricate economic regulations.

³⁰**Peerless general finance & investment co. Ltd: In 1992**, the supreme court emphasized that courts should respect the economic expertise of the legislature and refrain from intervening in economic policy matters.

Examples of previous cases provide evidence that economic governance necessitates specialized knowledge in technical and financial matters, which courts are typically not well-versed in.

3: Institutional engagement and involvement.

Before rendering decisions in cases that deal with intricate economic policies, courts should:

Invite friends of the court and expert opinions.

When faced with complex financial matters, it is advisable to seek guidance from specialized ³¹regulatory bodies such as SEBI, or RBI, who possess domain-specific expertise.

²⁹ Balco Employees' Union v. Union of India, (2002) 2 SCC 333.

³⁰ Peerless General Finance and Investment Co. Ltd. V. Reserve Bank of India, AIR 1992 SC 1033.

³¹ SEBI and RBI, Regulatory Advisory Role under Indian Economic Laws.

Encourage open communication and collaboration between the executive and legislature by providing judicial recommendations instead of issuing direct orders in specific situations.

This approach helps avoid sudden legal actions and encourages cooperation in the process of reform and governance.

4: Enhancing oversight and quasi-judicial institutions.

Judicial overreach frequently arises from the belief that regulatory bodies are either unable or unwilling to address certain issues. By bolstering these institutions, we can create a protective barrier between the judiciary and executive branches.

Regulators that are autonomous, transparent, and accountable can alleviate the workload on the judiciary.

By fostering self-regulatory mechanisms within industries, conflicts and policy failures can be resolved without the need for court intervention.

Limiting judicial review to specific grounds, such as illegality, irrationality, or procedural impropriety, can help maintain control over judicial interference.

5: Emphasizing the importance of judicial minimalism.

Judicial minimalism involves making decisions in court cases based on specific facts and legal principles, without making broad statements about the constitution unless absolutely necessary. This method:

Preserves the government's capacity to modify or adapt its policies over time.

Enables the judiciary to rectify any rights violations without disrupting the functioning of the government.

Constructs cumulative and logical legal reasoning over time.

A prominent example of this principle can be observed in the case of ³²**State of Kerala v. Unni (2007)**, where the court refrained from providing specific policy guidelines and instead focused on ensuring adherence to constitutional principles.

6: Determining the limits of military action.

To establish a structured approach to economic governance, courts can implement the following doctrinal thresholds:

The **doctrine of proportionality** requires that the judicial remedy be in line with the constitutional harm or illegality.

³² State of Kerala v. Unni, (2007) 2 SCC 365.

Wednesbury unreasonableness: courts may step in if the decision is so unreasonable that no reasonable person could have made it.

Public trust doctrine: employed sparingly and only in situations where irreparable harm is inflicted upon vital public resources.

These thresholds serve as a legal benchmark to prevent excessive actions while maintaining accountability.

7: Ensuring judicial accountability and transparency.

Courts are obligated to follow transparent reasoning and provide clear explanations in their judgments. The influence of economic governance can be far-reaching and encompasses a variety of stakeholders. Therefore, decisions must:

Justify the constitutional or legal basis of invalidity.

Evaluate the consequences, whenever feasible, prior to dismissing extensive regulations.

It is advisable to steer clear of policy recommendations that involve legislative actions, such as altering auction methods or pricing models.

For instance, the **2g spectrum judgment (2012)** faced criticism not only for its conclusions but also for advocating for a mandatory auction policy—a decision seen as an overreach of legislative power.

8: Regular assessment and communication on division of responsibilities.

It is crucial to establish organized platforms for judicial training, awareness, and interdisciplinary collaboration to understand the impact of economic policies. This includes:

Workshops and seminars with economists, policymakers, and legal scholars.

Establishment of judicial-economic think tanks for advisory functions.

Law commissions were established to examine the constitutional boundaries between the judiciary and economic governance.

These mechanisms guarantee continuous improvement of jurisprudence, taking into account the evolving democratic and economic landscape.

8. Conclusion:

Judicial review remains a fundamental pillar of constitutional democracy, guaranteeing that laws and executive actions adhere to the constitution and safeguard citizens' basic rights. Nevertheless, when courts venture into economic governance, which is typically the responsibility of elected policymakers, it can disrupt democratic processes and blur the lines between different institutions. Through landmark cases such as *Swiss Ribbons v. Union of India*, **2G spectrum**, and **coal block allocation**, this chapter has demonstrated the dual-edged impact of judicial intervention: while some rulings enhance transparency and accountability, others have led to market uncertainty, investor apprehension, and policy paralysis.

Consequently, a carefully calibrated approach to judicial review in economic matters is of utmost importance. Courts should exercise caution, intervening only when policies are arbitrary, discriminatory, or violate the constitution. Enhancing regulatory institutions, promoting expert consultations, and adhering to the principle of judicial minimalism can safeguard the judiciary's integrity while respecting the executive's policy-making authority. Ultimately, ensuring a fair distribution of powers among the three branches of government is crucial for fostering both economic growth and democratic legitimacy in India.

THE PROACTIVE ROLE OF JUDICIAL REVIEW IN ENVIRONMENTAL FEDERALISM

-Thaarani S

Abstract:

Environmental Federalism can be observed in the Indian Constitution by analysing the Seventh Schedule which is the basis for division of powers between the centre and the states. Matters pertaining to agriculture, animal borne diseases are enlisted in the List II (State List)¹, whilst, Entry 17, 17A & 18² of the List III (Concurrent List) lays down the basis for joint powers in legislating the domain particular to environmental protection. The Role of Judicial Review has ensured that the government was held liable for any unprecedented damage to the ecosystem. Article 13³ facilitates Judicial Review in the Indian territorial context and this has paved the way for Judicial Activism and Public Interest Litigation. Environmental protection delineated in the Directive Principles of State Policy and relevant legislations such as the Environmental Protection Act, 1986⁴ contains internationally recognised principles upheld by the United Nations. The influence of major environmental documents such as the Rio Declaration on Environment and Development⁵ and The Stockholm Convention⁶ has led to the introduction of paramount legal principles such as the “polluter pays” principle, precautionary principle within the framework of Indian environmental jurisprudence. Judicial Review has also led to the recognition of “Right to Healthy & Wholesome Environment” as a fundamental right under Article 21⁷ through landmark judgements such as the *Rural Litigation and Entitlement Kendra V. State of UP*⁸ and through informal amendment. This chapter focuses on discourse of Environmental Federalism and the role of Judicial Review in shaping the government's role in environmental protection through doctrinal research.

Keywords: Environmental Federalism, Seventh Schedule, Constitutional Interpretation, United Nations, Public Interest Litigation

Introduction:

Judicial Activism, rightly defined by the words of British Author Gerard Brennan is the “courts standing between the government and the governed”. Over the past few decades, the Judiciary has played the role of the torch bearer of environmental protection, upholding global standards

¹ The Constitution of India, sch.7

² *Ibid.*

³ The Constitution of India, art.13.

⁴ The Environmental Protection Act, 1986 (Act 29 of 1986).

⁵ The Rio Declaration On Environment And Development, 1992.

⁶ The United Nations Conference on the Human Environment, 1972.

⁷ The Constitution of India, art.21.

⁸ *Rural Litigation and Entitlement Kendra V. State of Uttar Pradesh*, 1985 AIR 652.

such as sustainable development (SD) in the Indian legal fraternity. The Emergency period during the 1970's witnessed the expansion of judicial activism & review into the realm of environmental law and its jurisprudence. This shift toward judicial activism, in the field of environmental law in particular was chiefly because of India's participation in the Stockholm Conference⁹ in 1972. The Indian Judiciary, principally the Supreme Court has facilitated the adoption of international customary principles such as the precautionary principle¹⁰, absolute liability principle¹¹ into the Indian legal expanse through judicial review from monumental documents such as the Rio Declaration¹², Ramsar Convention¹³ and other United Nations instruments. The Supreme Court of India has adopted various mechanisms to facilitate the function and viability of judicial activism into environmental governance - One such tool is the judicial review. Judicial Review allows the courts to freely interpret any law to fit the growing needs of the society while upholding the larger interest of the public. With reference to environmental governance, judicial review has led to the introduction of new fundamental rights under the guise of Article 21¹⁴. Rights such as "Right to Healthy & Wholesome Environment", "Right to water", "Right to Pollution Free Environment" are the guerdon of judicial review - challenging the judiciary's traditionally entrusted role in the area of enforcement of law. Further, The 42nd Amendment of the Indian Constitution¹⁵ observed the introduction of two new articles in environmental governance. Article 48-A¹⁶, introduced under the Directive Principle of State Policy provided guidelines to the state to improve and safeguard forests and wildlife. A fundamental duty under Article 51(1)(g)¹⁷ to protect and improve the environment was also introduced under the 42nd Amendment of 1976¹⁸. The Role of Judiciary in interpreting the constitutional provisions in a liberal and expansive manner has led to the protection of environmental rights that are integral to human life. Introduction of environmental legislations provided statutory furtherance and depth to the interpretation made by the Indian courts. This chapter encapsulates the paramount role that the Indian Judiciary has played in introducing new legal measures and principles through judicial review and sometimes, even through judicial overreach by implementing measures such as 'continuous mandamus'¹⁹ and 'epistolary jurisdiction'²⁰ in matters connected to the environment and forests.

⁹ *Supra* note 6 at 1.

¹⁰ The Rio Declaration On Environment And Development, 1992, pr. 15.

¹¹ Refer to *M.C.Mehta V Union of India*, 1987 AIR 1086.

¹² *Supra* note 5 at 1.

¹³ The Ramsar Convention on Wetlands, 1971.

¹⁴ *Supra* note 7, art.21.

¹⁵ The Constitution (Forty-second Amendment) Act, 1976.

¹⁶ The Constitution of India, art.48-A.

¹⁷ The Constitution of India, art.51(1)(g).

¹⁸ *Id.* at 15

¹⁹ Refer to *M.C.Mehta V Union of India*, 1988 AIR 1115.

²⁰ Refer to *Municipal Council, Ratlam v. Vardhichand*, 1980 AIR 1622

Brief History of Environmental Jurisprudence in India

The Ancient Era accounts for Vedic scriptures which prove that human life and environment functioning has always been interwoven with each other. The Rig Veda mentions the worship of 'Panch Mahabhoot' which includes water, air, fire, sky and the earth. Practices in the Indian Subcontinent during the ancient era focused on harmonious relationships with the environment. In fact, worshipping and nurturing the five elements of nature was more often a daily practice in people's lives. However, the British era changed the way people dealt with the environment. Pre Independence legislation, for instance, the Forest Act, 1878 (amended version of the forest act, 1865)²¹ was introduced to govern and regulate certain subjects of the environment. The introduction of "industrialisation policies" shifted the purview of nurturing the environment into a rather commercialised activity, aimed at survival and earning profits. However, in the post independence era, two major events can be outlined -

Firstly, the recognition of environmental protection and governance in the constitution (1950).

Subsequently, The Modern Era of Environmental Policies and Regulations post the Stockholm Declaration (1972).

The Supreme Court, through various landmark judgements in cases of Public Interest Litigation (PIL), has recognised that the United Nations Conference on Human Environment²² in 1972 played a significant role in elevating the importance of environmental consciousness and establishing the idea of sustainable development as part of Customary International Law. The year of 1980 marked a crucial moment as the government established the Department of the Environment on November 1, 1980, followed by several state departments. Major Environmental statutes were introduced during the period between 1972-1986, i.e., post stockholm declaration era. These legislations include:

1. *The Wildlife (Protection) Act, 1972*²³
2. *The Water (Prevention and Control of Pollution) Act, 1974*²⁴
3. *The Air (Prevention and Control of Pollution) Act, 1981*²⁵
4. *The Environment (Protection) Act, 1986*²⁶

²¹ The Forest Act, 1878 (Act 7 of 1878).

²² *Supra* note 6 at 1.

²³ The Wildlife (Protection) Act, 1972 (Act 53 of 1972).

²⁴ The Water (Prevention and Control of Pollution) Act, 1974 (Act 44 of 1974).

²⁵ The Air (Prevention and Control of Pollution) Act, 1981 (Act 41 of 1981).

²⁶ *Supra* note 4 at 1.

Article 253²⁷ of the Indian Constitution, the integration of international agreements and documents into the national and territorial governance of the state was the constitutional basis for the enactment of The Environment (Protection) Act.²⁸ Further, In 1992, the year which witnessed the adoption of Rio Declaration²⁹, the Indian Government introduced mandatory Environmental Impact Assessment (EIA) for 32 industries in India to ensure that economic interests do not inflict harm on the ecology. One of the most recent additions to the ever progressive environmental protection in India is the National Green Tribunal (NGT) Act³⁰ of 2010 which introduced the establishment and administration of a special tribunal called the NGT for issues related to the environment.

Constitutional Interpretation

The Indian Constitution, often referred to as the Supreme Law of the Land has always proven positive with regards to safeguarding fundamental rights and freedoms of its citizens. Constitutional Interpretation by Indian Judiciary has accounted for various informal amendments, measuring up to the introduction of such fundamental rights. The First instance of using the aid of constitutional interpretation in judicial review for the purpose of confirming environmental protection was in the Ratlam Municipality case in 1980³¹. This landmark case also accounts for the acceptance of writ petitions under Article 32³² and 226³³ as handwritten letters addressed to the courts by affected people. This ensures that justice is served to underprivileged groups who may not be able to afford all the fancy procedures of filing a petition through an advocate.

In 1985, the Supreme Court upheld the principle of ‘intergenerational equity’ in the case of Rural Litigation and Entitlement Kendra V State of Uttar Pradesh³⁴. The Court asserted that natural resources are assets of human kind and cannot be depleted by one generation. This principle was subsequently recognised as the cornerstone of the Brundtland Commission Report of 1983³⁵ under the broader scheme of sustainable development. The Expansion of Article 21³⁶ to include the right to water, clean air and environment is a result of liberal constitutional interpretation undertaken by the courts. The system of judicial review, especially in infrastructural projects has been vigorous. One such instance is the Calcutta Taj Hotel Case

²⁷ The Constitution of India, art.253.

²⁸ *Supra* note 4 at 1.

²⁹ *Supra* note 5 at 1.

³⁰ The National Green Tribunal Act, 2010 (Act 19 of 2010).

³¹ *Supra* note 20 at 2.

³² The Constitution of India, art.32.

³³ The Constitution of India, art.226.

³⁴ *Supra* note 8 at 1.

³⁵ “Report of the World Commission on Environment and Development : "Our common future ""(October,1983).

³⁶ *Supra* note 7, art.21.

(1987)³⁷ where the court extensively inquired into the permission granted by the government in case of Medium Rise Buildings. This was done to ensure that these buildings do not affect the flight path of the migratory birds.

Apart from expanding the fundamental rights, the Supreme Court has also directed the government to abide by the rules laid down in the DPSP, despite its unenforceability by the court of law. The Constitution, through Articles 47, 48, and 48-A³⁸, imposes a duty on the state to protect the environment and forests, as well as to enhance public health. Article 47³⁹ indirectly deals with environmental protection by emphasising the government to ensure improvement of public health and Sanitation. As discussed earlier, there is also a binding obligation on the citizens to uphold environmental protection under Article 51(1)(g)⁴⁰. The Supreme Court has also placed reliance on Article 142⁴¹ to issue guidelines to enforcement agencies. The motive behind such guidelines is to administer the implementation of the environmental policies and judicial decisions by local bodies. In the case of Damodhar Rao v. Municipal Corporation, Hyderabad⁴², the court invoked the constitutional directives under Articles 48A⁴³ and 51A(g)⁴⁴ to affirm that environmental pollution constitutes a violation of the fundamental right to life and personal liberty guaranteed under Article 21⁴⁵.

Environmental Federalism in India

A thorough analysis of the shared responsibilities between the local, state and the union government will reveal the fact that environmental federalism has both positive and normative effects in Indian Environmental governance. During the British era, the Indian Forest Act, 1927⁴⁶ amounted to drainage of forest resources. The legislation categorises the Indian forest coverage into four types - Reserve Forests, Village Forests, Protected Forests and Non-Government Forests. This act gave British rulers the power to commercially exploit Indian forest resources to highly benefit the East India Company's trade and business. The Indian Independence led to the introduction of constitutional powers, both centralised and decentralised to the different tiers of the government. The subject of environment is divided into various subcategories such as agriculture, fishing, forestry and each sub division is enlisted under the schedule VII⁴⁷ of the

³⁷ *Sachidananda Pandey vs State Of West Bengal & Ors*, 1987 AIR 1109

³⁸ The Constitution of India, art.47,48,48-A.

³⁹ The Constitution of India, art.47.

⁴⁰ *Supra* note 17, art.51(1)(g).

⁴¹ The Constitution of India, art.142.

⁴² *T. Damodhar Rao And Ors. v. The Special Officer, Municipal Corporation, Hyderabad*, AIR 1987 AP 171

⁴³ *Supra* note 16, art.48-A.

⁴⁴ *Id.*, art.51(1)(g).

⁴⁵ *Supra* note.7, art.21.

⁴⁶ The Indian Forest Act, 1927 (Act 16 of 1927)

⁴⁷ *Supra* note 1 at 1.

constitution. Environment and its governance is a concurrent subject, but the central government has an overriding power over the state's action.

The need for a decentralised approach in environmental governance is a subsisting problem in India. Local bodies should be vested with the power to administer the natural resources within the reach of local limits for a better ecosystem. This view has been argued by many environmentalists over the past few decades. Even during the earlier days of Indian independence, environment was not a primary concern for the nation. The capitalist mindset of the government further depleted the natural resources, which were previously exploited by the british rulers. It was not until 1972, under the rule of the then Prime Minister, Ms.Indira Gandhi, that environmental conservation became a matter of importance. Further, the international movement to preserve the ecology urged developing countries like India to shift their focus on conserving their natural resources to tackle social problems like poverty, poor health and sanitation. The 42nd Amendment⁴⁸ was a converging movement for Indian environmental governance as it introduced articles focusing on improving the environment. Later, the 73rd Amendment⁴⁹ carried forward the spirit of protection of the environment. Over the years, while the subject of environment has gained a strategic position in Indian governance, Non-Governmental Organisations (NGO) and Environmentalist have been urging the indian government to decentralise its environmental policies to facilitate the inclusion of local bodies such as the zilla parishad and the panchayat raj. This will account for greater autonomy and better administration of local resources.

Tools used for Judicial Review

The tools used by the courts to deploy judicial review includes judicial activism, PIL and the application of legal doctrines. However, oftentimes Judicial Review conflicts with political and economic interests of the state. When judicial review takes the side of environmental conservation and sustainable development, governments and industries tend to argue that it hinders the economic interests and development of the nation. There have also been certain instances when the government focus on political influx and overlook environmental concerns. There have been certain instances when judicial review has failed to guard the environment. These are cases of judicial restraint, when the judiciary doesn't overstep its boundaries and interfere with political interests. Once such an instance can be observed in the Silent Valley case dealt by the Kerala High Court (1980)⁵⁰. In the judgement of Silent Valley case⁵¹, the government's decision to construct an hydel power project was upheld by the court since it has

⁴⁸ *Supra* note 15 at 2.

⁴⁹ The Constitution (Seventy-third Amendment) Act, 1992.

⁵⁰ *Society for protection of Silent Valley vs Union of India and Others*, O.P Nos. 2949 and 3025 of 1979

⁵¹ *Ibid*.

statutory backing in the state legislations. The court refused to interfere with the government's choice to construct the hydel project.

However, the course of judicial review has been mostly positive. With instruments such as the PIL, the court has flavoured the greater welfare of the people in line with the socialistic pattern of Indian society. M.C.Mehta has been a leading figure who shaped the modern approach of judiciary towards environmental conservation. The Supreme Court has delivered multiple landmark judgements in cases of PIL initiated by M.C.Mehta. The infamous Oleum gas leak case⁵² was a result of a PIL initiated by M.C.Mehta. Other paramount cases initiated by M.C.Mehta includes M.C.Mehta V. Kamal Nath & Ors.⁵³, M.C.Mehta V. Union of India (Taj Trapezium case)⁵⁴, the Ganga Pollution case⁵⁵ and the introduction of the CNG case⁵⁶, among other notable contributions. The following section of this chapter deals with a brief discussion of these judgements.

Apart from PIL, Judicial Activism and introduction of international principles into the Indian legal context is due to the extensive work of judicial review by the Higher Courts in India. The Supreme Court has time and time again interpreted and referenced numerous international documents such as the Brundtland report⁵⁷, Rio Declaration⁵⁸, Stockholm Declaration⁵⁹, Montreal Protocol⁶⁰ when deciding cases involving a question related to environmental protection. The concept of sustainable development was brought to global prominence by the World Commission on Environment and Development, commonly known as the Brundtland Report⁶¹. In the Indian Environmental context, first references to SD can be traced to the Supreme Court's Judgement in the case of Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group⁶². The Court held that the states cannot take the defense of absence of 'scientific certainty' when any action causes irreversible damages to the ecology. States must adopt and practise precautionary approaches to environmental protection, even in the absence of scientific certainty.

In fact, International instruments such as the Convention of Biological Diversity and the Framework Convention on Climate Change (UNFCCC)⁶³ illustrate India's efforts to harmonise

⁵² *Supra* note 11 at 2.

⁵³ *M.C.Mehta V. Kamal Nath & Ors.*, AIR ONLINE 1996 SC 711

⁵⁴ *M.C.Mehta V. Union of India & Ors.*, AIR 1997 SUPREME COURT 734

⁵⁵ *Supra* note 19 at 2.

⁵⁶ *M.C.Mehta V Union of India and Ors.*, AIR 2002 SUPREME COURT 1696

⁵⁷ *Supra* note 31 at 4.

⁵⁸ *Supra* note 5 at 1.

⁵⁹ *Supra* note 6 at 1.

⁶⁰ The Montreal Protocol on Substances That Deplete the Ozone Layer, 1987.

⁶¹ *Id.*, at 53.

⁶² *Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group*, 2006 (3) SCC 434

⁶³ The United Nations Framework Convention on Climate Change, 1992.

national goals with global standards. The Rio Declaration includes the precautionary and polluter pays principle in Article 15 & 16⁶⁴ respectively. This has been adopted into the Indian Environmental jurisprudence through the mechanism of judicial review. Precautionary Principle was used to render the judgement in the case of *A.P. Pollution Control Board v. M.V.Nayudu*⁶⁵, and introduced the new ‘burden of proof’ rule in matters related to environmental pollution. The court, adopting the precautionary principle, re-emphasized the need for scientific inputs to adjudicate complicated issues of environmental pollution and degradation.

Subsequently, in the case of *Vellore Citizens Welfare Forum v. Union of India*⁶⁶, the Supreme Court affirmed the principle of ‘Polluter Pays’ and held that the burden of proof lies on the party responsible for the damages caused to prove the conducive nature of the project or activity. This case recognised the polluter pays principle as an integral part of SD and integrated it into the principle of sustainable development. The Court recognised the importance of achieving sustainable development in order to eradicate poverty and human life, which is related to Article 21 of the Indian Constitution.

The Principle of Absolute Liability has ensured that the wrongdoer compensates those who have suffered the loss of environmental degradation. Cases such as *Union Carbide Corporation v. Union of India*⁶⁷ and *M.C.Mehta v Union of India (Oleum Gas Leak Case)*⁶⁸ are instances when the Supreme Court employed the principle of absolute liability to provide relief to those affected by the unprecedented damages arising out of environmental degeneration. In the case of *M.C. Mehta v. Union of India*⁶⁹, the Supreme Court laid down two significant legal principles. Firstly, it affirmed the judiciary's authority to provide remedial relief, including compensation, for established violations of fundamental rights, particularly under Article 21⁷⁰. Secondly, it introduced the doctrine of “no-fault” or absolute liability for industries involved in hazardous activities, marking a transformative development in the legal framework governing liability and compensation in India.

Decoding Landmark Judgements

Apart from the above stated principles, the supreme court has propounded other doctrines such as the public trust doctrine, the public nuisance doctrine to effectively adjudicate issues concerning the environment. For instance, In the case of *M.C. Mehta v. Kamal Nath and Ors.*⁷¹,

⁶⁴ The Rio Declaration On Environment And Development, 1992, pr. 15,16.

⁶⁵ *A.P. Pollution Control Board v. M.V.Nayudu*, 1999(2) SCC 718

⁶⁶ *Vellore Citizens Welfare Forum vs Union Of India & Ors*, 1996 (5) SCC 647

⁶⁷ *Union Carbide Corporation v. Union of India*, AIR 1988 SC 1531

⁶⁸ *Supra* note 11 at 2.

⁶⁹ *Ibid.*

⁷⁰ *Supra* note.7, art.21.

⁷¹ *Supra* note 48 at 6.

the Supreme Court held that the Public Trust Doctrine is an inherent part of the rule of law and affirmed the right To a wholesome environment under article 21⁷². According to the Public trust doctrine, the judiciary categorises natural resources as assets of the public. Mindlessly exploiting natural resources for personal or profit motives will attract judicial intervention through judicial review. The judicial response to causing public nuisance in the environmental context can be observed in the case of Ratlam Municipality⁷³, where the local authorities were held liable for abating public nuisance. The supreme court emphasized that the government is obligated to provide the citizens with a pollution free environment even in cases of budgetary constraints.

The Right to water was recognised as an integral fundamental right under Article 21⁷⁴ in the case of Narmada Bachao Andolan v. Union of India and Ors. The Court held that the Right to Water is an implicit human right integrated into the Right to Healthy Environment. Further, in the case of Arjun Gopal v. Union of India⁷⁵ (2017), The Supreme Court imposed restrictions on firecrackers in Delhi to control rising air pollution. The growing concern of air pollution in the Indian capital was already discussed by the Supreme Court in the case of M.C.Mehta v. UOI (Taj Trapezium Case)⁷⁶. However, air pollution remains a primary concern with regards to environmental degradation due to rapid urbanization in the Indian capital, Delhi.

In case of forest conservation, judicial intervention was thorough in the case of T.N.Godavarman Thirumulpad v. Union of India⁷⁷ (1996). Popularly termed as the “Forest Conservation Case”, The Supreme Court, by invoking judicial review, gave a broader interpretation to the Forest Conservation Act, 1980⁷⁸, leading to the suspension of deforestation activities in multiple Indian states. This case proved that judicial review which focused on the legislative intent of the drafters will always prove to be in the greater welfare of the people. The exaggerated form of Judicial Review is called Judicial Overreach. There have been certain instances where the judiciary has overstepped its boundary, thus defeating the separation of powers in the process, and constituted Executive committees to undertake the implementation of measures suggested through its judicial decisions.

In the Dehradun Valley Case (1985)⁷⁹ The court took the initiative to appoint a committee to investigate the detrimental effects of illegal and indiscriminate mining operations in the Uttarakhand region. The respondent government was directed to justify the national significance of the limestone extracted from the concerned quarries, in order to assess whether such demands

⁷² *Id.*, art. 21.

⁷³ *Supra* note 20 at 2.

⁷⁴ *Id.*, art. 21.

⁷⁵ *Arjun Gopal v. Union of India*, AIR 2018 SUPREME COURT 5731

⁷⁶ *Supra* note 49 at 7.

⁷⁷ *T.N.Godavarman Thirumulpad v. Union of India & Ors.*, AIR 1997 SUPREME COURT 1228.

⁷⁸ The Forest (Conservation) Act, 1980 (Act 69 of 1980).

⁷⁹ *Supra* note 8 at 1.

could be met through mining activities in alternative locations. A similar judicial approach was evident in *Tarun Bharat Sangh, Alwar v. Union of India* (1992)⁸⁰, where the court adopted a firm stance against mine owners operating within reserve forest areas. In both instances, the court constituted independent expert committees to evaluate the environmental consequences of the ongoing commercial activities leading to judicial overreach.

The concept of a ‘continuing mandamus’ refers to a judicial mechanism employed by courts to ensure the effective and ongoing enforcement of their directions, particularly in matters involving public interest or complex policy implementation. Rather than delivering a one-time order, the court retains jurisdiction over the case and issues successive directions over time. This tool is used to continuously monitor the compliance and progress of governmental or public authorities in implementing court orders. In practice, the court seeks periodic status reports from the concerned agencies, allowing it to assess the pace and quality of execution. If necessary, the court may issue further instructions to address delays, obstacles, or non-compliance. This approach ensures accountability, encourages transparency, and maintains pressure on authorities to fulfill their constitutional and statutory obligations in a timely and effective manner.

For example, in the *Ganga Pollution Case*⁸¹ the court issued a continuing mandamus and retained its jurisdiction in the subject matter for decades to ensure the sustained implementation of its orders. Similarly, this approach was also adopted in the case of *Delhi air pollution*⁸² where the court constantly monitored the introduction of cleaner fuels such as CNG to minimise vehicular pollution. The tool of continuing mandamus has also been employed in the case of *Almitra Patel v. Union of India*⁸³, W.P. No. 88 of 1996 (Continuing mandamus) where the court dealt with negligence in solid waste management. This case was considered as a milestone in the environmental jurisprudence as apart from examining inefficiencies in waste management, it further brought in significant changes in administration of local bodies and municipal government.

Epistolary jurisdiction represents an innovative and inclusive legal mechanism through which courts extend their reach to those who might otherwise be excluded from the formal justice system due to socio-economic or educational barriers. Under this doctrine, courts accept informal modes of communication—such as letters, postcards, and telegrams—as valid writ petitions, thereby significantly lowering the threshold for accessing judicial remedies. This mechanism has been particularly instrumental in promoting social justice, especially for marginalized and underprivileged populations who may lack the resources or legal literacy to file formal petitions. It reflects a shift toward a more compassionate and responsive judiciary that recognizes the lived realities of the disadvantaged.

⁸⁰ *Tarun Bharat Sangh, Alwar v. Union of India & Ors.*, 1993 SCR (3) 21.

⁸¹ *Supra* note 19 at 2.

⁸² *Supra* note 51 at 7.

⁸³ *Almitra H. Patel and Anr. v. Union of India and Ors.*, 2000 (2) SCC 679

A landmark application of this principle was witnessed in *Municipal Council, Ratlam v. Vardhichand* (1980)⁸⁴, where a mere letter from slum residents pleading for improved living conditions was treated as a Public Interest Litigation (PIL). The Supreme Court not only admitted the communication but also delivered a transformative judgment linking public health with environmental rights. The Court held that the municipal authority had a statutory obligation to ensure proper sanitation, underscoring the legal enforceability of basic environmental and public health standards. Through such cases, epistolary jurisdiction conferred upon the judiciary has enabled it to adopt progressive and non-traditional methods to address concerns at the nexus of environmental justice, human dignity, and public interest. This has widened the ambit of judicial action and reaffirmed the judiciary's position as a defender of fundamental rights, especially for those lacking a voice in the established legal order.

However, Some people argue that after the mandate of EIA⁸⁵ and introduction of NGT, the need for judicial review in the subject matter of the environment is unnecessary. The requirement for conducting an Environmental Impact Assessment (EIA) prior to the initiation of construction activities marks a significant step forward in promoting sustainable development. Despite this evolution in regulatory practices, judicial oversight remains essential. Such oversight ensures that the EIA process is not only formally completed but also carried out with transparency, accountability, and meaningful public consultation. Without vigilant judicial scrutiny, there is a risk that the EIA may become a mere procedural formality rather than a genuine tool for environmental protection and participatory decision-making.

Conclusion

Judicial Review, in the words of Chief Justice John Marshall quoted from the landmark U.S. Supreme Court case, *Marbury v. Madison*⁸⁶, 1803 “is emphatically the province and duty of the judicial department to say what the law is.” Despite the doctrine of separation of powers between the three organs of the government, the role of judiciary in enforcement of laws has always been substantial. India, as a hub of different kinds of natural resources, needs to retain its ecological importance to grow and develop as a nation. On the other hand, the need to economically progress often has environmental consequences. The need to balance and create an harmonious relationship between the ecological and economic interests of the nation has been widely taken into consideration while adopting the principle of sustainable development. This can be termed as the horizontal scope of environmental protection.

⁸⁴ Supra note 20 at 2.

⁸⁵ Environment Impact Assessment (EIA) Notification, 2006 (notification S.O.1533(E))

⁸⁶ *Marbury v. Madison*, 5 U.S. 137.

The vertical scope of environmental protection inherently deals with what sustainable development stands for. To meet the growing needs of the largest populated country, India, the government and other primary industries must not exploit the resources in such a manner that the future generation have none to enjoy and preserve. The government has always prioritized economic goals over the environment. However, the judiciary has served as the watchdog of environmental protection and provided real solutions to environmental degradation. Apart from assessing and rendering the judgement, the judiciary has also taken the effective implementation and administration of such measures in cases concerning environmental conservation. In safeguarding the environment, judicial review stands not merely as a legal mechanism, but as a vital guardian of constitutional promises, ensuring that environmental justice is not just envisioned, but enforced.

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ORIGIN AND JURISDICTION OF THE SUPREME COURT OF INDIA- A CRITICAL ANALYSES

-Dr. Pradip Gharami ¹

Abstract

Every country in the world has a supreme judicial authority to administer justice. The Supreme Court of India is a unique judicial institution, entrusted with large powers enjoying original, appellate, revisional and advisory jurisdictions and has the powers to issue writs. On 26th January, 1950, a new era in the legal history of India began when the Constitution of India came into force. Under the provision of Article 124, it provided for the establishment of a Supreme Court of India was inaugurated on 28th January 1950 in the Court house, New Delhi. Under Article 131, the original jurisdiction of the Supreme Court extends to any dispute between the Centre and the Constituent States or between the States inter se. Articles 132 to 136 of the Constitution deal with the appellate Jurisdiction of the Supreme Court in Constitutional, Civil and Criminal cases. Article 143(2) provides for referring a dispute to the Supreme Court for its opinion. The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution. The advisory opinion of the Supreme Court will not be binding on the President as it constitutes merely consultation between the Executive and Judiciary. Article 137 empowers the Supreme Court to review its own judgments, subject to the provisions of any law made by Parliament. The Supreme Court is declared a Court of Record under Article 129. Special provision in this respect is introduced in order to remove any doubt. The Supreme Court, under Article 142 is empowered to pass decree or make necessary orders for doing complete justice in the exercising of its jurisdiction. Under article 140, the Supreme Court has the power to transfer a criminal case or appeal from one High Court to another ‘Whenever it is make to appear to the Supreme Court than an order under this section is expedient in the end of justice’. The Constitution of India has given important and also very wide powers to the Supreme Court of India under Article 32. It provides for the enforcement of Fundamental Rights as conferred by Part III of the Constitution by means of writs when it is moved by appropriate proceedings. According to Article 71, the Supreme Court is empowered to go into disputes arising out of or in connection with the election of the President or Vice President. The Supreme Court is constituted to function as the protector of the fundamental rights and liberties of the individual in exercise of its original as well as appellate jurisdiction.

Key words- Origin of The Supreme Court, Original Jurisdiction, Appellate Jurisdiction, Special Jurisdiction, Advisory Jurisdiction, Power to Review Judgments, Power to Issue Writs

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“Precedents keep the law predictable and so more or less ascertainable”

Lord Devlin

Introduction

Every country in the world has a supreme judicial authority to administer justice. In England it is the House of Lord; in U.S.A., the Judiciary Act of 1789 established the Federal Supreme Court. The Supreme Court of Canada was established by the Act of the Imperial Parliament in 1875. In Burma, the highest court of appeal is known as Supreme Court of Burma. In Australia, the highest court is known as the High court of Australia while the State Courts are known as the Supreme Courts. Constitutional provisions relating to the Supreme Court are based on the analogous provisions contained in the Government of India Act, 1935 regarding the Federal Court. Compared to the Federal Court, the Supreme Court exercise much wide power. It is quite independent and it combines in itself the functions and power both the Federal Court and the Privy Council.

The Supreme Court of India is a unique judicial institution, entrusted with large powers enjoying original, appellate, revisional and advisory jurisdictions and has the power to issue writs to the Union and the State Governments and other authorities.

A. Origin of the Supreme Court

With the transfer of political power from the British Parliament to the people of India, under the Indian Independence Act, 1947, it was considered necessary to establish a separate judicial organ in India, supreme in authority and in jurisdiction. Steps were taken to enlarge the jurisdiction of the Federal Court of India and the Federal Court (Enlargement of Jurisdiction) Act, 1947 was passed. It stopped all direct appeals, in civil matters, to the Judicial Committee of the Privy Council from 1st February, 1948. It was provided that the appeals from the Indian High Courts would lie first to the Federal Court and thereafter a further appeal to the Privy Council was allowed. The Constitution Assembly of India, therefore passed in October 1949 the Abolition of the Privy Council Jurisdiction Act, 1949 which abolished the system of appeals in Civil and Criminal matters to the Privy Council. The Federal Court of India was thus made the highest judicial authority as the jurisdiction of the Privy Council was transferred to it.²

A new era in the legal history of India began on 26th January, 1950 when the Constitution of India came into force. According to the provisions of Article 124, it provided for the establishment of a Supreme Court of India. The seat of the Supreme Court as per the provision of Article 130 was to be in Delhi. It further empowers the Chief Justice of India to hold the sitting of the Supreme Court at any place or places subject to the prior approval of the President of

² V.D.Kulshreshtha's, Landmarks in India Legal and Constitutional History, pages no. 201-202 (Eastern Book Company, Lucknow, 18th Edition, 2006)

India. On 28th January, 1950 the Supreme Court of India was inaugurated in the Court House, New Delhi. It was presided over by Hon'ble Sri Harilal J. Kania, Chief Justice of India.

Sri M.C. Setalvad, the Attorney General delivered the welcome address and Chief Justice Kania, in his inaugural address, highlighted the status and independence of the Supreme Court in India.

B. Jurisdiction of the Supreme Court

The Constitution of India has granted three types of jurisdiction to the Supreme Court, namely, Original, Appellate and Advisory. It is also given special powers, e.g., to review its judgment, to punish the guilty for contempt of court, to issue writs, judicial review of legislation, etc.

I. Original Jurisdiction

Under the provision of Article 131, the original jurisdiction of the Supreme Court extends to any dispute between the Centre and the constituent states or between the States inter se. The original jurisdiction is excluded in cases of a dispute arising out of any treaty, agreement, covenant, engagement and other similar instrument which having been executed before the Constitution continue in force or which provide for such exclusion. The Supreme Court, therefore, is not a Court of ordinary jurisdiction in all matters and between all parties. In order to invoke its jurisdiction two conditions which are necessary relate (a) to parties, and (b) to the nature of dispute. A suit cannot be filed before the Supreme Court simply on the basis that there is no other court in the land which can try the question raised in the suit.³

The provision of Article 32 of the Indian Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another High Court or from a Court subordinate to another State High Court. If the Supreme Court satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are substantial questions of general importance, may with a case or cases pending before the High Court or High Courts and disposes of all such cases itself. Under the provisions of Arbitration and Conciliation Act, 1996, International Commercial Arbitration can be initiated in the Supreme Court.

II. Appellate Jurisdiction

The Supreme Court is the highest Court of Appeal in the country. The writs and decrees of the Court run throughout the country. The provisions of Article 132 to 136 of the Indian Constitution

³ J.N.Pandey, Constitutional Law of India, pages no. 465-467 (Central Law Agency, Allahabad, 42nd Edition, 2005)

deal with the appellate jurisdiction of the Supreme Court in constitutional, civil and criminal cases.⁴

i. In Constitutional Matters

The provisions of Article 132 deals with appeals involving interpretation of the Constitution, arising out of any proceedings in a High Court – civil, criminal or otherwise. It provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of any High Court, in the territory of India in any Civil, Criminal or other proceedings- but the High Court must certify to that effect.

It is ensured by the provisions of this article that the decision of the High Court in constitutional matters will not be final and the final authority to interpret the Constitution rests with the Supreme Court whatever may be the nature of the suit or the proceedings where the question arises. In this respect, a right of the widest amplitude is allowed in cases involving interpretation of constitutional questions.

The provision of Article 132 is not controlled by the provision of article 133(3) and the word “any judgment, decree or final order of a High Court” as used in Article 132 are wide enough in their meaning. Hence appeals to the Supreme Court from constitutional decisions of Single Judge cannot be barred on the ground that an appeal lies to a Division Bench from such a decision. An appeal will lie to the Supreme Court upon the certificate of the Single Judge of the High Court in constitutional matters, certifying that there is some substantial question of law as to the interpretation of some of the Constitution involved in the case. A question which has been settled by the previous decision of the Supreme Court is not a substantial question and in such cases, therefore, an appeal will not lie to the Supreme Court.

ii. In Civil Matters

The provision of Articles 133 confers a constitutional right to appeal to the Supreme Court in civil matters. It provides that apart from appeal by special leave under the provision of article 136 and appeals on constitutional ground under Article 132, an appeal shall lie to the Supreme Court from a civil proceeding before any High Court in the territory of India, if (a) the subject of the appeal is a “judgment, decree or final order”; (b) the High Court grants a certificate for such an appeal (i) that the case involves a substantial question of law of general importance; and (ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

As the right to appeal is a constitutional right, it cannot be taken away by ordinary law. Revenue proceedings are considered civil proceedings under the provision of Article 133. In *CIT v. Ishwarlal*⁵, the Supreme Court held that an appeal under Article 133 was competent because such

⁴ Narendra Kumar, Constitutional Law of India, pages no. 697-716 (Allahabad Law Agency, Faridabad, 10th Edition, 2018)

⁵ AIR 1965 SC 1818

proceedings were civil proceedings, that is, “proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof.

The pecuniary value of the subject matter of the suit is of no consideration at all. There may be cases where the point in dispute cannot be measured in terms of money and yet, the decisions may have far-reaching results, e.g., where the case is one of the great public or private importance.⁶

iii. In Criminal Matter

The Constitution for the first time sets up a court of criminal appeal over the High Courts and creates a right of second appeal. The provision of Article 134 in the Indian Constitution empowers the Supreme Court to hear appeals from any judgment, final order or sentence in the criminal proceedings of a High Court in three cases enumerated therein.

Under sub-clause (a) and (b) of Article 134 of the Constitution, the appeal lies as of right both on questions of fact and of law while under sub-clause (c) the appeal lies only if the High Court certifies that the case is “a fit one for appeal”.

In an appeal under the provision of Article 134, the Supreme Court will not reassess evidence and argument on a point of fact which did not prevail with the courts below. The Supreme Court will not act as a third court of facts to set aside a concurrent finding of fact, in the absence of any compelling reason or exceptional circumstances.

The Supreme Court is not necessarily bound to hear an appeal on the merits merely because a certificate has been granted by the High Court under the provision of Article 134(1)(c) of the Indian Constitution. If the Supreme Court is satisfied that the High Court has not properly exercised its discretion under this provision, the Supreme Court may either remit the case or exercise the discretion itself and treat the appeal as under the provision of Article 136 (Special Leave) of the Indian Constitution

.The Court may also dismiss the appeal in limine if it finds no sufficient reasons to interfere under the provision of Article 136.

By the provision of Article 134(2), this jurisdiction can be enlarged and Parliament has enlarged the jurisdiction of the Supreme Court to entertain the hear appeals in criminal matters by the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. Now a right to appeal is provided if the High Court on appeal reverses the order of acquittal and awards a punishment of death, life imprisonment or imprisonment for a period of not less than ten years or give such punishment in deciding cases withdrawn from the lower courts for its decisions.

III. Special Jurisdiction

⁶ Inda Devi v. Board of Revenue, AIR 1957 All 116

The provision of Article 136(1) of the Indian Constitution confers on the Supreme Court overriding and extensive powers of granting special leave to appeal. It provides that the Supreme Court shall have the power to grant leave to appeal from any judgment, decree, determination sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. This provision is not applicable to any court or tribunal constituted under any law relating to the Armed Forces.

The power of the Supreme Court to grant leave is not subject to any constitutional limitation and is left entirely to the discretion of the Supreme Court.

The Supreme Court has declined to fetter its discretionary power by laying down “principles” or “rules”. In *Dhakeswari Cotton Mills Ltd. V. CIT*⁷, Mahajan C.J., said, “It is not possible to define the limitation on the exercise the discretionary jurisdiction vested in this Court by the provision of Article 136. The limitations whatever may be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power naturally. It has to be exercised sparingly and with caution and only in special and extraordinary situations”.

IV. Appeals Under Certain Statutes

Appeal also lie to the Supreme Court under the provisions of Representation of the People Act, 1951, Monopolies and Restrictive Trade Practices Act, 1969, Advocates Act, 1961, Contempt of Courts Act, 1971, Customs Act, 1962, Central Excises and Salt Act, 1944, Enlargement of Criminal Appellate Jurisdiction Act, 1970, Trial of Offences Relating to Transactions in Securities Act, 1992, Terrorist and Disruptive Activities (Prevention) Act, 1987, Consumer Protection Act, 1986 and Securities and Exchange Board of India Act, 1992.

V. Advisory Jurisdiction

This is provided by Article 143(1) of the Indian Constitution. The provision of Article 143(2) provides for referring a dispute to the Supreme Court for its opinion⁸.

The provision of Article 143 of the Indian Constitution practically reproduces the provision of section 213 of the Government of India Act 1935. It is therefore natural that the principle laid down by the Federal Court regarding the advisory power will also be a good guide for the Supreme Court of India. Under clause (1), it is in the discretion of the Supreme Court to entertain a reference and to report to the President its opinion and the Court may in a proper case decline to express any opinion on the question submitted to it, e.g., where the question referred to is a political one. While under clause (2) it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion.

⁷ AIR 1955 SC 65

⁸ V.D.Kulshreshtha's, Landmarks in India Legal and Constitutional History, pages no. 208-209 (Eastern Book Company, Lucknow, 18th Edition, 2006)

The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under the provision of Article 143 of the Constitution. There are provisions for reference to this Court under Article 317(1) of the Constitution, Section 257 of the Income Tax Act, 1961, Section 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, Section 130-A of the Customs Act, 1962, Section 35-H of the Central Excises and Salt Act, 1944 and Section 82-C of the Gold (Control) Act 1968.

The advisory opinion of the Supreme Court will not be binding on the President as it constitutes merely consultation between the Executive and Judiciary. It is also true that the opinion of the Supreme Court on a particular issue will not prevent the Supreme Court from giving a contrary judgment if in a proper case filed before it, the validity of the proposed enactment is challenged. On these matters the provision of Article 143 provides no direction. It is judicially acknowledged that the chief utility of an advisory judicial opinion is to enable the Government to secure an authoritative opinion as to the validity of a measure before initiating it in the Legislature. The advisory opinion is not a judicial pronouncement. It is, therefore, not equivalent to the judgment of the Supreme Court and is not binding on either party. It is not binding upon the Courts in India under the provision of Article 141 though it may have a great persuasive force. In Kerala Education Bill case⁹, Das C.J., observed that the Court would deal with a President's Reference bearing the principles laid down by the Judicial Committee and the Federal Court as valuable guides to the Court.

The scope of the advisory jurisdiction was considered in depth in Special Courts Bill, 1978, Re, wherein the Supreme Court held that it would not consider a purely political question nor would it entertain hypothetical or speculative questions. That the Bill under reference could be subsequently amended does not make it hypothetical or speculative. The question should be specific and not general or vague. Questions of policy and wisdom of a particular action fall outside the purview of the provision of Article 143. The Court would proceed strictly by law. The law declared by the Supreme Court in giving its opinion under the provision of Article 143 would be binding under the provision of Article 141 on all courts in India.

In the Federal Constitution of America, there is no provision for seeking an advisory opinion from the Supreme Court and the Supreme Court has steadily refused to pronounce any opinion except as to the rights of litigants in actual controversies. The Supreme Court of India, like the Canadian Supreme Court, exercises the power to give advisory opinion to the President.

VI. Power to review judgments

The provision of Article 137 in Indian Constitution empowers the Supreme Court to review its own judgments, subject to the provisions of any law made by Parliament or any rules made by the Supreme Court under the provision of Article 145. Part VII. Order XI of the Supreme Court Rules, 1966, provides for Review. Rule 1 provides that in civil cases no application will be

⁹ AIR 1958 SC 956

entertained except on the grounds mentioned in Order 47, Rule 1 of Civil Procedure Code and in Criminal cases except on the grounds of error apparent on the face of the record. Order XL, Rule 3 as amended in 1978 provides that the review petition may be disposed of only by circulation amongst the judges without oral arguments. This provision has been commended and upheld¹⁰.

In civil cases, the review of the Supreme Court orders and judgments is possible on any of the following grounds:

- (a) Discovery of new and important matter(s) or evidence.
- (b) Mistake or error in the record.
- (c) Any other sufficient reason- a ground analogous to the two above stated in (a) and (b).

There is no express provision in the Constitution of India, declaring the Constitution to be the Supreme Law of the land. The framers of the Constitution, it may be said, deemed such a declaration superfluous, because they might have believed the power to be implied clearly enough when all the organs of the Government, Federal and State, owe their origin to the Constitution and derive powers therefrom and the Constitution itself cannot be altered except in the manner specifically laid down in the Constitution as provided for in Article 368. Similarly, the Constitution does not expressly empower the Courts to declare laws invalid. But the absence of such a provision does not restrict the right of the courts to decide whether a piece of legislation is void or not. And this is a necessary consequence of the supremacy of the Constitution. Moreover, a Federal polity functions within demarcated and delimited spheres. The Constitution, as such, imposes definite limitations on the different organs of Government and exercise of any excess of authority by any organ of Government is transgression of the Constitutional limitations and, accordingly, void under the Constitution. It is for the Courts to determine whether any of the Constitutional limitations has been exceeded or not. Constitutionally there are two kinds of limitations on the powers of legislature: (1) Legislative Competence, and (2) Fundamental Rights conferred by Part III of the Indian Constitution.

VII. Power to punish for contempt

The Supreme Court is declared a Court of Record under the provision of Article 129. Specific provision in the Constitution in this respect is introduced in order to remove any doubt. As a Court of Record it has all the powers of such a Court including the power to punish for its contempt. Guiding principles in this regard have been laid down by the Supreme Court. This extraordinary power to punish for scandalizing the Court is a weapon to be used sparingly and always with reference to the administration of justice and not for personal insult of a Judge which is not affecting the administration of justice. Where public interest demands the Court will not shirk from exercising it and imposing even by way of imprisonment, in cases where a mere

¹⁰ <https://main.sci.nic.in>

fine may not be adequate. No ordinary law enacted by Parliament under Entry 77, List I can take away this power of the Supreme Court¹¹.

Under the provisions of Articles 129 and 142 of the Indian Constitution, the Supreme Court has been vested with power to punish for contempt of Court including the power to punish for contempt of itself. A contempt of court may be punished with simple imprisonment for a term which may be extend to six months, or with fine which may extend to Rs. 2000, or with both¹².

In *Delhi Judicial Service Assn. v. State of Gujarat*,¹³ it has been held that under the provision of article 129 of the Indian Constitution, the Supreme Court has power to punish a person for the contempt of itself as well as of its subordinate courts.

In case of contempt other than the contempt referred to in Rule 2, Part 1 of the Rules to Regulate proceedings for Contempt of the Supreme Court 1975, the Court may take action (a) suo motu, or (b) on a petition by Attorney General, or Solicitor General, or (c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General.

VIII. Enforcement of decrees, orders etc

The Federal Court of India, under the Government of India Act 1935 was not authorized to pronounce any judgment other than in a declaratory form.

The Supreme Court under Article 142 is empowered to pass decree or make necessary orders for doing complete justice in the exercise of its jurisdiction. The Supreme Court can make orders for the purpose of securing the attendance of any person, the discovery or production of documents or any investigation. The mode of execution of such decrees is left to the Union Parliament to pass necessary legislation. The President has made the Supreme Court (Decrees and Orders) Enforcement Order, 1954.

The decree or order made by the Court shall be enforceable throughout the territory of India in such manner as may be prescribe by or under any law made by Parliament. The provision of Articles 144 provides that, “all authorities civil and judicial, in the territory of India shall act in aid of that Supreme Court.

The power under Article 142 of the Indian Constitution is inherent power and can be used for doing complete justice. The power of Court under the provision of Article 144 is very wide and the Court can formulate legal doctrines to meet the end of justice. The object of this article is to enable the Court to declare law to give such directions or pass such orders as are necessary to do complete justice.

¹¹ J.N.Pandey, Constitutional Law of India, pages no. 461-462, 485-487 (Central Law Agency, Allahabad, 42nd Edition, 2005)

¹² Section 12 of the Contempt of Courts Act, 1971.

¹³ (1991)4 SCC 406

IX. Ancillary Powers

The provision of Article 140 provides some elasticity to the original and appellate powers of the Supreme Court by permitting Parliament to pass legislation to supplement those provisions. Under this Article the Supreme Court has the power to transfer a criminal case or appeal from one High Court to another “Whenever it is made to appear to the Supreme Court that an order under this section is expedient in the ends of Justice”.

According to the provision of Article 71 of the Indian Constitution, the Supreme Court is empowered to go into disputes arising out of or in connection with the election of the President or Vice President. The decision of the Supreme Court will be final in these cases. Under the provision of Article 317, the Chairman or a member of the Public Service Commission will be removed on the ground of misbehavior only when the Supreme Court, to whom the matter was referred by the President of India, holds an inquiry that such a Chairman or member must be removed from office. During the period of inquiry by the Supreme Court such members may be suspended by the President of India. The Supreme Court can declare a law unconstitutional or ultra vires if parliament or State Legislature enacts a law on the subject which is not given in their respective lists.

X. Power to issue Writs

The Constitution of India has given very important and also very wide powers to the Supreme Court of India under the provision of Article 32. It provides for the enforcement of Fundamental Rights as conferred by Part III of the Constitution, by means of writs when it is moved by “appropriate proceedings”. The expression “appropriate proceeding” has been defined in the Judges Appointment and Transfer case. This includes in its fold the Social Action litigation or popularly called the Public Interest Litigation. The Supreme Court is empowered to issue appropriate writs, orders, and directions for the purpose of enforcing Fundamental Rights. Clause (2) of Article 32 gives a very wide jurisdiction of the Supreme Court by empowering it to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of the Fundamental Rights as conferred by Part III of the Constitution. The right to constitutional remedies as provided by article 32 is itself a Fundamental Rights. The Supreme Court is constituted the protector and guarantor of Fundamental Rights and it is the duty of the Supreme Court to grant relief under Article 32 where the existence of a Fundamental Right and its breach, actual or threatened, is prima facie established. In Charanjit Lal case¹⁴, Mukherjee, J., explaining the scope and ambit of Article 32 said, “Article 32 gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ has not been prayed for”.

¹⁴ Chiranjit Lal v. Union of India, AIR 1951, SC 41

The provision of Clause (4) of Article 32 specifically provides that the right to move the Supreme Court for the enforcement of Fundamental Rights which is guaranteed by this Article shall not be suspended except as provided by Article 359 (in Emergency) of the Constitution. The power of the Supreme Court to issue writs cannot be taken away by any legislation. Any law which renders nugatory or illusory the exercise of the Supreme Court's power under Article 32 is void. In *Kesavanda Bharati case*¹⁵, the Supreme Court overruling *Golak Nath case*¹⁶ held that though Parliament can amend any part of the Constitution, it cannot change the "basic and essential" features of the Constitution. The original writ jurisdiction under Article 32 will fall under this protection and immune from Parliament's amending power.

The jurisdiction of the Supreme Court to issue writs is concurrent and not exclusive. Under the provision of Article 226 similar powers have been granted to the High Courts in the State.. It is established that an application under article 32 lies in the first instance to the Supreme Court, without first resorting to the High Court under Article 226. It has been said that, "The writ of this Court will run over territory extending to over two million square miles. It can truly be said that the jurisdiction and powers of this Court in their nature and extent are wider than those exercised by the highest court of any country in the Commonwealth or by the Supreme Court of U.S.A.

XI. Public Interest Litigation

Although the proceedings in the Supreme Court arise out of the judgments or orders made by the Subordinate Courts including the High Courts, but of late the Supreme Court has started entertaining matters in which interest of the public at large is involved and the Court can be moved by any individual or group of persons either by filling a Writ petition at the Filing Counter of the Court or by addressing a letter to the Hon'ble Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. Such concept is popularly known as 'Public Interest Litigation' and several matters of public importance have become landmark cases. This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has exercised this extraordinary jurisdiction. A writ petition filed at the filling counter is dealt with like any other writ petition and processed as such. In case of letter addressed to the Hon'ble Chief Justice of India the same is dealt with in accordance with the guidelines framed for the purpose.

XII. Provision of Legal Aid

If a person belongs to poor sections of society, having an annual income of too less belongs to the Scheduled Castes or Scheduled Tribes, is a victim of natural calamity, is a woman or a child or a mentally ill or otherwise a disabled person or an industrial workman, or is in custody including custody in a protective home, he/she is entitled to get free legal aid from the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all application connected therewith, in addition to providing an Advocate for

¹⁵ *Keshvanand Bharati v. State of kerala*, AIR 1973, SC 1461

¹⁶ *Golak Nath v. State of Punjab*, AIR 1971, SC 1643

preparing and arguing the case. Any person desirous of availing legal services through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her.

To depend on yearly income, a party will get the benefit of legal aid from the Supreme Court Middle Income Society. Every State has decided the minimum yearly income of a party for the facility of legal aid according to its policy. Person who has yearly income less than rupees 500000/- will be eligible to get legal aid from the Supreme Court Middle Income Group Society, on nominal payments¹⁷.

XIII. Amicus Curiae

If a petition is received from jail or in any other criminal matter if the accused is unrepresented then an Advocate is appointed as amicus curiae by the court to defend and argue the case of the accused. In Civil matters also the Court can appoint an Advocate as amicus curiae if it think it necessary in case of an unrepresented party; the Court can also appoint amicus curiae in any matter of general public importance or in which the interest of the public at large is involved.

C. Doctrine of Precedent and the Supreme Court

The provision of Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. This provision corresponds to Section 212 of the Government of India Act, 1935 which provided that the law declared by the Federal Court and by any judgment of the Privy Council was binding on all courts in British India.

The doctrine of precedents is given constitutional recognition under the provision of Article 141 of the Constitution of India. The decision of the Supreme Court are a source of law. They have the binding force of law. The provisions of Article 141 show that even the obiter dicta of the Supreme Court, on a point raised and argued before it, will be binding. Where there is a hierarchy of courts in India the law declared by the superior court must be binding on inferior courts. The Supreme Court has the authority to reverse its own judgment. As expressed by the Supreme Court itself if the subject is of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought, that it is wiser to be ultimately right rather than to be consistently wrong, the Supreme Court may change or reverse its opinion. Only the ratio decidendi or the principle laid down in a case has the binding force of law and not the whole case. Sometimes it becomes very difficult to find out the ratio of a case. The whole opinion of the Supreme Court under the provision of article 143 is also binding on subordinate courts.

¹⁷ Narendra Kumar, Constitutional Law of India, pages no. 754-758 (Allahabad Law Agency, Faridabad, 10th Edition, 2018)

The Supreme Court will be free to overrule and reverse its previous judgments but it would be slow to take such a step. The words “all courts in India” indicate that even the Subordinate Courts are bound to follow decisions of the Supreme Court in preference to the decisions of the respective High Courts in case there is any conflict between the two decisions. It is true, judgment of the majority in the Supreme Court which is binding on Subordinate Courts within India.

Conclusion

The Supreme Court is constituted as the protector of the fundamental rights and liberties of the individuals in exercise of its original as well as appellate jurisdiction. The Supreme Court is the ultimate authority to interpret and enforce the provisions of the Constitution and the laws. It is the final court of appeal in all matters, constitutional, civil, criminal, revenue, etc. against all decisions and orders of all courts and tribunals in the country. This Court is the sole tribunal to decide Centre-State and inter-state disputes and to give opinion in an advisory capacity on important questions of law or fact on reference by the President.

Thus the Supreme Court occupies the most vital and exalted position under our constitutional set-up, entrusted with the power to utter the final word in all matters relating to the interpretation of the Constitution and the law and their enforcement and constitutes the symbol of national unity in the field of administration of law and justice.

THE POLITICAL INFLUENCE ON JUDICIAL REVIEW: HOW JUDICIAL INDEPENDENCE WORKS ACROSS SYSTEMS

-Lakshya Kumar

Abstract

Judicial review functions as both a democratic safeguard and a source of political tension. This chapter examines the theory and practice of judicial independence in democracies, examining political pressures and constitutional frameworks in the US, UK, Israel, and India. It investigates the covert and overt ways that political actors influence, limit, or facilitate judicial power through in-depth case studies. It evaluates the risks posed by politicised appointments, makes a distinction between strong-form and weak-form judicial review, and emphasises the courts' resilience through public trust and international legal influences. The results imply that judicial independence must be continuously upheld via institutional protections, civic vigilance, and a cultural dedication to the rule of law rather than being assured by text alone.

Keyword: Judicial review, judicial independence, politicisation of judiciary, constitutional courts, separation of powers, transnational influence, Article 142, Electoral Bonds case, Miller case, Israeli judicial reform.

Within democratic states, an essential foundation of democratic government is judicial independence. Judicial review helps courts to guarantee that legislation and government actions obey the constitution. Since this role is occasionally disputed and goes against political goals, maintaining the court free from outside political interference causes tensions. This chapter investigates how judicial review functions conceptually and in actual cases in various political systems as well as how judicial independence is claimed or undermined. Apart from addressing transnational judicial trends and institutional designs, it will also examine recent developments all over, particularly in India, the United States, Israel, and the United Kingdom.

Clarifying Political Interference on Judicial Review

The authority judges have to assess whether legislation or government acts violate the constitution is known as judicial review. Protecting personal rights and maintaining majority rule under control depends on this vital instrument. However, this is not just a dry legal concept; it is intricately linked to power relations, and politics always follows where power exists. Judges should interpret the law impartially in accordance with the idea of judicial independence, which is unaffected by politics. However, that

is often much easier said than done. In practice, courts frequently operate in politically delicate settings, and their rulings can have significant political repercussions.

Two systems of Judicial Review

Regarding democracies, judicial review usually fits two primary theories that highlight the distribution of authority between courts and legislators.

In the strong-form judicial review system, judges hold the final decision regarding the validity of a statute. The legislators cannot reverse their decisions; they are binding. Prime instances of this strategy are India and the United States. Although this approach improves the courts' responsibility for protecting rights, some academics, such as Mark Tushnet¹, contend that it may hinder progress on issues related to social welfare. Why is this the case? Since only the courts have the power to decide what is constitutional, it denies elected officials that crucial discussion.

Conversely, weak-form judicial review gives courts the ability to examine laws and point out potential constitutional issues, but it gives the legislature the final say. This paradigm governs countries like Canada and the United Kingdom. It is more adaptable; parliaments have the power to respond, alter, or even overrule court rulings. According to Tushnet¹, this system can promote greater democratic engagement with constitutional ideals because it compels lawmakers to give careful thought and commit to protecting liberties.

This brings us to a crucial lesson: sometimes a democracy may benefit from courts having less ultimate authority. It opens the door for additional voices to participate in the constitutional discussion.

Thus, when a country selects its judicial review model, it is revealing a more complete picture of how democratic power ought to be allocated in addition to selecting a legal framework.

Features of Judicial Independence

Examining what judicial independence really means will help us to grasp how politics could compromise judicial review. It exhibits two main features:

¹ **Tushnet, M.** (2008). *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton University Press.

Decisional independence is the ability of judges to render decisions grounded on the law and the facts free from regard for consequences. Institutional independence refers to the court's ability to operate separately from the other branches of government. This addresses everything from court procedures to retirement standards to how budgets are distributed and judges are chosen.

Even with these systems in place, matters can spiral out of the jurisdiction of the court. Judges may find long terms and steady pay appealing, but their independence could be undermined if they consistently face pressure from the public or politics, or if loyalists control appointments. However, judges sometimes have to find work after leaving the court.

Therefore, experts argue that objectivity and independence are not synonymous. The structure—the way the court is organised—relates to independence. On the other hand, impartiality refers to their actual judges' conduct. In theory, a court may be "independent", but if judges act unethically or with political bias, it may still be viewed as unjust.

And that perspective is crucial. People start to lose faith in the system if they believe that the courts are unfair. Even the strongest legal systems cannot safeguard court independence without that trust.

Constitutional powers of judicial review in India²

India has one of the strongest courts in the world. It has the authority to issue any order required for "complete justice" under Articles 13, 32, 226 and most importantly, Article 142.

Over time, the Indian court has taken a more active role, especially in Public Interest Litigation (PIL) cases. When governments failed, courts have stepped in to protect the environment, expand rights, and step in. This advocacy has, however, also come under fire because some people believe the courts overreach.

During the most recent debate, the Honourable Vice President Jagdeep Dhankhar³ publicly criticised the Court, claiming it had overreached and interfered with executive authority. This statement was made in response to the Supreme Court's use of Article 142 to grant "deemed assent" to laws that were pending approval by the Tamil Nadu governor. The Court had stepped in to fight prolonged delay, highlighting the Governor's constitutional duty to act in accordance with the elected legislature.

Nevertheless, many people resort to the court as a last resort when other branches fail them. Judicial review serves as a symbol of hope and a spark for political discussion in India.

² **Indian Constitution**, Articles 13, 32, 226, and 142.

³ **Vice President Jagdeep Dhankhar** Public speeches and criticism regarding Article 142 usage.
<https://www.hindustantimes.com/india-news/vice-president-jagdeep-dhankhar-article-142-nuclear-missile-judiciary-remark-parliament-supreme-court-101745029562781.html>

The first case study is the 2024 election bonds⁴ verdict.

In February 2024, the Electoral Bonds Scheme was rejected by the Supreme Court in a landmark decision. According to Article 19(1)(a), the Court determined that the programme infringed upon people's freedom of information. When the bonds were first introduced in 2018, they allowed political parties to receive anonymous corporate payments, raising serious concerns about transparency, quid pro quo practices, and the erosion of democratic processes.

Civil society and proponents of transparency applauded the decision, but those in power took political heat for it. The decision questioned a main policy connected to the financing sources of the ruling party. A daring gesture of judicial independence, the court proceeded with this ruling in spite of political opposition.

This issue concerned public rights to know who supports their leaders, not only campaign money. The decision reminded all that judicial review is a fundamental democratic protection rather than a legal housekeeping.

Second case study: Tamil Nadu Governor⁵'s 2025

The Supreme Court also made another important decision using Article 142 to grant "deemed assent" to various measures that had been postponed by the Tamil Nadu Governor. Emphasising the constitutional need to honour the will of the elected legislature, the court pointed out the governor's prolonged silence. It underlined that the governor's job is to enable rather than to hinder government.

This ruling started a nationwide discussion. publicly attacked the court, Vice President Jagdeep Dhankhar said it was oversteering and invading executive authority. But the Court's posture emphasised its constitutional protection function, intervening when other branches neglect their obligations.

Even though Article 142 gives the Court a lot of power, it raises questions: where does ensuring justice end and destroying the separation of powers end? The case demonstrates how bold court decisions, even when made with the best of intentions, can provoke political backlash.

The third case study is the release of Perarivalan in 2022⁶.

⁴ **Electoral Bonds Case** – Association for Democratic Reforms v. Union of India, Supreme Court of India, February 2024.

⁵ In The Supreme Court Of India Civil Original Jurisdiction Writ Petition (Civil) No. 1239 Of 2023

⁶ **Perarivalan v. State of Tamil Nadu**, (2022) Criminal Appeal Nos. 833-834 of 2022

In 2022, the Supreme Court once again invoked Article 142 when it ruled to free A.G. Perarivalan, who had been convicted of the murder of former Prime Minister Rajiv Gandhi. The Court granted his mercy petition despite years of executive delay.

By stepping in, the court emphasised an important lesson: constitutional rights are not absolute. The court will take action to protect justice and liberty if the executive fails to act.

Numerous civil society organisations applauded the action because they saw it as a human rights stand. In the meantime, some viewed it as judicial overreach. This case illustrated how, on occasion, courts act as the last resort for justice, especially when the system is slow or malfunctioning.

When combined, these rulings demonstrate how the Indian court uses its power to uphold democratic principles in the face of institutional failure in addition to interpreting the law.

United States: ideological entrenchment and judicial review

The United States Supreme Court plays a significant role in shaping American law. The strong-form judicial review process contributes to the finality and enforceability of its decisions. The Court's interpretation of the Constitution cannot be overridden by the President or Congress. However, the political debate now mostly centres on how judges get to the bench and how long they remain there.

The Senate reviews federal judges nominated by the president of the United States. On paper, this is a check and balance system. In fact, it has become quite political. Presidents frequently appoint justices who align with their beliefs; confirmation hearings have evolved into contentious political forums. American justices of the Supreme Court are appointed and serve life terms. This was intended to protect them from political pressure, but it has had some unexpected consequences.

Since 1993, the average tenure of a U.S. justice on the Supreme Court has been about 28 years, which is significantly longer than in most democracies. Presidents can have an impact on the Court's philosophy for decades after they leave office thanks to this lifetime. As a result, courts tend to reflect, traditionsadministrations that are more pronounced than those of the current one.

Dobbs v. Jackson Women's Health⁷, 2022, is the first case study.

The nation was rocked by the Supreme Court's 2022 ruling. In *Dobbs v. Jackson Women's Health*, the Court overturned *Roe v. Wade*⁸ (1973) and *Planned Parenthood v. Casey*⁹ (1992), depriving abortion rights of constitutional protection. Abortion legalisation could then be decided by each state.

The majority opinion holds that the right to an abortion is not protected by the Constitution. Many detractors, however, thought that the ruling was the result of thoughtful selections and a multi-decade attempt by conservative leaders to assemble a conservative-leaning Court. Three of the justices who voted to overturn *Roe* had been chosen just five years earlier.

Protests nationwide were triggered by the decision, which also rekindled discussions regarding the Court's legitimacy. According to the opposing justices, the ruling endangered women's freedom and equality. Legal scholars noted that the upholding of earlier rulings, or *stare decisis*, had become less prevalent.

This case showed how a court with life tenure and politicised nominations could fundamentally change the legal landscape and even overturn rights that had been in place for nearly 50 years. It also contributed to the general perception that the court had become just another branch of government.

Case Study 2: Trump v. Anderson¹⁰ (2024)

The Supreme Court rendered a much-awaited decision in 2024 in the case of *Trump v. Anderson*, which questioned whether Donald Trump could be disqualified from the presidential election under Section 3 of the 14th Amendment, which prohibits insurrectionists from holding public office.

Instead of enquiring as to whether Trump had taken part in a revolution, the Court took a more circumspect approach. It determined that only Congress, not any one state, could use this constitutional provision against candidates for president. Trump may therefore continue to be on the ballot.

The decision was unanimous but not without discussion. Critics argued that by focusing on procedural issues intended to suppress political response, the court

⁷ *Dobbs v. Jackson Women's Health Organization*, 597 U.S.215 (2022).

⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰ *Trump v. Anderson*, 601 U.S. 100 (2024).

sidestepped the real issue—Trump's actions leading up to the January 6 Capitol violence.

Advocates argued that the court acted sensibly by avoiding a ruling that might have caused further political unrest in the country. Regardless, the case illustrated the caution that even an independent court should exercise when rendering decisions that impact election outcomes and political stability.

This was not just about constitutional interpretation. The challenge was to navigate a political minefield without setting off an explosion. The Court's restraint was viewed as weakness by some and wisdom by others. In any case, the case demonstrated how the court functions in a society where politics and the law are often intertwined, despite its theoretical independence.

United Kingdom: Without a written constitution, judicial review¹¹

Unlike most democracies, the United Kingdom does not have a single written constitution. Instead, it operates under parliamentary sovereignty, which means that laws are ultimately decided by Parliament. This makes UK courts unable to invalidate laws comparable to those of their counterparts in the United States or India. Still, they are crucial in ensuring public servants obey the law.

In the United Kingdom, judicial review largely concerns human rights and administrative law. Courts ensure that public entities make just, rational, and legal choices; they do not prescribe what those decisions should be. Built on what is known as the ultra vires theory, this system guarantees public officials behave within their legal authority. Not substitutes, courts serve as supervisors.

Case Study: *Miller v. Secretary of State*¹² (2017 and 2019)

Two historic decisions, both known as *Miller*, pushed the boundaries of UK court review during the Brexit years.

The Supreme Court decided in *Miller I* (2017) that without an Act of Parliament, the UK government could not set Article 50—to leave the European Union—active. The court declared it unacceptable to use royal prerogative powers to change domestic law, thus nullifying rights granted by Parliament. Parliament's control over the executive was firmly established by this ruling.

¹¹ **United Kingdom Judicial Review and Ultra Vires Doctrine** –Craig, P. (2016). *Administrative Law* (8th ed.). Oxford University Press.

¹² ***Miller v. Secretary of State for Exiting the European Union (Miller I)***, [2017] UKSC 5.

Then Miller II¹³ (2019) came along. Shortly before a pivotal Brexit date, then-prime minister Boris Johnson suspended Parliament for five weeks. The Supreme Court declared the prorogation unlawful, stating that it effectively hindered Parliament's ability to fulfil its constitutional obligations.

Significant responses were obtained in both cases. Some media outlets ran headlines after Miller I that referred to judges as "Enemies of the People." The response was intense and personal. After Miller II, the tone was more muted, possibly because previous attacks had failed or because Parliament was no longer seen as blocking Brexit.

UK courts have demonstrated that, in the absence of a written constitution or robust judicial review, they are capable of contesting executive authority when necessary. These instances demonstrate the importance of legal culture and public trust¹⁹ in addition to official regulations. Additionally, they show that when the rule of law is threatened, even courts with limited authority can make bold interventions.

Israel: Popular opposition and judicial reform

Under its Basic Laws, which act as a de facto constitution due to the absence of a single codified document, Israel's courts, particularly the Supreme Court, possess extensive review powers. In the historic case of *Bank Mizrahi v. The Minister of Finance*¹⁴ (1995), the Supreme Court declared its authority of judicial review over these Basic Laws; this decision is sometimes compared to the constitutional relevance of *Marbury v. Madison*¹⁵ in the US Supreme Court. Lack of a bicameral legislature or a president with executive powers and a rather weak system of checks and balances define the Israeli system. The Supreme Court's protection of constitutional values and defence of human rights depends especially on this institutional architecture.

Case Study: Judicial Reforms Under Netanyahu's¹⁶ 2023–24 Government

In January 2023, Prime Minister Benjamin Netanyahu's administration proposed extensive judicial reforms aimed at significantly limiting the Supreme Court's authority. The proposed laws sought to limit the Supreme Court's power to declare laws, including Basic Laws, unconstitutional and to grant the government direct control over court selection. A key component of the amendment was an "override

¹³ *R (Miller) v. The Prime Minister (Miller II)*, [2019] UKSC 41

¹⁴ *Bank Mizrahi v. Minister of Finance*, HCJ 6821/93, Israel Supreme Court (1995).

¹⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁶ *Netanyahu Judicial Reforms*, Israel (2023–24) Barak, A. (2006). *The Judge in a Democracy*. Princeton University Press.

clause" that gave the Knesset, Israel's parliament, the power to overrule Supreme Court rulings with a simple majority. Proponents of these reforms claimed that they were necessary to re-establish equilibrium between a court that had become overly activist and democratically elected officials. Critics, including the Israeli President and Attorney General, asserted that the government was attempting to gain complete control and erasing recognised norms of checks and balances, especially in view of Netanyahu's ongoing corruption prosecution.

These recommendations sparked widespread public protests throughout Israel and garnered significant international attention. A key element of the reforms was undermined in January 2024 when the Supreme Court struck down the "reasonableness" clause, which sought to eliminate judicial review of the reasonableness of government decisions. Most of the twelve out of fifteen justices declared the Court's jurisdiction to review and nullify Basic Laws in extraordinary, extreme circumstances whereby the Knesset strayed from its basic power. Under the cover of "rebalancing", this crisis powerfully shows how a president may target court review and appointments to try to destroy judicial independence. The suggested "override clause" and government control over appointments represented direct attacks on the autonomy of the court. However, the broad public demonstrations and international attention played a significant role in reversing these changes, thereby strengthening the Supreme Court's ability to defend itself. This scenario creates a strong causal link: executive attempts to capture the court, usually justified by charges of judicial overreach, can cause major popular opposition, which in turn can empower the court to preserve its independence. The Israeli example emphasises how often formal legal protections are inadequate without a vigilant public opinion ready to actively defend constitutionalism. The episode also highlights how fragile judicial independence is by nature in societies with political polarisation.

Comparative Analysis and Global Trends

Throughout a variety of political systems, judicial review frequently acts as both a sword—sometimes charged with judicial overreach—and a shield—protecting individual rights and containing majoritarian excesses. In well-established liberal democracies, it protects fundamental liberties and upholds constitutional order. However, in hybrid or authoritarian systems, judicial review is frequently compromised or appropriated, turning it from a check on the governing power to a weapon. When these global events are compared, a number of recurrent patterns emerge.

Patterns of Political Influence

The consistent discrepancy between formal (de jure) and substantive (de facto) judicial independence is one startling discovery. Institutions may seem autonomous on paper, protected by constitutional provisions, but in practice, they are often subject to strong unofficial political pressure. A key sign of democracy's health is the discrepancy between purported legislative guarantees and actual court behaviour. It suggests that active societal participation, strong institutional culture, and political will are just as crucial to ensuring freedom as constitutional texts alone. These phenomena are best illustrated by the experiences of Poland and Hungary¹⁷, where legally adopted amendments methodically destroyed the court's substantive independence. Often an indication of democratic A growing amount of backsliding is shown by a discrepancy between formal and substantive independence, where a concentration of power is hidden behind legal façades. This highlights the continuous need for oversight and external pressure, such as that from the EU, to ensure that formal guarantees are actually translated into actual judicial autonomy.

The court is commonly charged with either aggressive judicial overreach in risky situations or passive judicial abdication. This sums up the inherent conflict in the court's function in a democracy. Courts inevitably enter the political sphere when they reject popular laws, as in the case of India's Electoral Bonds ruling, or interfere with executive operations, as in the cases of India's Article 142 or the UK's Miller rulings. Nonetheless, claims of "abdication" could be made in response to purported inaction or deference to other branches. This implies that, despite its objective of objectivity, the court cannot completely avoid politicisation, particularly when it makes decisions on extremely divisive social and political issues. The charge of "overreach" usually originates from a basic disagreement over the appropriate scope of judicial power and democratic accountability, emphasising the ongoing negotiation of institutional boundaries within a checks and balances framework.

In the US, India, or Eastern Europe, politicised appointments are often a major source of conflict. Controlling the appointment process is the most effective long-term strategy for political actors to influence or take over the court, as demonstrated by the consistent focus across multiple case studies. This is evident in Poland's deliberate politicisation of the National Judicial Council and Hungary's forced retirements intended to create jobs for loyalists. This establishes a clear causal relationship: politicised nomination processes directly result in judiciaries that share ideological

¹⁷ **Hungary and Poland** judicial reforms –Bánkuti, M., Halmai, G., & Scheppele, K. L. (2012). *Disabling the Constitution*. *Journal of Democracy*, 23(3), 138–146.

views, which can significantly alter how laws and constitutional principles are interpreted, jeopardising the rule of law and democratic checks and balances. Even though tenure security and financial independence are important, this highlights how frequently the most important instrument of political power is control over who is appointed as a judge.

Qualities Influencing Judicial Resilience

Civil society and public opinion have a significant influence on the development of judicial independence. It is either maintained or opposed, depending on the level of public trust¹⁸ that judicial authority commands. The public's support and the courts' ability to equitably administer justice and ensure that their decisions are followed are both essential to the health of democracy. Since the court lacks a "sword or purse," as was previously mentioned, its authority is primarily defined by public trust and legality. Large-scale public protests against government attempts to curtail judicial power in Israel demonstrate how effective civil society and public mobilisation can be as a kind of unofficial defence mechanism when official protections are threatened. Even the public's desire for judicial independence may increase when they learn about presidential meddling. This highlights a crucial feedback loop: public trust upholds judicial independence, which can be re-established through public mobilisation in the event that it is contested. However, a decline in public trust could make it harder for the court to resist political pressure. Civil society must act as a vigilant watchdog, and the court must actively promote and maintain public legitimacy through transparent and impartial decision-making.

Transnational influence is yet another crucial factor. Despite nationalist politics' frequent challenges to international norms, courts are increasingly referencing international precedents. International courts and organisations like the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) can have a big influence on national judiciaries, especially within regional blocs like the EU. They do this by interpreting international law and penalising member states that violate its regulations. Preliminary reference procedures can connect regional disputes with global legal frameworks and potentially enhance judicial review by enabling domestic courts to ask foreign courts for their opinions on issues pertaining to international law. However, populist governments and domestic constituents who see

¹⁸**Judicial Independence and Public Trust** –Ferejohn, J., & Kramer, L. (2002). *Independent Judges, Dependent Judiciary: Institutional Dynamics of Judicial Independence*. *University of Pennsylvania Law Review*, 139(1), 1–66.

international adjudication as a danger to democratic agency or national sovereignty usually mount "sovereignty-driven resistance" to this external influence. This leads to a paradoxical situation: transnational influence has the potential to improve judicial independence through external checks and legal frameworks, in addition to providing a new forum for political contestation. The idea of external intervention can be used as a weapon by populist narratives to undermine the legitimacy of both international and domestic courts that adhere to international norms. This suggests that the effectiveness of international influence in maintaining judicial independence is largely determined by the level of domestic political context and the strength of nationalist counter-movements.

Judicial independence is a global issue that extends beyond the specific countries being examined. These include judicial corruption, excessive political and financial intervention, lack of transparency in appointment processes, and direct attacks on judges and prosecutors involved in high-profile public interest cases. For example, judicial reforms in Latin America have aimed to increase efficiency and fortify independence, while authoritarian programmes have sparked anti-democratic changes intended to subject the court to excessive control. Concerns about court impartiality and selective enforcement, historical executive emasculation of the court, magistrates' lack of independence as a result of executive oversight, and other issues are further highlighted by examples from South Africa and Brazil, such as the Operation Car Wash (Lava Jato)¹⁹ investigation in Brazil. The specific tactics used to undermine judicial independence may vary, but the fundamental factors—such as the executive branch's desire for unchecked power and the prevalence of corruption—are the same in all democracies. This lends credence to the idea that, despite the universal principles at play, judicial independence is an ongoing struggle that requires resilience-building strategies tailored to the unique circumstances of each nation.

Conclusion

Constitution text by itself does not ensure judicial independence. Its life and efficacy depend on a complex interaction of elements, including a strong institutional culture, open appointment procedures, and mutual respect among the branches of government. Courts are often thrown into the role of final defenders of constitutional order when democracies all across face growing populism, compromised legislatures, and more forceful leaders.

¹⁹ **Operation Car Wash (Lava Jato)** – Brazil

Taylor, M. M. (2017). *Judging Policy: Courts and Policy Reform in Democratic Brazil*. Stanford University Press.

A comparative study shows that maintaining judicial independence is an ongoing dynamic fight. With an increasing gap indicating democratic backsliding, the difference between nominal law safeguards and real practice typically acts as a crucial indication of democratic health. Politicised appointment procedures consistently emerge as a significant weakness, providing a means for political players to influence or take control of the court. Even without direct intervention in specific instances, the subtle power of financial control can also foster a climate of dependence, therefore influencing the quality of justice.

The study does, however, also draw attention to important elements fostering judicial resilience. Strong informal protections from public trust and a vigilant civil society show that popular mobilisation can be a vital check on administrative aggression. Particularly inside regional blocs, the impact of transnational legal systems and international tribunals can act as outside anchors for judicial independence. But this international influence can also inspire opposition driven by sovereignty, hence creating new political competitive outlets.

The courts have to ultimately negotiate this difficult terrain with great care. Although defending rights and maintaining the constitution depends on court review, it should not turn into judicial governance. Apart from its constitutional foundation, the validity of judicial authority rests in its capacity to uphold public confidence and in line with democratic values. For constitutional democracies all over, the delicate and contentious balance between judicial activism and judicial restraint, and between independence and responsibility, still defines their struggle. Therefore, the future of judicial independence will be formed not only in courtrooms but also in the civic areas of constitutional democracies where the people, too, must stay alert defenders of justice.

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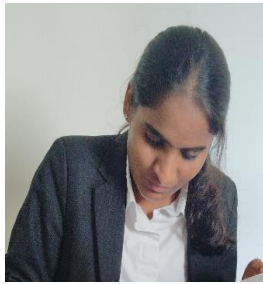
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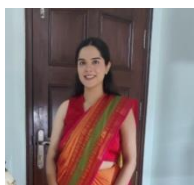
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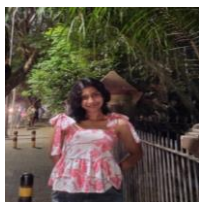
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