

The Judicial Adventurism under the realm of Judicial Review in India: A Critical Analysis

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Abstract

Constitutional democracy is practised in India with a focus on the rule of law. In order to protect citizen rights and the Constitution from arbitrary actions by the legislature and government, the judiciary has accepted the challenging role of serving as the Constitution's Protector. The article covers Judicial Review from an Indian perspective, which is essential for safeguarding the public interest. However, Contrary to popular opinion, courts' judicial duties do not entail making new laws; rather simply interpret ones that already exist. In practise, however, the judiciary has safeguarded the public interest through Judicial Review but in doing so, the judiciary has "extended" its judicial powers beyond what was intended to do and engaged in judicial adventurism by ignoring the constraints on Judicial Review power, such as the separation of powers and judicial restraint, etc., entrenched in the Indian Constitution. This paper shall give more emphasis on restrictions fixed on Judicial Review power of the judiciary for the purpose of maintaining the balance of power in the governance of the nation with the support of various constitutional provisions and judicial decisions. This Paper shall focus on the instances where Judiciary in the exercise of Judicial Review indulge in Judicial Adventurism and ignored the restrictions fixed on Judicial Review power of the judiciary which are required to be followed for the purpose of maintaining the balance in individual interest and societal interest in true sense.

Keywords: Judiciary, Complete Justice, Judicial Review, Judicial Activism, Judicial Restraint.

Introduction

The British and American constitutions are combined in the Indian Constitution. Constitutional structure of India "wonderfully adopts the middle path between the American system of judicial supremacy and the English principles of legislative supremacy" (Basu, 2009). All other laws in India are governed by its democratic federal constitution, which is the country's written constitution and the highest law (Pandey, 2022). It is undoubtedly a cause for great concern that India's unconstitutional legislation is growing and becoming more complex, and it will need vigilance and require to develop the habit of ignoring laws that are not in line with the Constitution.

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The Indian Constitution does not explicitly state that it is the supreme law of the land because it was thought that since the Constitution gave both the federal and state governments their foundations and gave them their forms, the Constitution itself could only be changed in ways specified by the Constitution (Pandey & Dubey, 1992). One of the fundamental components of the Indian Constitutional structure is the Judicial Review. In order to prevent tyranny and arbitrariness, India has a constitutional democracy with limits on the power of the executive branch and relies on the majority rule (Seervai, 2015). The Indian Constitution's preamble guarantees all of its citizens equality and justice, and it states that the country's laws are subject to Judicial Review (Jain, 2014). Even if it is commonly encountered that the best rule is addicted to tyranny, the majority always rules. Because of this, democracy depends on the creation of an impartial organisation (Jha, 1974). In order to prevent courts from misusing their power and acting as permanent "third chambers" or "powerful legislatures," the Constitution's framers endeavoured to clarify the scope of Judicial Review jurisdiction and enacted a number of regulations (Sarkar, 1976).

Judicial Adventurism and Judicial Review in India

According to Webster's definition, "adventurism" means "improvisation or experimenting in the absence of or in defiance of established plans or principles." judicial adventurism is a term used to describe when a judge, or a group of judges, go beyond their usual role of interpreting and applying the law to make significant policy decisions or changes that are not explicitly mandated by the law or the Constitution. This can occur when a judge interprets the law in a way that expands the rights of individuals, or when they create new legal principles or rules that were not previously recognized is called Judicial Adventurism. Judicial Adventurism can be controversial because it can be seen as a judge overstepping their bounds and potentially interfering with the role of the legislative branch of government, which is responsible for making policy decisions. The Proponents of Judicial Adventurism argue that it is necessary to ensure justice and protect individual rights in cases where the law or policy has not kept up with changing social norms and circumstances. However, opponents argue that it undermines the democratic process and can lead to uncertainty in the law, as well as potentially creating unintended consequences. The Supreme Court is in a unique position since it has the authority to evaluate laws passed by both the Federal government and State legislatures. As the protector of fundamental rights and the arbitrator of constitutional disputes involving the allocation of powers between the union and the states, the Supreme Court plays a crucial role in the country (Roy, 2012).

The Judiciary plays a significant role within the framework of a constitution that ensures individual Fundamental Rights, divides power between the union and the states, and explicitly defines and delimits the powers and tasks of every instrument of the state, including the parliament. This is done through their ability to conduct Judicial Reviews (Srivastava & Srivastava, 2014). Under Indian Constitution, Judicial Review can conveniently be classified under three heads. If the courts decide that a statute is unconstitutional, they have the authority to invalidate it.

According to Indian Constitution, Judicial Review can be neatly divided into three categories (Mohammed Quadri, 2001). Judicial Review of Constitutional amendments. This has been the subject-matter of consideration in various cases by the Supreme Court; some of them are worth mentioning includes Shankari Prasad case (Shankari Prasad Singh Deo v. Union of India, 1951), Sajjan Singh case (Sajjan Singh v. State of Rajasthan, 1965), Golak Nath case (Golak Nath v. State of Punjab, 1967), Keshavanand Bharati case (Keshavanand

Bharati v. Union of India, 1973), Minerva Mills case (Minerva Mills v. Union of India, 1980), Sanjeev Coke case (Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., 1983) and Indira Gandhi case (Indira Nehru Gandhi v. Raj Narain, 1975). Judicial Review pertains to legislative competence, violations of fundamental rights, or any other constitutional or statutory restrictions. It also pertains to Judicial Review of administrative actions taken by the Union of India as well as State Governments and authorities that fall under the definition of State.

Judicial Review is "supervisory" in nature, not "corrective." The Indian Constitution's Articles 32 and 226 define Judicial Review and govern it through the writ system. On the other hand, judicial control is a more general phrase which represents a significantly broader idea and incorporates Judicial Review inside itself. Judicial control includes all procedures a person may use to obtain relief from the administration in the form of appeals, writs, declarations, injunctions, and statutory remedies for damages against the administration (Jain & Jain, 2007).

Glaring instances of Judicial Adventurism include, decriminalization of Homosexuality Under section 377, decriminalization of Adultery under section 497, recognizing right to privacy which seems to be very impracticable to observe and implement, the prohibition on providing alcohol in dance clubs, and the specified civil and criminal penalties for violations, woman's right to refuse sexual intercourse or, in the alternative, to insist on using contraceptive methods etc. are the glaring examples of Judicial adventurism.

Judicial Adventurism in India-A Recent Experience

An important decision concerning the decriminalisation of homosexuality under Section 377 of the Indian Penal Code, was pronounced by the Constitutional Bench of the Supreme Court. The Supreme Court ruled that intimate relationships between consenting adults who belong to same sex are not covered by the state's legitimate interests since sexual orientation is a basic aspect of liberty, dignity, privacy, individual autonomy, and equality. Section 377 was written during the Victorian period, along with all of its corresponding moral standards. Elizabethan ethics must surrender to constitutional morality. Insofar as Section 377 requires consenting adults (i.e., those over the age of 18 who are capable of consent) to participate in sexual actions in private, it contradicts Articles 14, 15, and 21 of the Constitution (Navtej Singh Johar vs. Union of India, 2018). The Critics opposed this decision on the ground that it will make LGBTQ vulnerable to HIV/AIDS disease. It has also been contended that each and every organ of a human body is assigned some functions which if are abused goes against nature and will lead to the obstruction of the Indian social culture and structure. The Critics said that considering the principles of health and morality of the people of the country, restrictions can be imposed on the right to sexual orientation. Indian courts do not have the right of legislating any statute.

The Supreme Court invalidated Section 497 of the IPC, which made adultery a crime, on the grounds that it violated Articles 14, 15, and 21 of the Constitution. The law "treats a husband as the master of wife," declared it illegal. "Any legislative provision that violates an individual's dignity or the equality of women invites the ferocity of the Constitution," the Court made remark. It's time to acknowledge that the husband is not the wife's master. It is improper for one sex to have legal dominance over another (Joseph Shine vs. Union of India, 2019). The critics opposed this decision by saying that it will destroy the sanctity of institution of marriage, because marriage is done with the object to give freedom to couple to have sex when they want. Bipin Rawat (Army Chief) on 11/1/2019 stated that we cannot accept the decriminalization of adultery as it is a serious crime. He further added that no doubt army is conservative, but we

love to remain conservative rather than accepting westernization in the form of decriminalization of adultery. Furthermore, such verdict will create a situation where legitimacy of the children shall be in danger.

The Supreme Court determined that privacy is a constitutionally protected right in K.S. Puttaswamy case, often known as the "Aadhaar Case," and that it principally derives from the Constitution's Article 21 guarantee of life and personal freedom. It was also concluded that aspects of privacy also arise in various settings from the other characteristics of freedom and dignity recognised and secured by the fundamental rights included in Article III (Justice K.S. Puttaswamy (retd.) Vs. Union of India and Ors., 2017). The critics contended that implementation of Right to privacy is not possible because of its nature. It requires continuous supervision by the court and privacy is different for different people where role of the courts become very difficult to interpret on every occasion of violation.

The Supreme Court's three-judge panel confirmed Section 18-A of the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Amendment Act of 2018 as constitutionally legitimate (no need of preliminary enquiry before registration of FIR or requirement of seeking approval of any authority prior to arrest of an accused). Furthermore, it was determined that offences under the SC/ST Amendment Act cannot be subject to anticipatory bail (Prithvi raj Chauhan v. Union of India (WP(C) 1015/2018). The Critics contended that the Apex Court of India has previously ordered that SC and ST Act which mandates the immediate arrest of the culprit on filing the FIR, sometime fake FIR without investigation and inquiry leads to violation of the right to personal liberty of the accused under Article 21. Hence held in Subhash Kashinath Case (Subhash Kashinath Mahajan Vs State of Maharashtra, 2018), that no arrest without preliminary inquiry by the Deputy Superintendent of Police, which was overruled in Prithivi Raj Chauhan Case. If Ruling and Overruling will be done so frequently by the Apex Court of India will raise the question of veracity and responsibility of the Apex Court of India in the governance of the nation.

The Supreme Court's panel, led by Hon'ble Justice Dhananjaya Y. Chandrachud, disagreed with the Union Government, the appellant, and asserted that they are persistent in establishing gender roles for women. It is clear that their fundamental rights, which are safeguarded by Article 14 of the Indian Constitution, are not being violated. He said that while Article 33 of the Indian Constitution did permit limitations on fundamental rights in the armed services, it also explicitly stated that those limitations could only be imposed to the amount necessary to ensure the performance of duty and the maintenance of discipline (The security ministry of defence v/s Babita Puniya and other, 2020). The Critics contended that the allegation that females are not treated equally in the defence services is not right contention because applicability of fundamental rights in relation to defence services can be restricted under article 33. Defence services are the exceptions of right to equality u/a 14.

The Supreme Court overturned the Kerala High Court's decision and permitted a Muslim convert girl to live with her husband, Safin Jahan, in the following words: "The father may claim that his right to safeguard his daughter's interests has been grossly violated, but his point of view and attitude cannot be employed to restrict her daughter's fundamental rights, who married the appellant as a result of her own personal choice." Article 21 of the Indian Constitution explicitly guarantees the individual's right to wed the person of his or her choosing. At this point, the Bench relied on the Supreme Court's rulings in the cases of Shafin Jahan and Shakti Vahini case in which it was determined that a person's right to make decisions on important issues like marriage cannot be restricted and that societal acceptance of intimate relationships is not a prerequisite for recognising them as legal arrangements. The

Constitution's Articles 19 and 21 protect this freedom and provide that two people have the right to marry in a private ceremony without the approval of their family, clan, or community (Shafin Jahan v. Ashokan K M, 2018). The Critics opposed this decision on the ground that giving weightage to personal Autonomy rather than societal and family not sound good because parents are not the servants of their children for the purpose of bringing them up and sacrifice their life for children's interest and life and once, they attained the majority role of parent comes to an end is somewhere shows immaturity in understanding the value of parent throughout children life.

In Dance bar case, the issue was whether or not the Maharashtra Prevention of Obscene Dancing in Hotels, Restaurants and Bar Rooms and Preservation of Dignity of Women (working Therein) Act, 2016 (Dance Act) and the rules adopted thereunder were constitutionally legitimate. The Apex Court of India ruled that applications for licence grants should be evaluated objectively and without imputing any moral standards in order to prevent a total ban on holding dance performances in specific places (Indian Hotel and Restaurant Association (AHAR) and Anr. vs. The State of Maharashtra and Ors. 2019). The Critics Contended that safety and security of women is of prime importance for the government of any state. If the government is imposing ban on dance in specific places and employment of women in bar is not restriction on right to livelihood but for the purpose of securing women from danger at above given places.

The case contested the Dancing Act's requirements for licencing, the definition of obscene dances, the prohibition on providing alcohol in dance clubs, and the specified civil and criminal penalties for violations of Act. The court made an observation that there could not be a general prohibition on the operation of dance clubs and that only measures that were clearly relevant to the goal of the Dancing Act would be sustained in this case. The Court affirmed the prohibition on obscene dances, the rules governing the payment of bar dancers' wages, and the restriction against dousing the dancers in cash as a result. It reversed the prohibition on serving alcohol in dance clubs, the requirement that discotheques and dance clubs be kept apart, and the requirements based on the character of the applicant for a licence. The requirement that CCTV cameras be installed in the rooms where dances were to be performed was examined by the Court specifically in the context of privacy. The Court invalidated this requirement because it violated the right to privacy.

The Supreme Court ruled that the right to life and liberty guaranteed by Article 21 of the Constitution includes an individual's right to dignity, that the right to live with dignity also includes the right to a dignified death for those who are terminally ill or who are in persistent vegetative state (PVS) with no chance of recovery, and that a competent adult who has reached legal age has the right to refuse any and all medical treatment or to choose an alternative course of action, even if it is less effective. The Critics countered the decision on the ground that right to life can not include right to die because legal system of the nation cannot allow their citizens to die as coward if they are unable to carryout dignified life held in Gain Kaur Versus State of Punjab case.

Limitations on Judicial Review Power of Indian Judiciary

Separation of powers

The Indian Supreme Court observed: "Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. The legislature,

executive, and judiciary have to function within their own spheres demarcated in the Constitution. No organ can usurp the function of another. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint (Asif Hameed vs. The State of J&K, 1889).”

But as laid down in Ram Jawaya case “The notion of separation of powers has not been explicitly recognised by the Indian Constitution, although the duties of the various government branches have been sufficiently distinguished (Ram Jawaya Kapur Vs State of Punjab, 1955). Functions that essentially belong to another organ cannot be taken on by another organ. Although having a federal framework, our constitution is based on the British parliamentary system. The British Cabinet was described as "a hyphen which links, a buckle which fastens the legislative portion of the State to the executive part, and the Council of Ministers, which is made up entirely of legislators, is similar. The Cabinet effectively has sole control of both the legislative and executive branches of government because it holds a majority in the legislature. In that regard, there is more fusion and blending than there is power separation. In Keshavanand Bharti V. State of Kerla, 1974, Separation of Power has been declared to the basic feature of Indian Constitution.

Political Question-

The executive, legislative, and judicial branches of government are maintained as distinct branches of government under this constitutional strategy. This definition states that the judiciary cannot hear cases involving the legislative or executive branches. The "Doctrine of Non-justifiability," which asserts that the issue is unsuitable for Judicial Review, is sometimes referred to as the "Political Question" which maintains that some issues are genuinely political in nature and are best handled by the body politic rather than the Judiciary (Jacob, 1993). The Supreme Court has frequently emphasised that political issues should not be settled by the judiciary but rather by the political organs of government, such as the executive or legislature, depending on the circumstances, since Marshall's pivotal judgement in (Marbury v. Madison, 1803). The Supreme Court addressed at the application and scope of the political problem theory in Indian constitutional law in the case of (State of Rajasthan v. Union of India, 1977). Although Justice Goswamy accepted that the Court's Judicial Review power is somewhat circumscribed. He argued that the Court should avoid entering a "prohibited territory." The court, according to him, was more concerned with legal than political matters. Assuming the identical judicial perspective, he asserted that the Home Minister's letter could not under any circumstances be regarded as being purposefully unnecessary or irrelevant. The SC declined to provide counsel in the Ismail Faruqi Case due to the political nature of the subject.

Unwanted intrusion into policy making by Judiciary leads to unenforceable fundamental rights.

The Supreme Court declared in (Mohini Jain v. State of Karnataka, 1985), that "the right to education was covered within the right to life." In Unni Krishnan case, the court held that "the right to life encompasses the right to primary education," notwithstanding the irrationality of such a claim, and made an effort to limit the application of the ruling. It is fair to say that this decision was taken by the court outside of the bounds of its constitutionally established authority (Unni Krishnan v. State of Andhra Pradesh, 1993). In accordance with the Constitution, one of the most important tasks for the government to complete is to provide free and compulsory primary education for all children under the age of 14 for a period of ten years. The Court decisions cannot transform a public policy into a fundamental right, and even

if they did, the result would be to turn a directive idea into a fundamental right that is not enforceable (Sathe, 1974).

DPSP mentioned under clause (b) and (c) of Article 39

The twenty-fifth amendment inserted Article 31C. According to Article 31C, regardless of anything else in Article 13, no law that carries out the state's policy to uphold the values outlined in clauses (b) and (c) of Article 39 shall be ruled unconstitutional because it conflicts with, abridges, or destroys any of the rights granted by Article 14, Article 19, or Article 31. Later, in Keshavanand Bharti case ruled by the Supreme Court's full bench in 1973, the Twenty-Fourth, Twenty-Fifth, and Twenty-Ninth Amendments were challenged as unconstitutional, but the Apex court of India upheld these amendments as constitutional (Keshavanand Bharti v. State of Kerala, 1973).

The Supreme Court ruled that the Constitution's conscience is represented by its Fundamental Rights and Directive Principles. Both are complementary to one another and do not contradict one another. Matthew J. stated that the Fundamental Rights must occasionally be sacrificed to Directive Principles in order to establish a just and social order. Furthermore, it should be noted that neither the majority nor the minority opinions of the Court stated that the Directive Principles were superior to or inferior to the Fundamental Rights, despite the appearance of a significant shift in the judiciary's attitude towards the directives enshrined in Part IV of the Constitution. The Court has ruled that in the event of a conflict, it should interpret the law so as to favour both Parts III and IV, and both should be rendered effective.

Judicial Self-Restraint

A concept called "judicial restraint" encourages the judiciary to employ its judicial powers only to the extent necessary. To put it another way, judges are prohibited from introducing their personal opinions into a case. At a public lecture, Justice A.S. Anand, a former Chief Justice of India, discussed judicial restraint. He stated that in order to effectively carry out their judicial duties, judges must practise self-discipline. Uncertainty is the worst outcome of judicial activism. Judges might eventually give orders based only on their personal preferences. Judges must therefore use restraint in order to prevent judicial adventurism, which is a particularly extreme kind of judicial activism (Tharani, 2021).

The Supreme Court ruled in S.R. Bommai case, that the exercise of power under Article 356 of the Constitution constituted a political subject. Hence, the judiciary shouldn't become involved. According to Judge Ahmadi, if courts looked into political judgements, they would be invading the political sphere and contesting the political judgement. And the court must keep away from this (S.R. Bommai v. Union of India, 1994). He stated in the Ismail Farooqi case as well that the supreme court should not even offer guidance in matters of politics (Ismail Faruqi Vs. Union of India, 1995).

Conclusion

In the words of Mr. S.P. Sathe "activism can easily transcend the borders of Judicial Review and turn into populism and excessivism" (Sathe, 1974). It is further elaborated that "excessivism is when a court undertakes responsibilities normally discharged by other co-ordinate organs of the government" (Sathe, 2002). Hence, there is a caution that "Judicial activism must also function within the limits of the judicial process". Judicial Review is a notion that was developed to shield the people from new laws that might violate their constitutional rights. To ensure that the fundamental framework of government is not obstructed and that there is responsibility for all of the government's organs, it is crucial that

the extent to which the judiciary uses the power of Judicial Review be reviewed and supervised, notably by the Apex Court of India. As we have seen earlier, there are numerous situations where the use of Judicial Review and, more specifically, judicial activism, has benefited the populace. Yet, it is crucial that these instances be limited to prevent the legislative and executive branches of government from becoming ineffective.

Judicial Review is a fundamental component of a functioning independent judiciary. Although the court has been designated as the protector of people's fundamental rights, there have been many occasions in which the institution has failed to use its genuine authority of Judicial Review and has instead chosen judicial restraint in an extreme manner. Several arbitrary laws have been exempted from proper Judicial Review due to the improper or ambiguous application of the power. The Prevention of Money Laundering Act, 2002's arbitrary provisions were examined by the Supreme Court in Vijay Madan lal, and the court supported the act's constitutional legitimacy. However, the court's poor use of the review process led to numerous critiques of the verdict (*Vijay Madan lal v. Union of India*, 2022).

Both the practise of judicial restraint and the authority of Judicial Review have limits. The independent body must always apply these principles in an equal manner, regardless of whether the judiciary is exercising Judicial Review or restraint. The court must use restraint to prevent any overreach that could result in intrusion by the legislature, even as the authority of Judicial Review is used to prevent any violations of fundamental rights by laws approved by the legislature. The doctrines cannot be used as a uniform norm that applies to all proceedings. The judiciary must apply a narrow interpretation of the laws and select the best principle. The authority of Judicial Review provides the Indian judiciary, a pillar of the constitution, with the majority of its independence.

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