DISCUSSION PAPER

JUDICIAL SUPREMACY IN INDIA: THE APPLICABILITY OF DOCTRINE OF COLOURABILITY TO THE JUDICIARY

SATHYAJITH MS
JUNIOR RESEARCH ASSOCIATE
ABHIGLOBAL LEGAL RESEARCH & MEDIA LLP

Global Law Assembly

Judicial Supremacy in India: The Applicability of Doctrine of Colourability to the Judiciary

Satyajith MS

Junior Research Associate
AbhiGlobal Legal Research & Media

Synopsis

The paper analyses the position of the judiciary and the concept of judicial review in the constitutional framework. Further, the paper studies the doctrine of colourable legislation which has been evolved by the judiciary to test the constitutionality of statutes. The applicability of such doctrine in judicial context will be made in the light of the recent order of the Hon'ble Supreme Court in the matter concerning the constitutional challenge to the three farm laws- The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, The Essential Commodities (Amendment) Act and The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act.

Introduction

The Constitution of India provides for various aspects relating to structure, functions and powers of various organs of the State and such authorities or bodies which come within the ambit of the State. The Constitution can be termed as the *grundnorm* by employing Kelsen's outlook. While it is true that some commentators opine that the Basic Structure Doctrine enunciated and evolved by the Hon'ble Supreme Court in the case of *Kesavananda Bharathi v. State of Kerala* [(1973) 4 SCC 225] is the *grundnorm* which governs few aspects relating to the Constitution, for this paper such differing views would not have a substantial effect on the issue at hand.

The Constitution clearly provides for definite functions and powers of various organs such as the legislature, executive and the judiciary. Such powers and functions have been enumerated in different parts of the Constitution. As is the case with other States as well, regardless of how nicely such powers and functions have been enumerated in the Constitution, the way such powers and functions are put to practice determines the success or failure. With the Indian experience, the fact that the Constitution has continued to be operational for over 70 years of independence may signify that it has been a fair success.

The task of interpreting the Constitution in any free and fair democracy naturally is vested with the judiciary. Similarly, over the years, the Hon'ble Supreme Court has employed various methods and techniques to apply such principles and doctrines as deemed necessary to determine the essence and spirit of the provisions in the Constitution. The Parliament has also brought about certain amendments from time to time to make necessary changes in the Constitution to address such requirements of the time.

Considering that India is a functioning democracy, few amendments brought about by the Parliament and judgements of the Hon'ble Supreme Court have received their fair share of criticism as well. One such recent criticism that the Hon'ble Supreme Court unwillingly invited was regarding its order in the matter relating to the farm laws that were enacted by the Parliament and the subsequent spiralling of protests demanding repealing of the respective laws.

The objective of the paper will be to understand the functioning of the judiciary vis-à-vis the powers that it has been entrusted with by the Constitution. The paper will attempt to study the *de jure* position of the judiciary in respect of its functions and the *de facto* position as it exists in the status quo. It will further look at the consequences of such a *de facto* position on policymaking by the State.

Judiciary and the Constitution

The Constitution of India was framed and given to themselves by the people of India. It was adopted on 26th November 1949 and came into full operation on 26th January 1950. (Kashyap, 2019). The Constitution provides for the establishment and functioning of the judiciary in a detailed manner. Provisions concerning the judiciary are contained in Part V, Chapter IV and Part VI, Chapters V & VI. While Part V, Chapter IV deals with the Supreme Court of India, Part VI, Chapters V & VI deal with High Courts and Subordinate Courts respectively (Kashyap, 2019).

Powers and jurisdiction of the Supreme Court commence from Article 129. Apart from this, the writ jurisdiction is conferred upon the Supreme Court under Article 32 of the Constitution. The Supreme Court of India has been vested with original jurisdiction in relevant matters like inter-state and centre-state disputes. Further, appellate jurisdiction has also been conferred upon the Supreme Court. Additionally, the apex court is also vested with a review jurisdiction to revisit its own judgements. Another significant provision that has majorly shaped the role of the Indian judiciary is Article 142.

Article 142 confers a wide and plenary power to the Supreme Court to do complete justice in matters that come before the court. It is affirmed that the term 'complete justice' is used in the provision to signify that it strives to impart justice not just for one side, but everyone. It is also said that the term is of wide amplitude "couched with elasticity to meet myriad situation".

The Hon'ble Supreme Court has held that "the Supreme Court has been conferred with very wide powers for proper and effective administration of justice. The Court has inherent power and jurisdiction for dealing with any exceptional situation in larger public interest which builds confidence in the rule of law and strengthens democracy"[Manoharlal Sharma v. Principal Secretary & Ors (2014) 2 SCC 532]. The power under Article 142 is an inherent power which is to be employed for effective administration of justice and to prevent any manifest perpetuation of injustice. To briefly sum up, the objective of the provision can be said to be ensuring 'effective, real and substantial justice, coextensive and commensurate with the needs of justice in a given case in order to meet any exigency that may arise' [Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3467]. This provision has also been a reason for the Supreme Court to effectively dispose of Public Interest Litigations (PILs), a concept that has been evolved uniquely by the Indian Judiciary.

Judicial Review

The origin of the concept of judicial review can be traced to the United States of America. It essentially refers to the power of the highest court of the land to pronounce finality on the legality or otherwise of a legislation in so far as it conforms, or does not conform to the Constitution (Kashyap, 2019). Since the Constitution is considered as the fundamental law of the land, all laws made should be in conformity with the same. It would be prudent to consider the Constitution as the *grundnorm* for this particular reason. It is placed highest in the hierarchy and all such other laws enacted needs to be in conformity with the Constitution.

Article 13 clearly states that all laws which are inconsistent with the Constitution, whether enacted before or after commencement of the Constitution, shall be void to the extent of its inconsistency. This basically provides the flexibility to severe the inconsistency from the whole legislation wherever possible rather than declaring the legislation void *in toto*. However, Article 13 being a substantive law largely, does not deal with the mechanism to declare such laws as inconsistent.

Article 32 which confers the writ jurisdiction to the Supreme Court also includes the power of judicial review. Article 32 itself being a fundamental right was termed as the heart and soul of the Constitution by Dr B. R. Ambedkar. Under this provision, every citizen has the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred in Part III (Kashyap, 2019). The apex court can issue necessary orders, directions or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. The respective high courts have also been conferred such power under Article 226 and the high courts have a wider subject matter jurisdiction as far as issuing orders, writs and directions as far as enforcement of rights is concerned.

When the court is supposed to review the constitutionality of a legislation, there are two fundamental aspects that the court enquires into. First, if the concerned legislature or executive exceeded or transgressed its jurisdictional limit as provided in the Seventh Schedule of the Constitution. This is to determine the legislative competence of the said legislature to enact the law. Second, if the enacted legislation infringes or violates any right guaranteed in Part III of the Constitution.

It is pertinent to note that there is a presumption in favour of constitutionality of a legislation. The burden of proving otherwise is always on the party claiming unconstitutionality. The burden is not to prove the constitutionality. Rather, it is to prove the unconstitutionality of the enactment. Hence, the burden of providing all facts and proof against the constitutionality of an enactment lies with the petitioners (Kashyap, 2019).

When a particular statute is declared as unconstitutional by the Supreme Court, by the virtue of Article 141, it is considered to be binding on all courts within the territory of India. If a law is declared unconstitutional on the ground of legislative incompetence or violation of fundamental rights, the order of the apex court is in effect a law which is binding on all courts (Kashyap, 2019). In effect, such laws which are considered to be *ultra vires* of the Constitution is totally ignored and not implemented in any subsequent proceedings [Star Co. v. Union of India, AIR 1987 SC 179].

The judiciary has evolved several principles and doctrines when it comes to determining the constitutionality of a statute. The Doctrine of basic structure, Doctrine of harmonious interpretation, Doctrine of severability, Doctrine of legitimate expectation, Doctrine of colourable legislation *inter alia* are some of the notable principles that the apex court has developed and employed over the years to determine the validity of constitutional amendments and constitutionality of statutes. These can be considered as yardsticks and standards that the legislative organ of the State needs to conform for enacting a constitutionally valid statute. In other words, these are the principles that the legislature and executive are subjected to by the judicial organ.

Triumph of Legal Realism

The origin of these doctrines may signify the exposition of legal realism. Legal realism in essence signifies law as the practice of the court. It is said that the theory of legal realism, like positivism, views law as an expression of the will of the sovereign made through the medium of courts (Fitzgerald, 2020). Essentially, it considers the sovereign power to be the courts and not the other organs of State like the Parliament or the Executive.

For instance, it is argued that all laws in England are not made by the legislature, but by the courts. Salmond defined law as the body of principles recognised and applied by the State in the administration of justice, as the rules recognised and acted on by the courts of justice (Fitzgerald, 2020). The aforementioned doctrines and principles that have been evolved by the judiciary have been in furtherance of such instances which ticks the box of legal realism.

The definition of legal realism cannot be wholly applicable in India when we consider that the judiciary is not the *de jure* sovereign. There are instances where the judgements of the courts have been circumvented subsequently by the other two organs by changing the law or introducing a new law. There are instances where the Parliament has brought out constitutional amendments to effectively overturn or circumvent the judgements of the Supreme Court. For example, the First Amendment was put into effect due to the adverse judgements of the Supreme Court and various High Courts to the governments of the day.

The relevant provisions of the Madras Maintenance of Public Order Act were declared void by the Supreme Court. Similarly, in Bihar, the State Management of Estates and Tenures Act was declared unconstitutional by Patna High as violative of Articles 14 and 31 of the Constitution. When the First Amendment Act was being introduced in the Parliament, the then Prime Minister Jawaharlal Nehru remarked that 'Somehow, we have found that this magnificent Constitution that we had framed was later kidnapped and purloined by lawyers' (Singh, 2020). Consequently, by the virtue of the amendment, the judgements of the Supreme Court and the high courts were rendered redundant by the Parliament which effectively demonstrated its supremacy.

However, it is noticed that the Indian judiciary has evolved its jurisprudence to test the validity of the legislations which have been inserted in the IX Schedule of the Constitution as well. As stated above, of the several principles and doctrines formulated by the Supreme Court, the paper would analyse the applicability of Doctrine of Colourable Legislation by the judiciary.

The Doctrine of Colourable Legislation

This doctrine is used to test if the subject matter of the legislation in question falls within the jurisdiction of the Parliament or the concerned state legislature. It is used in the interpretation of legislative lists to test legislative competence. Legislative competence is one of the primary tests employed in determination of constitutional validity of the impugned statute concerned.

If there is no legislative competence to enact a statute on a particular subject, it cannot enact the law by merely purporting to act within its powers (Manohar, 2010). This is based on the maxim that "you cannot do indirectly what you cannot do directly". It essentially implies that the substance of the concerned statute is important for consideration and not merely the outward appearance. The court will analyse the true nature and character of the enactment. In case the legislature has the power to make the law, it is held that the motive in making the law becomes irrelevant.

While determining the scope of the doctrine, the apex court in the case of *K.C.G. Narayan Deo v. State of Odisha* [1953 AIR SC 375] has held that-

"*If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such* **transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect** *and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.*" (Emphasis intentional)

This clearly signifies that this doctrine intends to prevent the Parliament or the concerned state legislature from employing indirect methods to circumvent the constitutional prohibitions. This doctrine was applied in the case of *State of Bihar v. Kameshwar Singh* [AIR 1952 SC 252] to declare the Bihar Land Reforms Act, 1950 as ultra vires of the Constitution (Manohar, 2010). This doctrine is applied by the judiciary to test the constitutional validity of the acts of the legislature or the parliament. This essentially tests if the concerned legislature or the parliament has the requisite power or jurisdiction to enact a statute.

However, there are no such standards or methods which determine if judicial orders and judgements conform to the jurisdiction of the concerned courts. While it is true that this is not really feasible to empower the other organs of State to control the judiciary since it strikes at the core of judicial independence which is considered to be one of the basic features of the Constitution, there is definitely a need to at least apply similar principles to different organs of State when faced with similar situations.

The judiciary is the ultimate interpreter of the laws and the Constitution. While there are several doctrines and principles which regulate, prohibit and restrict the other organs of the State from acting to its whims and fancies, there is no such mechanism to determine if the pronouncements of the courts conform to the constitutional framework.

In this regard, the judiciary itself has imposed several norms to avoid transgression of boundaries and jurisdiction. The Supreme Court in the case of *A.M Mathur v. Pramod Kumar Gupta And Others* [1990 AIR SC 1737] has held that-

"*Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.*"

However, this has not fairly materialised since the apex court has undertaken responsibilities in several domains due to the lethargic attitude of the other two organs. For example, the Karnataka High Court has taken cognizance of the potholes and conditions of roads in Bengaluru and consequently issued directions to the local authorities to resolve the issue (Biju, 2021). While the function of maintaining and repairing roads does not concern the judiciary or even the functions that it performs directly, the concept of a welfare state has enabled the judicial organ to sway its power over issues which is conventionally not considered as a judicial function.

The Supreme Court has also ventured into such domains which are not conventionally dealt with by the courts by invoking its power under Article 142 of the Constitution. For example, the Supreme Court had banned the registration of diesel vehicles with engine capacity over 2000 cc (Sethi, 2016). This is a policy decision that was to be exercised by the executive and not concern the judiciary at all. However, the Supreme Court ventured into the domain in the interest of 'environmental protection'. Such judicial adventurism has effectively constructed a scenario of judicial supremacy.

A Case Study: Supreme Court's Order on Farm Laws

The judiciary has also ventured into arbitral functions between interest groups and the government. Recently, in the matter where the three farm laws, namely- The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, The Essential Commodities (Amendment) Act and The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act were challenged before the Supreme Court, the court ordered for staying implementation of the laws. This was done even without any constitutional problem or issue arising out of the enactment.

As stated above, the conventional function of the Supreme Court is to determine the constitutional validity of the laws. While the Hon'ble Supreme Court did not comment on any tint of unconstitutionality on *prima facie* reading of the laws, it went ahead to stay the implementation of the same. Generally, when the body which enacted the law has legislative competence and the law is not violative of fundamental rights on a *prima facie* reading, the matter should be heard on merits until the judgement is rendered.

Apart from the challenge to the laws, the Constitution (Third Amendment) Act, 1954 was also challenged. Generally, constitutional amendments are challenged on the yardstick of basic structure doctrine. Considering that the doctrine does not have a retrospective effect as far as constitutional amendments are concerned, the applicability of the doctrine for the said amendment would probably not arise.

In its order, the court noted "*Be that as it may, the negotiations between the farmers' bodies and the Government have not yielded any result so far. Therefore, we are of the view that the constitution of a Committee of experts in the field of agriculture to negotiate between the farmers' bodies and the Government of India may create a congenial atmosphere and improve the trust and confidence of the farmers. We are also of the view that a stay of implementation of all the three farm laws for the present, may assuage the hurt feelings of the farmers and encourage them to come to the negotiating table with confidence and good faith.*" [Writ Petition(s)(Civil) No(s).1118/2020]

This is effectively an exercise of the judiciary to act as an arbitrator between the government and the interest groups. The interest groups also had a problem with the members of the committee that was formed by the Supreme Court since the said members had already opined largely in favour of the impugned laws. This essentially sets a problematic precedent wherein the court proceeding is used as a tool to enforce or oppose policies of the State. This also gives rise to a possibility of other interest groups petitioning the courts to frustrate their issues as far as several other legislations are concerned.

The court is seen to be insulated from public pressure and opinion-making. When the court ventures into such realms wherein it effectively pays heed to such public opinion, it becomes problematic since it would be treading on a slippery slope. The dialogues between the government and interest groups have several other variable factors which the judiciary should not be venturing into.

Constitutionally, when there is a presumption in favour of constitutionality of the legislation, the judiciary has no prudent ground to stay a law enacted by the parliament or concerned state legislature by following the procedure prescribed under the Constitution. Apart from expanding the scope of Article 142 of the Constitution, there is no other provision by which the Supreme Court could pronounce such orders. Such broad-based reading of Article 142 provides unlimited power to the Supreme Court to venture into any domain. This broad interpretation also places the judiciary at a higher position when compared to the legislature and the executive. This clearly provides for a scenario where the judiciary is supreme without any checks and balances. The said order in itself may be construed to be violative of the principle of separation of power between different organs of the State. Separation of powers is also considered to be the basic structure of the Constitution. Hence, the judiciary transgressing upon the jurisdiction of other organs without constitutional function to do so hits at the core of the concept of separation of powers.

Moreover, when the judiciary is not permitted to directly venture into such domains by the virtue of separation of powers, should it be doing the same indirectly by interpreting Article 142 broadly? If the Parliament or the state legislature is not permitted to legislate on a subject matter indirectly when it cannot do so directly, it would be only reasonable and prudent for the application of doctrine of colourable legislation in the judicial context. Since the courts are not permitted to directly legislate, they should not indirectly do the same in disguise of orders. This is regardless of the *bona fide* intent that the court may have in passing the orders. The doctrine of colourability should be applied in such scenarios when the judiciary attempts to pass orders on issues indirectly by the application of Article 142.

Rendering orders and judgements on issues and subject matters which are considered to be the domain of the other organs of the State provide for judicial supremacy. In case of non-adherence to orders and judgements by the executive, the judiciary has the power to penalise the other organ with contempt proceedings. This effectively forces the executive to enforce such orders and judgements of the judiciary much against its will and the will of the legislature on issues that are primarily and solely the domain of itself and the legislature.

Conclusions

Eminent jurist Nani Palkhivala, in the context of the Parliament exercising its powers according to its whims and fancies, said that the Parliament being the creature cannot be granted unlimited power to make the creature of the Constitution its master (Chandrachud, 2020). Similarly, the judiciary also cannot be granted the unlimited and unhindered power to transgress constitutional functions by the invocation of Article 142 of the Constitution. Since the representatives of the people have been duly elected to perform their constitutional functions and duties, it would destroy the object of electoral exercise if the judiciary was to intervene actively in policymaking and policy formulation.

Attorney-General Mr K. K. Venugopal "Article 142 is treated as a '*Kamadhenu*' from which unlimited powers flows to the apex court of the country" (First Post, 2018). This approach should be discarded for the preservation of constitutional framework and prevent any form of tyranny and autocracy. The judiciary should be active and effective in the administration of justice to the public. But that does not imply transgressing constitutional boundaries when the situation does not call for it.

When the court is not permitted to formulate policies and implement them, it is pertinent for it to not do the same by invoking Article 142. In the *Yajnavalkya Smriti*, it is stated, though in a different context that, "A *dharma* based on agreements that do not violate the dharma specific to oneself should also be observed assiduously, as also a *dharma* proclaimed by the king" (Olivelle, 2019). While the quote is provided in the context of contracts, the underlying principle concerning the same would be relevant. If the Constitution is the equivalent of *dharma* proclaimed by the king and the three organs of the State being entrusted with duties and responsibilities, it would be important for each of the creatures to abide by the *dharma* as provided in the Constitution. Any transgression to such dharma-based order would cause disorder to the harmonious functioning of the State.

Hence, as a constitutional polity, it would be important for different organs of the State to perform their functions and responsibilities harmoniously. Providing unlimited power to one organ would be detrimental to the functioning of democracy. As it is said, "power corrupts; absolute power corrupts absolutely". This calls for self-application of certain doctrines by the judiciary like that of colourability to prevent itself from doing what it prevents others to do.

References

- **Biju, Rintu Mariam. 2021.** "Are you serious that Bengaluru roads have only 400 potholes," Karnataka High Court to BBMP. *Bar and Bench.* [Online] March 11, 2021. https://www.barandbench.com/news/litigation/are-you-serious-that-bengaluru-roads-have-only-400-potholes-karnataka-high-court-to-bbmp.
- **Chandrachud, Chintan. 2020.** How a case on Minerva Mills challenged and undid Indira Gandhi's damage to the Constitution. *The Print.* [Online] January 12, 2020. https://theprint.in/pageturner/excerpt/how-minerva-mills-case-challenged-indira-gandhi-damage-to-constitution/348426/.
- **First Post. 2018.** 'Constitutional morality can be very dangerous': Attorney General KK Venugopal fears SC may become third Parliament chamber. *First Post.* [Online] December 9, 2018. https://www.firstpost.com/india/constitutional-morality-can-be-very-very-dangerous-attorney-general-kk-venugopal-fears-sc-may-become-third-parliament-chamber-5698851.html.
- **Fitzgerald, P J. 2020.** *Salmond on Jurisprudence.* s.l. : Sweet and Maxwell, 2020. ISBN: 987-93-8474-696-4.
- **Kashyap, Subhash C. 2019.** *Our Constitution: An Introduction to India's Constitution and Constitutional Law.* New Delhi : National Book Trust, 2019. ISBN 978-81-237-0734-1.
- **Manohar, Sujata V. 2010.** *T K Tope's Constitutional Law of India.* s.l. : Eastern Book Company, 2010.
- **Olivelle, Patrick. 2019.** *Yajnavalkya: A Treatise on Dharma.* London : Murty Classical Library of India, 2019.
- **Sethi, Ashpreet. 2016.** Diesel Cars Above 2000cc Can Run on Delhi Roads But There's a Rider. *Bloomberg Quint.* [Online] August 12, 2016. https://www.bloombergquint.com/business/supreme-court-lifts-ban-on-diesel-car-registration-in-delhi-ncr-imposes-1-green-cess.
- **Singh, Tripurdaman. 2020.** *Sixteen Stormy Days: The Story of the First Amendment to the Constitution of India.* s.l. : Penguin, 2020.