Constitutional Law and Public Administration in India

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Judicial Review – II

Judiciary plays a very important role in determining public administration, especially in trying to define the scope and ambit of public administration, and to determine what is public policy from time to time. Judiciary is empowered under the constitution to be the custodian of the constitution and the rights of citizens. Hence, when you talk about judicial review, it is the role of the judiciary as enshrined in the constitution of India to look at the powers of the legislature and the executive and to maintain the doctrine of checks and balances. It is the duty of the judiciary as the custodian of the constitution to set the limits of government and governance. Whenever the legislature oversteps or the executive decides to usurp its authority and power through judicial review, the judiciary sets the limitation on the actions and directions of the other two branches of government, i.e., the executive and the legislature.

The doctrine of judicial review in India is defined in the Constitution. However, the initial idea as propounded in the United States of America by John Marshall in the famous case of *Marbury v. Madison* could be said to be the first idea of the power of judicial review. The then Chief Justice of the US Supreme Court, John Marshall laid down that judicial review is one of the essential principles of democracy. It is the basis on which democratic values and policies can be protected and the limits of government can be defined.

The constitution of most democracies empowers the courts and the judiciary to confirm to the principle of judicial review, to protect the rights of citizens and to also limit the power of the government. It is the government of the law, not the government of men as has been said by the US Supreme Court. Hence, the history of liberty is the history of limitation of government power and not to increase, enhance or abuse. John Marshall had remarked that the duty of the judicial department is to say what the law is and if two laws conflict with each other, it is the court that must decide the operation of each of these laws.

In India, the Constitution confers the power of judicial review on the Supreme Court and High Courts; these two courts are considered as the constitutional courts. The Supreme Court of India has been declared to have the power of judicial review, entwined with the

basic structure of the constitution. The power of judicial review cannot be limited by any legislative action. The doctrine of basic structure that was propounded in the *Kesvananda Bharati* case in 1973, restructured the premise that the judiciary shall be the final word when it comes to the interpretation of law and for the application of constitutional principles. Any constitutional amendment will be tested on the point of the principles that are important in the process of protecting liberty, fraternity, and equality of citizens. Hence, judicial review is the power of the judiciary to examine the constitutionality of both legislative enactments and executive orders of both the central and the state government.

Legislature can also make certain kinds of delegated rules or legislations. As defined under Article 13 of the Constitution of India, law will include any rule, order regulation, ordinance, notification, circulars, and bye-laws. These are delegated laws which the executive is entrusted by the parliament to bring in as the force of law. If on examination, the judiciary finds that any of these laws, substantive law or procedure law, or delegated law is violative of the Constitution or the principles of the Constitution or is ultra-virus, the Supreme Court or the High Court have the power to declare the unconstitutionality or invalidity of such legislations because the constitution is the basic test for the legitimacy of any law. So, the courts can determine whether any law as being violative of the constitution and can also declare such legislations or the provisions of such legislations as null and void. Once the judiciary steps in to declare any part or the entire law as illegal, unconstitutional, or invalid, such laws will not have any force of law and they shall not be made applicable in the territory of India or of any state.

Judicial review has many aspects. Firstly, can the judicial review any constitutional amendment? Because an amendment to the constitution itself is a law-making process, though it is a higher law-making process. The answer to the first question is yes, they do have. Secondly, can they review the legislation of the parliament and the state legislature? The answer is yes. Finally, can they review the administrative actions of the union and the state and the authorities under the state? The answer to that is also in affirmative.

The Supreme Court of India has time and again used the power and the doctrine of judicial review in various important and noteworthy cases, including the *Golaknath* case in the year 1967, the Bank nationalization case in the year 1970, the *Privy Purse abolition* case of 1971, *Kesvananda Bharati* in 1973 and *Minerva Mills* in 1980 etc. Recently in 2015, the Supreme Court declared the 9IX constitutional amendment, which brought in the National Judicial Appointments Commission (NJAC) in 2014 as unconstitutional and null and void. That clearly displays the supremacy of the doctrine of judicial review in most democratic systems. The doctrine of judicial review is so critically important, one, because it will ensure to establish the supremacy of the constitution and not of any other political party and two, the doctrine of judicial review maintains federal equilibrium between the center and the various state governments as the case may be.

And finally and most importantly, judicial review protects fundamental rights of the citizens in numerous ways and cases as it has happened in the past as well. So in India, the constitution is the supreme document and the custodial of the constitution under the doctrine of judicial review happens to be the courts, rightly so under the provisions of the constitution as well. Our constitution has very specific provisions for judicial review. And if one goes to the phrases in Article 32 of the Constitution of India, or Article 226 or 227, one would very clearly look at the doctrine of judicial review, saying that there cannot be any law that violates either the fundamental rights or the legal rights of citizens. And hence, the constitution has clearly dedicated itself to empowering the judiciary, placing the judiciary in such a high pedestal, giving it the power to review any such legislative or executive actions or orders, so as to ensure that the rights that are guaranteed in the constitution are protected at any cost, and none of these are contravened by any organ of the state or its entities.

The court is the ultimate body of authority to decide that every branch of the government is a limited government. And any such action of the branches of government or governance does not transgress its limits, so as to infringe the fundamental rights of the citizens. And hence, the power of the constitution in granting writ remedies, including the habeas corpus, mandamus, certiorari, and prohibition are all such writs which the courts exercise under the doctrine of judicial review. So, to deprive the authority of the constitution, to say that the authorities of the constitution must work within the confines of the constitution is what is attempted under the doctrine of judicial review.

The scope of judicial review in India, is not as wide as what is the scope under the American Constitution. But we must look at not the wordings of the way and process in which the Supreme Court is empowered, but the way in which it has been exercised. And hence, that is what we see is the difference between constitution and constitutionalism of the working of the constitution. If you take a look at the working of the constitution and how the Supreme Court has exercised the scope of judicial review in this country, it is obvious that the Supreme Court has time and again come to the rescue of citizens in protection of their fundamental and legal rights. They have tried to limit the power of the police state.

The Supreme Court has tried to decide the welfare agenda of certain governments. They have ensured that any such law that violates or attempts to violate the rights have been declared as void. They have also, to a larger extent, gone to the question of reasonableness and suitability of certain policy implications, wherever it is utmost necessary to do so. This is because the courts do not intervene in the policy matters unless and until the policy attempts to infringe fundamental rights or takes away or abridges or negates any such legal right of citizens. They do maintain a perfect balance between what they should interfere and what they should not interfere.

It can be concluded that judicial review in India establishes the supremacy of the judiciary and the constitution, because the provisions of any law can be struck down and they could be struck down if the provisions of the law are in violative of the principles of the constitution or in violative of the principles of natural justice, which is in the American constitution called the due process of law. And hence, the judiciary is the one that is the ultimate word on how laws have to be made and implemented in this country. And they will decide the course of any such sovereignty or supremacy of the law. The doctrine of judicial review becomes critical and important when one looks at the way center state relationships have been protected and maintained and balanced by the courts.

Center state relationships in India have undergone a lot of turmoil. Unfortunately, thanks to the way in which the powers of a president's rule under Article 356 have been misused by governments in the past. So, in the most famous case of *S R Bommai v Union of India*, it is the doctrine of judicial review that laid down how this power has to be exercised and in what manner and to check the abuse or misuse of president's rule in the state governments; and it is the Supreme Court that stepped in to limit the nature of governance. There are many such occasions which can be brought into place to substantiate how judicial review has worked in India.

Another area of relevance is the Ninth Schedule. The Ninth Schedule in the Constitution was added by the First Constitutional Amendment Act of 1951. It was not part of the original Constitution; it was added later. In the Ninth Schedule, one could bring certain legislation and keep it in the Ninth Schedule, thereby stating that the judicial review of these legislations can be taken off.

Any legislation that is brought under the Ninth Schedule will not be part of the judicial review and that was done through the First Constitutional Amendment in 1951. Article 31B says that the Acts and regulations included in the Ninth Schedule will not be challenged or invalidated on the grounds that they contravene fundamental rights. And hence 31B literally looked at limiting the doctrine of judicial review or the power of the judicial review, which in many contexts in the United States has no such limits or no such power. As it were, originally as it was started, the Ninth Schedule included those legislations that were in tune to the Zamindari system at a time it was thought about being abolished. Certain legislations on land sealing and land tenancy were brought in.

And these were basically legislations in the land reform movement, which had a kind of an attempt to infringe a fundamental right, which is the right to property. Because under the abolition of the Zamindari system, those people who are holding these lands but not tilling it, and, as Zamindars, were only collecting some kind of revenue or royalty from the tenants. They would go to the court and say that their property rights have been violated, which is a fundamental right and claimed to be compensated to that extent. And these laws should be held to be invalid was the automatic challenge that could have arisen in many of

these instances and which would then disturb the state's agenda of bringing in equality on the distribution of land as a resource; because you do not want concentration of wealth in the hands of few going by what Article 39(b) and 39(c) of the Constitution, Directive Principles of State Policy also say.

So, to have equal distribution of these lands and to make the tiller the owner of the soil an agenda started in the first land reform movement in the country. And various legislations regarding the same, especially like the abolition of the Zamindari system, the land sealing law, land tenant sealing acts, are all enacted and they were immediately brought into the IX schedule so that the challenges on fundamental right and judicial review will not be done. While the IX schedule originally had 13 legislations, in 2019, the number of legislations in IX schedule, had increased to around 282 which were supposed to be completely out of the domain of judicial review.

However, in 2007 in a very significant Supreme Court judgment in a case called I.R. Coelho, the Supreme Court ruled that there cannot be any blanket immunity from judicial review of laws that are included in the IX schedule. The court held that the judicial review is a basic feature of the Constitution and it could not be taken away by putting any law under the IX schedule as it is. It said that the laws placed under IX schedule after 24th, 1974 became relevant. April 24th, 1974, is a very important day in the history of the Indian Constitution because it was the day when *Kesavananda Bharati* case laid down the basic structure theory and judicial review is a basic structure and from there on there cannot be taken away by any Act of the parliament including a constitutional amendment which can take away judicial review in any manner or any process. If any legislation has been added to the IX schedule after 24th April 1973, such legislation will be subject to judicial review.

But prior to that, there were times from 1951 to 1973 when the Supreme Court decided to limit its own power and excluded judicial review of legislations under the IX schedule. So it is now open to the court to review any legislation in the IX schedule, especially those that have been brought into the schedule after 24th April 1973, if they would violate the fundamental rights of citizens, because the doctrine of basic structure becomes very core and important to how the doctrine of judicial review has been developed in the Constitution. In the *I.R. Colville* case, the Supreme Court says that a law that abrogates or abridges the rights of citizens guaranteed under Part III of the Constitution, such a law will violate the basic structure of the Constitution and hence, any such law that attempts to do the same shall be subject to judicial review and the constitutional validity of such legislations, whether they are ordinary legislations or legislations in IX schedule will be subject matter of the rights test.

The rights test means any form of an amendment is not relevant to the Constitution until and unless it affects or determines the rights of individuals. That is a very interesting development of assertion of judicial review or the doctrine of judicial review. The Supreme

Court judgment in 2007 very clearly says that the essence of the right test is the only basis for intervening in the law of judicial review. And the judges have the right to challenge any law if they violate the fundamental rights of citizens or if they lead to any kind of interaction on the basis that they damage or destroy the basic feature of basic structure of the Constitution in either Article 21, Article 14 or Article 19.

This is the golden triangle rule. So if at any point of time any of these three articles are going to be touched by any kind of public administration or by public policy or public law, then they shall be subject to judicial review of the Constitution. This is the very basic feature and aspect of judicial review or the doctrine of judicial review under the Constitution of India. The important cases are the *Kesavananda Bharati* case and the *A.K. Gopalan* case. It is important to understand that the judiciary has been a very active judiciary in this country, especially in the last four to five decades. And this has been by public interest litigation and how judicial review through public interest litigation has been made possible in this country, which is nothing but judicial activism.

A lot of criticisms are levelled against judicial activism as being judicial overreach or over activism. That is a fallout of every other public opinion that one has on whatever happens in the public debate. Our judicial activism is something that comes from the United States. This is a doctrine that was introduced in the mid-70s by judges like Justice V.R. Krishna, Justice P.N. Bhagwati, Justice O. Chinnappa Reddy and Justice D.A. Desai, who laid down the foundation of judicial activism in the country. Judicial activism is nothing but a proactive judiciary. And the judiciary plays a very important role in the protection of the rights of the citizens and the promotion of justice in the society. The judiciary plays a very assertive role. It's not a very passive role. It's not a spectator, but it's an active player to actually look at the functioning of the two organs of the government. The judiciary monitors whether the two organs of the government are discharging their functions as per the constitutional mandate. This is nothing but like many jurists would call it, it is judicial dynamism. It is an antithesis to judicial restraint. In many cases, judicial restraint means judicial self-control, which is also very important, because the judiciary also should not overstep into the domain of the legislature and the executive. In cases like the same sex marriage that was recently announced by the Supreme Court, there was some element of judicial restraint as well.

So, judicial restraint is important. However, the judiciary has been an active judiciary. It has kind of motivated its own institution, because the Supreme Court and the High Court are institutions, the judges are only members of this institution. It has motivated the institution to go away from the normal routine practice, or strict adherence to the judicial precedent and procedures, which delays justice. So, progressive judges with progressive mindset have laid down new benchmarks. But more importantly, they have laid down new societal policies. And they have taken the common practices out or common customs out. And they have done social engineering. And hence, at the cost of a slight intrusion into

legislature and the executive matters, the judiciary has been protecting individual rights, especially the rights of the vulnerable sections of the community and society, including women, children, indigenous communities and people and others. And, where the legislature has not acted, the judiciary has stepped in. This was also called the theory of filling the vacuum at times.

Despite several oppositions and quite a few constraints that the judiciary did face at its very initial stages, the process of judicial activism has contributed to judicial lawmaking. But it is very important that judicial activism has been a process of judiciary and judges trying to not only do the regular role of active interpretation of existing legislations, of not only looking at the traditional rule of dispute settlement or dispute resolution, but they have also looked at the utility of this legislation and they had looked at social betterment of the lives of individuals. They have come to the rescue of people, especially when there are some harassments that have been committed. In these cases, the judges have gone beyond their personal ideology and opinion.

Judges have looked at public good and public welfare and determined the facets of public policy. So, a new kind of philosophy of the judiciary has laid down new principles, new concepts, new formulas, and they have come up with a very innovative relief to citizens, thereby expanding the standing of why the people must knock at the doors of the judiciary and seek different aspects and ambit of justice. Judicial activism is one of the talking points of reference and feature all over the world of the Indian democracy and the Indian constitution and it is a feature that has always withstood the test of times. The concept of public interest litigation was antithesis to private interest litigation. In a private interest litigation a person who is a victim or an aggrieved individual goes to the court as a petitioner and seeks relief and remedy and justice from the court.

So, you are a party who is having some standing before the court of law, and you will say that this is what is the relief that you personally want. So, in reverse contrast to this, the public interest litigation philosophy is a litigation by an individual or by an NGO or by a public-spirited body who goes to the court not for relief for themselves, but for those who are not able to access the court or access the justice. So they are not private interested litigants, they are public interested litigants. They do not get any remedy or relief. It is the general public who are supposed to benefit or the concerned group of individuals on whose behalf that NGO comes to the court who actually gets relief from a public interest litigation.

So public interest litigation is different from class action litigation in a sense that class action means, a group of affected litigants like say a trade union or workers who go to the court to seek some kind of remedy, they would be considered as a class. It is a group or class action litigation as well. So public interest litigation is more known as social action litigation. You are going for a social cause, not for a selfish cause. You are interested in social welfare and social benefit and hence you are invoking the jurisdiction of the court.

And this is where jurists have believed that the principal rules of *locus standi*. *Locus standi* means what is your standing before the court of law and why you are coming to the court. You must justify what your locus is before the court to appear before it or to file a case before it. But this rule of *locus standi* has been diluted by the judiciary and they have allowed the permission of the public interest litigation process and that has been done for larger public interest and public good.

That has been the touchstone of Indian judicial activism as the case remains. It is interesting to look at how the concept of a PIL or judicial activism is being used by human rights and other groups? Some people have used this for establishing their civil rights and political rights. Some people have gone in for social and economic rights. There are consumer groups that have gone to the court, bonded labour groups, environmental groups, those who are opposed to large dams or irrigation projects, child rights groups, groups that are fighting custodial violence, custodial death, and prisoners' rights, have all used the PIL process. There are a lot of groups that are fighting for poverty or elevation of property that have used the PIL and judicial activism process.

Indigenous people, women's rights groups, groups that belong to certain kinds of association including the bar associations or even the legal services authorities have sometimes used the judicial review and the public interest litigation groups. Many times, even the media has used the process of public interest litigation and the groups regarding the same. Therefore, Judicial review and judicial activism are closely connected with each other. But they could be different at times. For example, we say that judicial review was very much existing before judicial activism came into picture.

While we say that in judicial review, the lawmaking policies are actually tested, in judicial activism, it is the exercise of these policies to whom and how it should be exercised which is usually attempted to be covered. And hence, while judicial activism is out of the necessity of inactions from the legislature and the executive that has propelled judicial activism, judicial review was to limit the two other organs of the government. And judicial activism is a 20th century philosophy, where judges are attempting to make very positive contributions to law. They are setting standards of how judiciary and judicial institutions have to be very positive and assertive in protecting and promoting certain core rights.

Judicial activism has its own charm. And judicial review now has become a kind of a part of the judicial activism process. The reason why people would justify judicial activism is because they feel that sometimes the governments do not have a clear majority and hence, they have gotten into policy paralysis. Very often than not, the executive has failed to discharge these functions and they continue to do that. They do not really inspire the confidence of the people and hence the judiciary is the only institution where the citizens can run up to and seek for protection of their rights and fix the responsibility of the

government. Judicial activism is justified in the sense that there is a lot of pressure on the kind of population that we have in the country.

There is a lot of aspiration, a lot of conflict of growth and protection of religious and other customs. And the judiciary is the only way that can actually elevate the suffering of the masses whenever such kinds of conflicts arise. For example, very recently the Supreme Court has said that wherever there is some kind of a violence or riot that take place due to some kind of a bond or a political protest, then if any public property is damaged, then it should be recovered from the assets of the persons who had taken part in such kind of a violence, to bring in some kind of accountability, even under your right to protest or your right to strike. Judicial activism is generally justified because the judges feel very enthusiastic to participate in the social reform process. They take upon themselves that kind of role, they have liberal ideas and liberal approaches. They feel that they have the duty to render justice, which is social, economic, and political. And they have to protect the constitution, make it work. It should not be simply a letter of law in words, but also in spirit. So, whenever the legislature has failed to discharge its responsibility, either central or state, judicial activism has been completely justified. And the weakness of the government has been the survival instinct of the judiciary to power those who are honest, to power those who are hardworking and to power public interest and public issues.

Therefore, when it comes to the aspects of decent life in India, it is the judiciary that defines the basic tenets of the right to life. It talked about the right to environment, the right to health. It talked about how the system of administration of justice, whether it be the police or be it any other executive organ should work. The judiciary through the public interest or litigation process has checked the misuse of the emergency power in this country, has tried to look at ulterior motives of government and parties, especially in terms of defection and other things. The media that we had and the media frenzy to a larger extent, the judiciary has been able to balance against the rights to the responsibilities that the media should have.

The expansion of judicial review over administration has in some way promoted open government, it has promoted transparency and accountability. To a larger extent, wherever jurisdiction did not exist, it was the judiciary that decided the jurisdiction. It laid the standards of rules of governance and delegation. And finally, the judiciary was very much involved in laying down the principles of natural justice. There are several judgments where the tenets of administrative law, the principles of natural justice have been laid down by the judiciary from time to time.

That has, in some way, modulated how the administration has to be sensitive in terms of ensuring that there is a fair hearing, there is no bias, and then orders are being passed without fear or favour. To a larger extent, all the kind of fear that we had in India, some of them are fears of ideology, for example, because you may not be supporting the ruling

party and you may be supporting the opposition party some fears of management or mismanagement from the administration. There were so many other fears that Indians, unfortunately, faced in their early part of their constitution. The judicial review was able to instill a sense of confidence in the masses and in the people.

And that is how the country has been able to progress because of the strong Supreme Court delivering strong governance as well. Now, if you see how the Supreme Court has defined public interest litigation in *Janata Dal v. S Chaowdhary*, it said that a legal action initiated in a court of law for the enforcement of public interest or general interest, in which the public or any classes of community have pecuniary interest or some interest by which their legal rights or liabilities are affected can be the process in which you can define what a public interest litigation is. The Supreme Court has laid down a set of guidelines on what a public interest litigation and how and which public interest litigation will be entertained. And they have also decided to impose costs if there is a frivolous PIL that is being filed. However, the process of activism has meant that in the past PILs have been filed through certain letters that were written to the court and those letters were converted into public interest certifications as well.

So, there are several such issues that have been resolved and brought to the forefront because of the judicial dynamic approach that we have in the country. While the critics may call for judicial restraint, there is enough justification of encouraging judicial activism to the highest level.Judicial lawmaking has also been a process in which the courts have taken a serious note of judicial lawmaking. The parliament itself, while it failed to make a law, the judiciary had to step in the interim phase and make judgment law. Now, the examples of judgment law probably are best explained through the case of *Vishakha v. State of Rajasthan*. This is where the Supreme Court till 2013 from the time the *Vishakha* case was decided in 1996 had laid down a law on prevention of sexual harassment of women at workplace.

Judicial lawmaking in India is a reality and the judiciary is able to enforce this law because of the power that it has in terms of the law of precedent and the enforcement through the law of contempt. The *Vishakha v. State of Rajasthan* is the best example of judicial lawmaking in this country. Several other cases including the child labour law of 1986 that was brought about, was something that the judiciary had to interpret and apply even before the rules were brought in. And it is the judicial law as well as the legislative law that ensured that child labour in India is eradicated at least wherever it could be possible. The *Kesavananda Bharati c*ase laid down the law on basic structure that is also a law-making power.

The *S R Bommai* case is also very relevant because it talked about Article 356 and how President's Rules can be imposed especially not disturbing the center-state relationship. That is also a huge lawmaking factor by the court protecting the federal structure as laid

down in the constitution of India. The DK Basu case is also another case where guidelines and strategy safeguard for arresting a person has been laid down that has become a basic law of the land. And the *DK Basu* case is important because to a larger extent it set the limits of police power. For example, some of these guidelines very clearly say that a lady cannot be arrested after 6 pm and kept in police custody unless there is a fear that the lady is going to commit a very serious offence.

So, she should be only arrested in the presence of a lady police officer and only from 6 am to 6 pm unless there is a fear that she could be involved in commission of an offence or is involved in a grand series or great act of action against the nation or the security of the state. The second judge's case and third judge's case are also one interesting case because it laid down the law on collegium system where the judges would recommend who shall be the members of the Supreme Court and High Court and who will decide the transfer of judges. So, the collegium system now is where judicial law making in terms of appointment of judges is being determined and that also is one interesting example of how the judiciary has been making law in the process or judicial activity. In the *Murli Deora* case, a case of smoking in public places, now has become a law under the prohibition of smoking in public places rules of 2008 under the Secret and Other Tobacco Products Act of 2003. But it was the Supreme Court that actually looked at the right to health of non-smokers or passive smokers in this 2001 judgment.

So while we should say that judicial activism or judicial rule or role through public interest litigation is not something that can solve all the problems in the society or all the problems of individuals, it is nevertheless some era of hope that citizens have especially when they feel very helpless, when the executive and the legislature do not respond to their plea. And to a larger extent, there has been protection of basic human rights of the weaker and disadvantaged sections of the community. Through the PIL, the courts have been encouraging genuine public-spirited individuals, and giving them credentials of bringing social transformation in the society. Prima facie the court when it is satisfied that the contents of the petition are bona fide, they have intervened in the larger public interest. Sometimes they have intervened in urgent hearings and looking at the gravity of the situation, the courts have actually abated public harm and public injury , a fact which is undisputed. The courts have never gained anything out of it. And the primary motive is to just ensure that the principles of the constitution are protected. They have adopted methods in curbing frivolous petitions and checked the misuse of the judicial activism process as well.

Finally, while we say that there is right to privacy today, that right to privacy comes from the *Puttaswamy* judgment and before that it was in the *Kharak Singh* case, where again, you will notice a new unenumerated right, a right that is not in the constitution has been spelt out by the Supreme Court in the *Puttaswam*y case. The right to privacy, in the information age or the digital age or internet age was said to be a fundamental right by the

Supreme Court. So, this is how through judicial activism, the court gives a new fundamental right like several other fundamental rights that have been granted to us from time to time.