



CRITICAL ANALYSIS OF JUDICIAL REVIEW IN INDIA; A LOOK INTO JUDICIAL AUTOCRACY AND BIASNESS OF THE JUDICIARY

By Aman Karan
From Delhi Metropolitan Education, Noida,
Uttar Pradesh

Abstract

The independence of the judiciary has long been a standard in Indian democracy. But in recent times, the arbitrary judgements of the Supreme Court has raised a concern and debate on the influence of outside powers on the Supreme Court and whether the courts are actually independent or not. In this paper, the powers of judiciary are critically examined and the autocracy of the Courts is criticised focusing on the power of judicial review through which the Courts exercises control over other organs of the government. The paper analyses the doctrine of judicial review from its genesis in the case of *Marbury v. Madison* to its application in modern India. It is further discussed how a good federal structure is preferable for the effective implementation of the power of judicial review so that it doesn't turn into a tool for despotism. Moreover, the power of judicial review is criticised as a door for autocratic practises by the Courts. This criticism is based on the grounds of judgements that have been passed by the Courts over the years. The arbitrary reasonings and malpractices by the Supreme Court of India and how judicial review plays a significant role in such

practices is examined, scrutinizing judgements of Sabarimala Temple case, Zakia Jafri's case, Mullaperiyar Dam case and Ranjan Gogoi's sexual harassment allegations case. Finally, this paper examines the various instances that influence the courts in India which clouds their judgements, like the government and the public opinion.

Keywords: Judicial Review, Supreme Court, Sabarimala Case, Zakia Jafri case, Ranjan Gogoi's Sexual Harassment Allegations case, Judicial Autocracy

Introduction

The basic structure of the Constitution forms the bedrock of judicial review in India. The doctrine of basic structure gives significance to the power of judicial review in the form of the supremacy of courts to check the actions of the legislature, executive and the judiciary itself. In numerous cases, the Courts of India have protected the fundamental rights of the citizens through the power of judicial review by declaring actions of the Parliament unconstitutional or *ultra vires*. For instance, in the landmark case of *Kesavananda Bharati vs. State of Kerala*, the Court put a limitation on the power of amendment of the Constitution given to the Parliament under article 368 by restricting such power to alter the basic structure of the Constitution.¹

Judicial Review refers to the power of the court to judge the lawfulness of a decision or an action by organs of the government. Judicial review is basically reviewing a decision or an action of the executive, legislative and administrative parts of the government. The Indian Constitution gives

¹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.



the court this power of influence. Many provisions like articles 372, 143, 226, 145, etc. of the Indian Constitution enumerates the power of courts to influence decisions and actions of other organs of the government.²

Judicial review was devised to strengthen the system of checks and balances in India. The system of checks and balances is an arrangement where different organs of the government, the executive, judiciary and legislature are prohibited and “checked” from abusing their power. In this system, the legislature organ of the government exercises limited control over the judiciary, like the impeachment and removal of judges, and over the executive, through dissolving government using a no-confidence vote. Similarly, the executive exercises control over the judiciary by making appointments to the office of Chief Justice and other judges, and over the legislature through an authority to make rules for regulating respective procedures and conduct for business. The control exercised by the judiciary over the executive and the legislature is exercised in the form of Judicial Review, where the Courts of the Indian judiciary reviews actions and decisions of the executive and the legislature and declare them unconstitutional if such actions and decisions violate the provisions of the Constitution.³

The power of judicial review is conferred upon court by the Indian Constitution. Article 372(1) of the Indian Constitution says that pre-constitutional laws can be repealed and

altered by the Legislature or other competent authority.⁴ Article 13 states that any law which contravenes the provisions of the part of the Constitution dealing with Fundamental Rights shall be void.⁵ The decision of declaring a law void will be at the hands of the Court. Articles 32 and 226 gives the power to the Supreme Court and High Courts respectively to act as a protector of fundamental rights.⁶ Article 246(3) states that powers of state legislatures shall be limited to matters given in state list only.⁷ The encroachment of the same is to be judged by Courts. Article 245 subjects the Parliament and State legislatures to the provisions of the Constitution.⁸

It is evident that in India, courts have been provided with the power to review decisions of other organs of the government. For instance, article 137 of the Indian Constitution gives special power to the Supreme Court to review and judgements or orders given by it.⁹ Also, other statutes legitimise the power of judicial review. Such as the power of revisional jurisdiction provided by section 115 of the Code of Civil Procedure through which the High Court is granted a power to call for re-examination of any case which has already been decided by a subordinate court.¹⁰

Judicial review has been in practice for a longtime. The part of judicial review in India that deals with the review of administrative

² The Constitution of India.

³ Checks and Balances, *available at*: <https://www.drishtiiias.com/daily-updates/daily-news-editorials/checks-balances-1> (last visited on July 11, 2022)

⁴ *Supra* note 2 art. 372

⁵ *Id.*, art. 13

⁶ *Id.*, art. 32 and art. 226

⁷ *Id.*, art. 246(3)

⁸ *Id.*, art. 245

⁹ *Id.*, art. 137

¹⁰ The Code of Civil Procedure, 1908 (Act 05 of 1908), s. 115.



actions has been inherited from Britain.¹¹ The power of judicial review in India has been a prevalent practice since the inception of the Constitution. This doctrine has been developed by the judges from case-to-case basis and implemented with efficiency. However, to understand the doctrine of judicial review in totality, a bird's eye view of this doctrine is necessary. It is important to understand the genesis of judicial review and from where it started to find out where it stands in modern India, where there is a declining faith in judiciary.

Marbury v. Madison; The Genesis of Judicial Review

The origins of Judicial Review can be traced back to the case of Marbury v. Madison. In the case of Marbury v. Madison, the president John Adams had issued William Marbury a commission as justice of the peace in 1801, but the Secretary of State, James Madison, refused to deliver the same. Marbury then sued Madison to obtain the document. In December, William Marbury along with Dennis Ramsay, Robert Townsend Hooe, and William Harper by their counsel moved to court for issuance of writ mandamus instructing James Madison to cause to be delivered the commission for justice for the peace of Washington D.C.¹²

Now the questions arose whether the US Supreme Court had the power to grant this request to issue a writ of mandamus and compel Secretary of State, James Madison to deliver the commission.

Chief Justice Marshall held that, for starters, Marbury did have the right to the commission. Consequently, Marbury's rights were being violated and it was proper for him to sue in court for a mandamus. Further, the Supreme Court held that it did not have the right to issue a writ of mandamus because the law under which Marbury was seeking to have mandamus issued was the Judiciary Act of 1789 which violated Article III Section 2 of the U.S. Constitution. Chief Justice Marshall went on to say "If . . . the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply", and "a law repugnant to the constitution is void, and . . . courts, as well as other departments, are bound by that instrument."¹³ By this statement, Chief Justice Marshall gave the power to declare an act of Congress invalid.

The genesis of the system of judicial review becomes evident by the judgement of Chief Justice Marshall. Implementing judicial review of legislative actions, he stated "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law is in opposition to the constitution: if both the law and the constitution apply to a particular case, the courts must either decide that case conformably to the law, disregarding the constitution or conformably

¹¹ I.P, Massey, *Administrative Law*, 279 (Eastern Book Company, Lucknow, 9th edn.,2017).

¹² Marbury v. Madison (1803), *available at*: <https://www.archives.gov/milestone-documents/marbury-v-madison> (last visited on July 16, 2022).

¹³ Marbury v. Madison Case Summary: What you need to know, *available at*: <https://supreme.findlaw.com/supreme-court-insights/marbury-v--madison-case-summary--what-you-need-to-know.html> (last visited on July 18, 2022).



to the constitution, disregarding the law. The court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty”.¹⁴

Chief Justice Marshall explicitly left the decision of the application of the law in the discretion of the courts. He put the court’s and the judges’ interpretation of the law as superior to that of the law itself. The courts can decide how the law will be applicable to a particular case. In case of conflicting laws, it was also put at the discretion of the courts to choose the prevailing laws. The case of *Marbury v. Madison* changed the way of interpreting the laws and how the court’s worked. It established significant power in the court’s hands in the form of judicial review.

However, presuming the power of judicial review as an open extended power of the judiciary may be wrong. The power of judicial review is not absolute. The concept and principles of federalism here becomes a necessary tool to make this power of courts efficient and work in the interest of justice and of the public at large. Federalism becomes necessary to make use of such powers of the organs of the government for development of the State. Therefore, under federalism, this power of the court is subjected to the separation of powers and the system of checks and balances. The excess and arbitrary use of judicial review by the courts tend to violate the doctrine of separation of powers, system of checks and balances and federalism which consequently keeps this power in check.

Federalism; How Judicial Review is Efficiently Enforced by Dividing the Government.

The English proverb “power corrupts and absolute power corrupts absolutely”, means that the more a person or an authority has power, the more corrupt they will be. A fundamental principle of federalism is separation of powers. In a federal structure, the power is divided between state level governments and national level government and further divided into branches of government, namely the legislature, executive and judiciary. The power is divided between different branches of the government and all these branches are made accountable to one another. The federal structure of the government in India limits the extending power of the judiciary and judicial activism through the doctrine of separation of powers and through a system of checks and balances. This federal system of government prevents absolutism of any one branch of the government. If the judiciary is exercising its power of judicial review in excess, the system of checks and balances would come into play to restrict such an action by the judiciary. The executive exercises control over the judiciary through the appointment of Chief Justices and other judges and the legislature exercises control over the judiciary by actions of impeachment and removal of judges. By restricting absolutism and limiting the power of the branches of the government, federalism makes sure that the extent of power of any branch of the government is required only to the point where it is proving to be efficient and effective for the system.

¹⁴ *Marbury v. Madison*, 5 US 137 (1803).



Federalism and The Power of Judicial Review in India

Federalism is a system of government where the powers are divided between two levels. The affairs of the state are handled by two levels of the government.¹⁵ For example, the United States has a federal form of government where the powers are divided between the State Government and the Federal Government. Even in India, there are two levels of government, the State Government and the Union Government. But the concept of federalism in India is quite different from the general concept of federalism. India has a parliamentary-federal system consisting of twenty nine states and seven union territories.¹⁶ It means that the executives at both national and sub national levels are dependent on the confidence of the parliament.

In India, for instance, the Seventh Schedule of the Constitution enlists distribution of legislative powers between the Union government and the State government. It contains three lists, the Union list provides for the subjects on which only the Union government can make laws. The subjects in this list include defence, foreign jurisdiction, citizenship, extradition, railways, etc. The state government cannot make laws on these subjects. The State list contains subjects on which only the State government can make laws on. The subjects in this list include education, public order, police, public health, etc. The third list, the Concurrent list, contains subjects on which both the State

government and the Union government can make laws on. Subjects in this list include Criminal Procedure, preventive detention, forests, economic and social planning, etc.¹⁷ So, the system of federalism divides the powers of government and consequently the powers of its branches. There is no absolute power in the hands of the executive, legislature or the judiciary. In India, the State legislature cannot make laws on defence, citizenship, foreign jurisdiction and other subjects that are mentioned in the Union list. Although, in some situations, the Union government may be allowed to make laws on subjects that are mentioned in the state list, there is a clear distinction of power in a federal system of government.

In a democracy, the consolidation of powers in the hands of one authority is violative of foundational principles because it can turn out to be troublesome and autocratic. In an autocratic state, there is no system that will check the authority's absolute power. Which is why political systems like federalism and doctrines like separation of powers and system of checks and balances have been developed, so that the principles of democracy can not be broken by absolute power of an authority, even if such a power has been provided by the law of such democratic state. By dividing the government into 2 levels, the power is also bifurcated into two levels of the government. The State government has their own powers, on which the Union government cannot encroach upon (unless in extraordinary situations) and the Union government has their own powers on

¹⁵ federalism, *available at*: <https://www.law.cornell.edu/wex/federalism> (last visited on July 20, 2022).

¹⁶ Manish Tewari and Rekha Saxena, "The Supreme Court of India: The Rise of Judicial Power and the

Protection of Federalism", in Nicholas Aroney and John Kincaid, (eds.), *Courts in Federal Countries; Federalists or Unitarists?* 229 (University of Toronto Press, 2017).

¹⁷ *Supra* note 2, art. 246



which the State government cannot encroach upon. Therefore, it can be said that through federalism and federalist principles, the power of the judiciary that practises control and influence over other organs of the government is efficiently checked and enforced.

Importance of Judicial Review for Maintaining the Federal Structure

Where federalism helps efficient enforcement of judicial review, the power of judicial review also helps in sustaining the federal structure. An independent judiciary is paramount in sustaining the federal structure. If any level of a government encroaches upon the authority of another, the judiciary has the power to interpret the Constitution through judicial review and rectify any such encroachment.¹⁸ In the case of *the State of West Bengal and Ors v. Purvi Communication (P) Ltd. and Ors*, the conflict arose regarding Entry 62 of List II (State List) of the Seventh Schedule of the Indian Constitution. Respondent 1, a cable operator, was the provider of the entertainment to the customer. The Supreme Court stated

“The cable operator can alone be asked to pay the tax on the entertainment that he has exhibited. This provision, therefore, does not cross the bounds of Entry 62 of List II of the Seventh Schedule to the Constitution and is intra vires. Providing a cable link up to the viewers’ end is the only role of the sub-cable operator. It is, therefore, inconceivable that despite putting forth the ready entertainment

in the form of a signal on the cable line, the cable operator cannot be said to be providing the entertainment within the meaning of Entry 62 of List II of the Seventh Schedule of the Constitution. So long as the State Act remains within the ambit of Entry 62 of List II and is not offending the provisions of Article 286 of the Constitution or the laws made thereunder, the State Act’s validity is beyond question. Thus, respondent 1 who is engaged in receiving and providing TV signals to individual cable operators is liable to pay tax under Clause (ii) of Sub-section (4-a) of Section 4-A of the Act.”¹⁹

The Apex Court in this case exercised its power of judicial review and interpreted Entry 62 of List II of Seventh Schedule of the Indian Constitution. The Court preserved the federal principles by declaring that if the act enacted by the State is within the ambit of Entry 62 of List II, then there is no question regarding the validity of such act. Furthermore, in the case of *State of Rajasthan v. Ashok Khatoliya*,²⁰ the Supreme Court, again defining the scope of powers of different levels of the government, held that the State legislature has the power to legislate on subjects of local government which is mentioned in the State List in seventh schedule of the Constitution and that the 74th Amendment does not take away such competence of the State government.

The Supreme Court enforced its power of judicial review and kept the legislative powers assigned by the Constitution to the Union government and the State government

¹⁸ M. Asad Malik, “Changing Dimensions of Federalism in India: An Appraisal”, 02 ILI Law Review 85, 93 (2019).

¹⁹ *State of West Bengal & Ors vs Purvi Communication Pvt. Ltd.*, available at:

<https://indiankanoon.org/doc/833158/> (last visited July on 25, 2022).

²⁰ *State of Rajasthan v. Ashok Khetoliya*, 2022 SCC OnLine SC 295



bifurcated. The courts take an active part in checking the powers of both levels of the government by interpreting the Constitution. If any level of the government encroaches upon the authority of the other, or exercises power extending outside its scope, the court declares such an action ultra vires. This is how judicial review preserves the principles of federalism.

Judicial Review; Power or Liability?

The power of judicial review is very pertinent to the essence of federalism. This power helps in sustaining democracy and is among its major pillars. But the same power can also prove to be dangerous for the people and the system at large. The effective implementation of judicial review does not render it vulnerable from faults and shortcomings. The power of judicial review, when implemented efficiently and without any bias, showcases the skills of intellectual interpretation of the Constitution by the judges. The most complex of provisions are interpreted by the judges along with efficient application of age old jurisprudence to contemporary legal issues. However, when the biases of judges clouds their judgements and the unwillingness to change according to the changing needs of the society, affects their judgement, the power of judicial review becomes more of a liability to society. The decisions of the court and the interpretations laws of a state by the court becomes arbitrary and unreliable.

The system of separation of powers is not followed strictly in India. An example of this is the power of judicial review itself, where the judiciary can declare any laws made by the legislature as unconstitutional if they

violate the provisions of the constitution. In *Ram Jawaya Kapur vs. State of Punjab*²¹, the Supreme Court said, “*Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can be said that our Constitution does not contemplate assumption, by one organ or part of the state, of function that essentially belongs to another.*” Thus, it can be said a separation of functions is followed in India rather than a separation of powers.

This modified application of separation of powers results in a restricted system of checks and balances on the organs of the government. The system of checks and balances is not applied in an absolute manner. The judiciary, being one of the organs of the government, acquires an immunity against arbitrariness due to this modified application. The most famous case of the court’s immunity against incompetency and arbitrariness is *ADM Jabalpur vs. Shivkant Shukla*,²² wherein the Supreme Court held that no person has any locus standi to move any writ petition under Article 226 before High Court for habeas corpus or any other writ and that writ of habeas corpus is not maintainable in case of proclamation of emergency. This case brought to light what that unchecked powers of the judiciary can lead to.

The disadvantages of judicial review stems from the same foundation which makes it an ideal doctrine of independent judiciary – interpretation by the judges. The interpretation of law by the judges is susceptible to personal biases and opinions. It

²¹ AIR 1955 SC 549

²² AIR 1976 SC 1207



is not always that judges will follow an ideal and be impartial in dealing with matters (as we have seen above in the ADM Jabalpur case). This personal bias creates arbitrariness in the system. Judicial review is a significant aspect of democratic government and is essential for maintaining a federal structure. However, it is not a perfect doctrine and is not immune to drawbacks. The various cases of fallacies of Courts in judgements prove that the power of judicial review can also become a liability to society. Application of judicial review in this regard can lead to judicial autocracy.

Judicial Autocracy; Case of Zakia Jafri v. State of Gujarat and Anr.

Whether the power of judicial review is dangerous or not depends fundamentally on its application by the courts. If the courts use the power of judicial review in the interest of justice, then it is favourable to society. But when the same is used as a tool to give judgements that are based on biases, not free from influences, and are far from the interest of justice, it is detrimental to the institution of justice and society at large. The courts, with the virtue of articles 32, 136, 226 and 227, have taken it upon themselves to act as guardians of the Constitution of India. This has proved to be fatal to society on numerous occasions.

One such recent example of the autocratic practices by the Courts of India is the case of Zakia Jafri.²³ The case started when Congress MP, Ehsan Jafri, Zakia's husband, was brutally murdered in the Gulber Society massacre during the time of Gujarat riots of 2002. Zakia filed a complaint against the top

officials, ministers and the Chief Minister of Gujarat at that time, Narendra Modi alleging inaction, complicity and conspiracy. Zakia approached Gujarat High Court after the State police did not take any action. The High Court dismissed the petition and asked her to file an appropriate private complaint and invoke section 190 of CrPC r.w. Section 200. This dismissal of the petition by the High Court was challenged in the Supreme Court. At the same time, the writ petition filed by the National Human Rights Commission (NHRC) critical of the law and order situation in Gujarat stood before the Supreme Court. By order dated 26.03.2008, the Court constituted a Special Investigation Team (SIT) to investigate in 9 cases of 2002 riots. When Zakia Jafri's plea came to the Supreme Court, the Court ordered the SIT to look into the matter and investigate the same. On 19.01.2010, the SIT asked for further time for investigation in respect of Zakia's complaint.

On 08.02.2012, the SIT submitted its final report. It identified 30 allegations and addressed them in its final report. The report showed that the Amicus Curiae was of the view that *prima facie* offences were made out u/s 153A(1)(a)&(b), 153B(1)(c), 166 and 505(2) IPC against the then Chief Minister of Gujarat, Narendra Modi. After this, Zakia filed a protest petition before the concerned Metropolitan Magistrate on 15.04.2013. The protest was rejected by a speaking order dated 26.12.2013 and the final report filed by the SIT was accepted.

The submission of the petitioner was not to allege any wrongdoing, criminal or otherwise, of the disputed facts but the submissions were based on undisputed

²³ *Zakia Ahsan Jafri v. State of Gujarat and Anr.*, 2022 SCC OnLine SC 773



evidence of “Tehelka Tapes” and official communications of public functionaries. The petitioner contended that, “the undisputed evidence on record points to a larger conspiracy which appears to have involved bureaucrats, politicians, public prosecutors, VHP, RSS, Bajrang Dal and members of the State political establishment”, and the same should’ve been investigated by the SIT but the SIT limited its investigation to matters in dispute relating to the meeting held on February 27, 2002. The Tehelka Tapes was one of the most important pieces of evidence submitted in support of the petitioner’s case. The Supreme Court, analysing the same stated that:

*“The trial Court in its judgement dated 26.12.2013 after analysing the same (Tehelka Tapes), has held that a sting operation can at best be a good corroborative material against the accused who are stung by the operation, relying on the decision of this Court in R.K. Anand and Rajat Prasad. We do not wish to elaborate further on the view taken by the trial Court in the state case, as it is pending challenge”.*²⁴

Further, the Supreme Court regarding the Tehelka Tapes Stated that:

*“We need to clarify that our analysis regarding sting operation or the Tehelka Tape and its transcript, is not a final determination regarding the evidentiary value thereof. We say so because the same will have to be dealt with in appropriate proceedings, in particular, other cognate criminal cases investigated by the Supreme Court appointed SIT including those pending before the High Court and this Court”.*²⁵

²⁴ *Supra* note 21 at para 263

²⁵ *Supra* note 21 at para 306

It is evident from the above mentioned statements that the Supreme Court has defaulted in examining the indisputable evidence of Tehelka Tapes in its full potential. The vague statements and an attempt to dodge discourse on the tapes illuminates the deliberate ignorance of the evidence by the Supreme Court.

Also, disregarding the petitioner’s complaint of the SIT not investigating the willful failure of the fire brigade in Ahmedabad to respond to the calls made by the minority community, the Supreme Court stated:

*“The appellant had urged that the SIT had not investigated the willful failure of the fire brigade in Ahmedabad to respond to the calls made by the minority community being part of the criminal conspiracy. This argument is unfounded and tenuous. The fire services in Ahmedabad City come within the jurisdiction of Ahmedabad Municipal Corporation and not the State police or the State civil administration”.*²⁶

Under List II (State List) of the Seventh Schedule in the Constitution of India, entry 5 states that local government including powers and constitution of *municipal corporations*, district boards, mining settlement authorities, among other such local authorities come under the administration of the State government and the State legislatures have the power to make laws to govern these institutions.²⁷ Also in the case of *State of Rajasthan v. Ashok Khetoliya and Anr.*, Supreme Court held that the 74th Amendment does not take away the legislative competence of the State

²⁶ *Supra* note 21 at para 297

²⁷ *Supra* note 2, sch. VII.



legislature to legislate on the subject of local government. So the reasoning of the Supreme Court that the “fire services in Ahmedabad City comes under the jurisdiction of Ahmedabad Municipal Corporation and not the State Administration”, is grossly executed as fire services of Ahmedabad city would indirectly come under the State Administration and State legislation if it comes under the jurisdiction of Ahmedabad Municipal Corporation. Such reasoning is to be considered as an excuse to wrap the petitioner in wires of complex governmental structures for the purpose of causing confusion and it is to be regarded as opposed to the interest of justice.

Another example of autocratic practices by the court is when a suo motu case was initiated against the allegations of sexual harrasment of a Court office by the Ex-Chief Justice of India, Ranjan Gogoi. The desecration of the principle of natural justice was visible even to the naked eye. The principle of “Nemo Judex in Causa Sua”, which translates to “No one should be made judge in his own cause”, was grossly violated when the CJI, Ranjan Gogoi, sat on the bench with Justice Arun Mishra and Justice Sanjiv Khanna, to pass a judgement over the allegations of sexual harrasment made against the CJI himself.²⁸

Judicial Review and Judicial Autocracy

The case of *Zakia Jafri v. State of Gujarat* clearly shows that the judiciary and the Supreme Court is not an ideal institution and are vulnerable to faults and personal biases.

It can give decisions which are influenced and are not in the best interest of justice or society. The autocracy of courts or judicial autocracy is prevalent in India today, legitimised by the doctrine of judicial review – from judging the constitutionality of acts, laws and amendments to judging the constitutionality of administrative actions. This autocracy is strengthened with every arbitrary and biased decision of the court.

In the famous case of Sabarimala Temple,²⁹ misuse of the power of judicial power is evident. In the case a 4:1 majority of the Supreme Court held that the Sabarimala’ exclusionary custom is unconstitutional and held that the temple cannot bar the entry of women. More than 50 review petitions were filed against this. On November 13, 2018, the Supreme Court started hearing the review petitions in open court. One year later, on November 14th 2019, the Bench delivered a judgement keeping the review petitions pending and referring certain overarching constitutional questions, like the issue of women’s access to public religious institutions, to a larger Bench. Another issue arose, before the final arguments, pertaining to whether the Bench hearing review petitions can make a referral or not. The nine-judge bench of the Supreme Court upheld the referral order and held that the Court has the power to refer a point of law to a larger bench but did not provide any sufficient reasoning for the same.³⁰ The Supreme Court used the power of judicial review to interpret and declare the administrative action of referring a question of law to a larger bench as valid. However, by not providing any sufficient

²⁸ Ranjan Gogoi, *Justice for the Judge* 131-132 (Rupa Publications Pvt. Ltd., New Delhi, 2021).

²⁹ *Indian Young Lawyers’ Association v. State of Kerala* (2019) 11 SCC 1

³⁰ Sabarimala Review, available at:

<https://www.scobserver.in/cases/kantaru-rajeevaru-indian-young-lawyers-association-sabarimala-review-background/> (last visited on October 5th, 2021).



reasoning to the same it is clear that the question was arbitrarily decided and implemented. This can be regarded as a misuse of judicial review by the Supreme Court.

Another example of the Court's arbitrary use of judicial review is the Mullaperiyar Dam case.³¹ The structural stability of the 120 year old Mullaperiyar Dam in the Idukki district of Kerala was in question. In 1979, at a tripartite meeting chaired by K.C. Thomas, the then chairman of the Central Water Commission, decided that the water level was to be lowered to 136 feet against the full reservoir level of 152 feet. While Tamil Nadu wanted to raise the water storage level from the present 136 feet to 142 feet to cater to the needs of the farmers in five districts, Kerala opposed the move on safety grounds. In 2006, the Supreme ruled that Tamil Nadu should be allowed to raise the water level to 142 feet. To fight against this decision of the court, Kerala enacted Kerala Irrigation Water Conservation Act of 2006 under which Dam Safety Authority was formed, who submitted a report declaring that the structure of Dam was weak and posed threat to those living in the vicinity. The Supreme Court ignored the report and quashed the legislation and in 2014 ordered the water level to be raised to 142 feet. This judicial review of administrative action of the Central Water Commission and legislative action of the government of Kerala put people at risk and was harmful to society.

This is how Courts, through the use of judicial review of administrative actions, legislative actions and judicial actions, exercise their extended control over the organs of the government. Consequently, the arbitrary and prejudiced reviewing of actions of different organs of the government and judging their constitutionality forms the foundation of judicial autocracy.

Conclusion

Ex-CJI, N.V. Ramanam while delivering a speech at Justice S.B. Sinha Memorial Lecture said that *"in the absence of judicial review people's faith in our Constitution would have diminished. The Constitution is ultimately for the people. The judiciary is the organ which breathes life into the Constitution"*.³² The competency of the judiciary has been proven time and time again. From the Kesavananda Bharati case to the Maneka Gandhi case,³³ there are numerous examples of the Supreme Court being the champion of rights of the citizens. The problem arises where the Court's become biased in the favour of the government and the people in power.

Amal Sethi, in his paper *"Taking the Constitution away from the Supreme Court of India"*, stated reasons for this bias. He reiterates that the reason the Supreme Court takes the route of biases in deciding its cases is due to the "tolerance interval" of the government, which, simply put, means that the government will only tolerate and independent judiciary only when they see

³¹ *State of T.N. v. State of Kerala*, (2014) 12 SCC 696

³² In The Absence Of Judicial Review People's Faith In Our Constitution Would Have Diminished, available at: <https://www.livelaw.in/top-stories/chief-justice-of-india-nv-ramana-judicial-review->

legislative-executive-action-constitution-204590 (last visited on October 5th, 2022).

³³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248



some benefit in having one or when the backlash of curtailing a court is too intense. Further, explaining the Court's reasons for bias and influenced decisions, he said:

*“When courts decide profusely against the interests of the government and the public is not behind the court or, worse, is against it, there is not much in the government’s way to prevent them from curbing courts and compromising their independence. As a result, to ensure that they do not put strain on their ‘reservoir of goodwill’ and fall outside the government’s ‘tolerance interval,’ courts over protracted periods (1) limit their decisions against the government to ensure that the latter does not see a net negative in maintaining an independent court (2) decide as many cases as possible in favour of the government to make it see a value in maintaining an independent court (3) largely stay in line with majoritarian preferences to avoid public backlash (4) issue multiple low-stakes human rights and other popular judgements to cultivate public support”.*³⁴

The attempt to play safe between the public and the government poses as a cloud in front of Courts. Therefore, to avoid transgressing the tolerance interval of the government, the Court passes judgements in favour of the government. It is said hereinabove that when the public is not behind the court or worse is against them, curbing the judiciary's independence is not a difficult task for the government. Therefore, to avoid public backlash and to stay in line with majoritarian preferences, the Court sometimes also passes low-stakes and human rights judgement. So, when any legislation, judgement or decision

is passed that is against the government, the Court using the power of judicial review, among other judicial mechanisms, tries to curtail that legislative, judiciary or administrative action.

All in all, judicial review is an important power of the judiciary in a democracy. An efficient use of this power proves (and has proven) to be a foundation in legal development of the society. This efficient and unbiased use of judicial review can only be made a recurrent practice through strengthening the federal structure and federalist principles like separation of powers and system of checks and balances. If there is a legitimate control over the judiciary not based on power dynamics but on federalist principles, the shortcomings of judicial review can be solved. If this power of the judiciary of India is lost, it would be more detrimental to the society than the biased use of this power.

BIBLIOGRAPHY

Research Papers

1. Manish Tewari and Rekha Saxena, “The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism”, in Nicholas Aroney and John Kincaid, (eds.), *Courts in Federal Countries; Federalists or Unitarists?*
2. M. Asad Malik, “Changing Dimensions of Federalism in India: An Appraisal”, 02 *ILI Law Review* 85, 93 (2019).
3. Amal Sethi, “Taking the Constitution Away From the Supreme Court of India”, 33

³⁴ Amal Sethi, “Taking the Constitution Away From the Supreme Court of India”, 33 *National Law School of India Review* 4 (2021)



National Law School of India Review 4 (2021).

Statutes

1. The Constitution of India.
2. The Code of Civil Procedure, 1908 (Act 05 of 1908).

Case Laws

1. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
2. *Marbury v. Madison*, 5 US 137 (1803).
3. *State of Rajasthan v. Ashok Khetoliya*, 2022 SCC OnLine SC 295
4. *Ram Jawaya Kapur vs. State of Punjab* AIR 1955 SC 549
5. *ADM Jabalpur vs. Shivkant Shukla* AIR 1976 SC 1207
6. *Zakia Ahsan Jafri v. State of Gujarat and Anr.*, 2022 SCC OnLine SC 773
7. *Indian Young Lawyers' Association v. State of Kerala* (2019) 11 SCC 1
8. *State of T.N. v. State of Kerala*, (2014) 12 SCC 696
9. *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

Websites

1. Checks and Balances, *available at:* <https://www.drishtiiias.com/daily-updates/daily-news-editorials/checks-balances-1>
2. *Marbury v. Madison* (1803), *available at:* <https://www.archives.gov/milestone-documents/marbury-v-madison>
3. *Marbury v. Madison Case Summary: What you need to know*, *available at:* <https://supreme.findlaw.com/supreme-court-insights/marbury-v--madison-case-summary--what-you-need-to-know.html>

4. federalism, *available at:* <https://www.law.cornell.edu/wex/federalism>
5. *State of West Bengal & Ors vs Purvi Communication Pvt. Ltd.*, *available at:* <https://indiankanoon.org/doc/833158/>
6. *Sabarimala Review*, *available at:* <https://www.scobserver.in/cases/kantaru-rajeevaru-indian-young-lawyers-association-sabrimala-review-background/>
7. *In The Absence Of Judicial Review People's Faith In Our Constitution Would Have Diminished*, *available at:* <https://www.livelaw.in/top-stories/chief-justice-of-india-nv-ramana-judicial-review-legislative-executive-action-constitution-204590>

Books

1. I.P, Massey, *Administrative Law* (Eastern Book Company, Lucknow, 9th edn.,2017).
2. Ranjan Gogoi, *Justice for the Judge* (Rupa Publications Pvt. Ltd., New Delhi, 2021).
