
INTERSTITIAL ARTICULATION AND JUDICIAL REVIEW: THE SAVING GRACE OF INDIA

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ABSTRACT

It has been more than 75 years since India became an independent nation. In this short history of independent India, the Constitution has been amended more than a hundred times. New legislations are being brought into force every few years to accommodate for the changes in the society of India and the world. The role of courts through these years have been active in reviewing old and new legislations, amendments and stitching the gaps of existing law which is called Interstitial Articulation. The law of the land is not just the law made by the Legislators. The ruling of the Hon'ble Supreme Court also forms a part of the law of the land. While there is freedom to legislate as per the needs of the people, the court can actively review any amendment or legislation. The court also has the power to strike down laws and give new meaning to them if necessary. This article aims at exploring Interstitial Articulation and Judicial Review in India, how it evolved, the impact it has had and what impact it could potentially have with newer unexplored fields of law springing into existence.

Introduction

Interstices or gaps in simple words are those that arise due to the changing dynamics of a country. These interstices are stitched by the Hon'ble courts from time to time to give new meaning. What would our country be if it weren't for the interpretation and reinterpretation of the laws and the Constitution is a question for today's citizens and posterity to ponder over. As Justice Krishna Iyer in his typical style once held, "...*this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot-cry of discipline will not deter, of security will not scare, of discretion will not dissuade, the judicial process.*"¹ While there is no section or article that specifically guides the court in cases of bail, but the rule "bail, not jail"² or also used in common parlance as "Bail is the norm, jail is the exception" as laid out by the Hon'ble Judge is still good law. The impact of this rule laid down paved the way for all the courts of the country to protect and not abridge the fundamental rights of a person. This is a prime example of how the Hon'ble Courts step in to bridge the gap in the legislations.

Evolution

The letter of the law versus the spirit of the law has been an age old question that has had numerous references in historical works. Shakespeare's *The Merchant of Venice*³ is a well-known play which ends with the spirit of law presiding over the letter of the law. The ancient Indian epic *The Mahabharata*⁴ has its foundation in the concept of *Dharma* which, on occasions involved reinterpretation of the law that existed at that time to uphold the spirit of the law over the letter. The aforementioned examples have manifested in the form of judicial activism and interstitial articulation in modern day India.

Origin of Interstitial Articulation and Judicial Review

One of the most influential legal scholars of the 20th century, Henry Hart, in his book *The Concept of Law*⁵ described Law as a union of Primary and Secondary Rules. Primary rules are those which have to be mandatorily followed by the people. These rules demand people to

¹ *Charles Sobraj v Supdt., Cent. Jail*, (1978) 4 S.C.C. 104, ¶ 4 (India).

² *State of Rajasthan v Balchand*, (1977) 4 S.C.C. 308, ¶ 2 (India).

³ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (Cedric Watts ed., Wordsworth Editions 2000).

⁴ VED VYAS, *THE MAHABHARATA*, (Bharatiya Vidya Bhavan 64th ed., 2018).

⁵ H.L.A. HART, *THE CONCEPT OF LAW* (3rd ed. 2012).

either perform an action or abstain from it. Secondary Rules on the other hand guides the introduction of new rules that may amend or replace the primary rules. This definition of a legal system by Hart is indeed functional and India is a good example to demonstrate the same. Primary Rules are laid out by the Legislature. Secondary Rules are made through amendments by the Legislature and through Judicial Activism and Interstitial Articulation by the Hon'ble courts. Judicial Activism is a facet of Interstitial Articulation. It is essential to maintain the smooth functioning of a country and without this power of the courts, there would be unfettered power in the hands of the Government which could potentially lead to chaos and disorder in the society.

Impact

Lord Denning was arguably one of the most celebrated judges in the history of England. He is also known for certain controversial views, but nonetheless, his views on judicial review and reform still hold great value to this day. His philosophy, put in his words is "Let justice be done; Freedom under the law; Put your trust in God."⁶ He believed in overriding certain laws for the sake of doing justice. The Indian take on doing complete justice is contemplated by Article 142⁷ of the Indian Constitution which gives the Hon'ble Supreme Court power to do complete justice. However, the Doctrine of Harmonious Construction does not permit overriding any law but giving laws meaning such that when read together, they are workable. Article 141⁸ of the Indian Constitution establishes the Supreme Court's decisions binding all High Courts. This essentially means that the Hon'ble court's ruling is the law of the land. The Hon'ble court's power is binding and can therefore stitch the gaps in the law without depending on the Legislature.

What it is today

The application of fundamental rights has moved from vertical application to horizontal application. The responsibility of the courts therefore has increased. Vertical rights are those that are between the Government, its entities and private individuals. The rights that have an impact between two or more private persons are said to be horizontal. Justice BV Nagarathna in her opinion in the *Kaushal Kishor v State of UP*⁹ case has analyzed the jurisprudence of

⁶ ALFRED THOMPSON DENNING, THE FAMILY STORY (Butterworths, 1981).

⁷ INDIA CONST. art. 142.

⁸ INDIA CONST. art. 141.

⁹ *Kaushal Kishor v State of U.P.*, (2023) 4 S.C.C. 1 (India).

various jurisdictions around the world with respect to the application of fundamental rights. One of the questions before the court was whether a writ petition to enforce fundamental rights against citizens would be maintainable or not. For the sake of not diverging from the topic, the court concluded that it is the responsibility of the courts as well as the legislature to protect fundamental rights of all citizens and for them to do the needful accordingly. This case analyzed various Indian and foreign judgements that discussed the idea of fundamental rights and the role of legislature and courts in protecting them. This case has a profound impact for reinforcing the power of the Hon'ble Supreme Court to judicially review and articulate as and when a situation deems it necessary to do so.

What Would Be the Situation if there was no Review by the Courts?

The case that had a massive impact on the power of courts to interstitially articulate and judicially review the law of the land was the case of the *Kesavananda Bharti v State of Kerala*.¹⁰ There have been numerous more cases such as the *Maneka Gandhi v Union of India*¹¹ which dealt with Right to Life. Article 21¹² was given a wider meaning by the Hon'ble court. The meaning of the article was far wider than what the mere text of the section read. Articles 14¹³, 19¹⁴ and 21¹⁵ were also linked by the Hon'ble Supreme Court which were otherwise read independently. But the sheer impact of the *Kesavananda*¹⁶ case makes it a landmark judgement.

The gravity of the judgement of the *Kesavananda Bharti*¹⁷ case can only be appreciated through understanding the brief background of the case. The then ruling government's policies had been overruled in the cases preceding the *Kesavananda Bharti*¹⁸ case. Firstly, in the *Golaknath*¹⁹ case, the Hon'ble Supreme Court ruled against the Government of the day by holding that the parliament did not have unlimited powers to amend the constitution and could never abridge the fundamental rights under part III of the Indian Constitution. Secondly, in the *Bank Nationalization*²⁰ case, the Hon'ble Supreme Court once again ruled against the Government

¹⁰ *Kesavananda Bharati v State of Kerala*, (1973) 4 S.C.C. 225 (India).

¹¹ *Maneka Gandhi v Union of India*, (1978) 1 S.C.C. 248 (India).

¹² INDIA CONST. art. 21.

¹³ INDIA CONST. art. 14.

¹⁴ INDIA CONST. art. 19.

¹⁵ INDIA CONST. art. 21.

¹⁶ *State of Kerala*, (1973) 4 S.C.C. 225 (India).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Golak Nath v. State of Punjab*, 1967 SCC OnLine SC 14 (India).

²⁰ *Rustom Cavasjee Cooper (Banks Nationalisation) v Union of India*, (1970) 1 S.C.C. 248 (India).

which had nationalized fourteen banks overnight and had refused to pay the necessary compensation to them. The 24th and 25th amendments to the Indian Constitution were specifically aimed at overruling the aforementioned cases. There was a huge socialist movement that led to the formation of the Government in 1971. These amendments, more specifically sought to amend articles 13²¹, 368²² and 31²³ thereby attempting to overrule the *Golaknath*²⁴ and *Bank Nationalization*²⁵ judgements. Granville Austin, in his book *Working a democratic constitution*, recounts some of the instances that showed the then Government's disdain for the judiciary and its ruling against their policies.²⁶ There was also the 29th amendment that inserted two amendments made to the Kerala Land Reform Act, 1963 in the Ninth Schedule to avoid any challenge on the grounds of violation of fundamental rights.

All these amendments were challenged and the Hon'ble Court ruled against the unlimited power of the parliament to amend the constitution by a wafer thin majority of 7:6. The major breakthrough of this case was *The Basic Structure Doctrine* that emerged. The majority ruled that this basic structure has always existed and can never be amended. Although different judges gave different definitions of the Basic Structure and what comes under its ambit, Sovereignty, Federalism, Democracy etc are all parts of the Basic Structure. The court, by imposing a limitation on the Parliament and by establishing its power to judicially review, prevented what could have been a sure massacre of the Constitution.

Future Areas of Application and Conclusion

The analysis so far has been restricted to constitutional laws. But, newer areas such as space law have received some concerns, primarily in the domain of commercializing space activities. Space tourism, extraction of potentially finite and important resources from outer space etc are some of the areas of concern due to the lack of concrete laws.²⁷ With rapid advancement in technology and increased competition among countries, it is only fair to conclude that interstitial articulation by courts around the world will have a massive impact. Another reason

²¹ INDIA CONST. art. 13.

²² INDIA CONST. art. 368.

²³ INDIA CONST. art. 31.

²⁴ State of Punjab, 1967 SCC OnLine SC 14 (India).

²⁵ Union of India, (1970) 1 S.C.C. 248 (India).

²⁶ GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (Oxford University Press 2003).

²⁷ Gbenga Oduntan, *Aspects of the International Legal Regime Concerning Privatization and Commercialization of Space Activities* 17 GJIA 79, 81.

for this conclusion is the lack of international agreements on space activities. There have been only five agreements on space and related activities from the United Nations. India has ratified four of them and has signed one.²⁸ As per the United Nations, the last agreement signed in relation to this was on 14 January 1975.²⁹ These facts only show the need of the courts to step in and stitch in such gaps.

The adage “*Change is the only constant*” is used in common parlance and its applicability is pertinent especially in the legal system of India. Numerous laws date back to decades old legislations which have withstood the test of time only due to the courts that have stepped in, providing necessary interpretation. The wafer thin majority of the Kesavananda³⁰ case is a reminder for all members of the legal fraternity and the common man that India might have been in a diametrically opposite position if the Hon’ble Supreme Court hadn’t stepped in.

²⁸ *Status of International Agreements relating to Activities in Outer Space*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS (Jul. 21, 2025, 12:37 PM), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html>.

²⁹ *Space Law Treaties and Principles*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS (Jul. 21, 2025, 12:37 PM), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html>.

³⁰ State of Kerala, (1973) 4 S.C.C. 225 (India).