

# *STATE OF WEST BENGAL V. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS: IS JUDICIAL REVIEW THE INDIAN JUDICIARY'S TRUMP CARD?*

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## **I. Introduction**

The case of *State of West Bengal v. The Committee for Protection of Democratic Rights*,<sup>1</sup> presents challenging questions to Indian Constitutional law jurisprudence with regard to the power of the judiciary *vis-à-vis* other organs of the state. It is a landmark judgment where the Supreme Court held that a High Court can direct the Central Bureau of Investigation (hereinafter, CBI) to investigate an offence without the consent of the state government within whose territorial jurisdiction the offence is alleged to have taken place. This power is clearly an executive one, and is one that has been expressly denied to the Parliament. Thus, while the petitioner argued relying on the doctrine of separation of powers and the federal setup envisaged under the Indian Constitution, the Court rebutted the petitioner by using its power of judicial review. Thus, the case presents an interesting battle between the legislature, executive and judiciary, bringing the scope of judicial power under examination.

This case comment argues that while the conclusion of the Supreme Court is correct, the Court has failed to give cogent reasoning to support its decision. The Court in its judgment basically placed one basic feature of the Constitution - judicial review - against the other two which had been put forth by the petitioner. The comment argues that instead of using the power of judicial review as a trump card, the Court should have addressed the Constitutional and legal issues arising in the matter to objectively analyse the scope of its powers.

The critique firstly describes the background of the case, giving in brief its facts and judgment. Next, it examines whether the basic structure doctrine has been correctly applied by the court. Thirdly, it examines the scope of the powers of the High Court in the light of the federal setup of the Indian Constitution and the doctrine of separation of powers. On the basis of the analysis, this critique highlights the flaws and implications of the Court's reasoning and suggests the approach that it should have adopted instead.

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1 2010 (2) S.C.A.L.E. 467.

## II. Background

In *State of West Bengal v. The Committee for Protection of Democratic Rights*,<sup>2</sup> a five-judge Bench of the Apex Court was called upon to decide whether the High Court, under Article 226 of the Constitution of India, can direct the CBI, established under the Delhi Special Police Establishment Act, 1946 to investigate an offence alleged to have taken place within the territorial jurisdiction of a state, without the consent of the state government. The question arose when the Calcutta High Court directed the CBI to take up investigation in a case where eleven members of a political party in West Bengal were killed and grave allegations were made against the ruling party. After discovering serious lapses and inadequacies in the investigation even after more than three months from the date of the incident, the High Court concluded that a strong suspicion might arise as to the fairness of investigation by the state police and hence, handed over the investigation to the CBI.<sup>3</sup> To challenge this direction, the petitioner approached the Supreme Court where the matter was eventually placed before a Constitutional Bench.

The petitioner put forth an argument based on two basic features of the Indian Constitution - federal setup and separation of powers. As per Constitutional<sup>4</sup> and statutory<sup>5</sup> provisions, the State Legislature has jurisdiction over police matters and the Parliament cannot encroach upon it without the consent of the concerned State government. It was argued that these restrictions over the powers of the Parliament, reflective of our federal setup, extend also to the judiciary, barring the courts from directing the police of one state to investigate an offence in another state without its consent, as such a direction would be in breach of the federal setup envisaged by the Constitution. It was further argued that the separation of powers doctrine prevents the courts from exercising the executive power of directing the police force of one State to carry out investigations in another without the latter's consent. Even in situations where the investigations are not carried out impartially, the judiciary should leave the matter to the wisdom of the Parliament to enact an appropriate legislation. In short, the petitioner argued that the impugned direction of the High Court is violative of the federal structure and separation of powers doctrine, both of which are basic features of the Constitution.

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2 2010 (2) S.C.A.L.E. 467.

3 *Committee for Protection of Democratic Rights v. State of West Bengal*, 2001 Cri.L.J. 2307.

4 Entry 2A of List I and Entry 2 of List II, Seventh Schedule, Constitution of India.

5 Section 6, Delhi Special Police Establishment Act, 1946.

The Supreme Court rejected the petitioner's arguments and concluded that a direction by the High Court under Article 226 of the Constitution to the CBI to investigate an offence committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of powers and shall be valid in law. The Court held that judicial review itself being a basic feature, while exercising powers under Articles 32 and 226, the courts are merely discharging their duties and not violating the federal setup or the separation of powers doctrine.

### III. Application of the Basic Structure Doctrine

To justify the judiciary's power of directing the CBI to investigate offences in other States without its consent, the Court ended up pitting one basic feature of the Constitution (judicial review) against two others (federal structure and separation of powers) put forward by the petitioner. However, the question of the violation of basic structure of the Constitution does not even come into the picture in this case as the basic structure doctrine is used only when a challenge has been made to a Constitutional amendment.<sup>6</sup> This case does not deal with any Constitutional amendment, but with the action of the *judiciary* itself. Extending the basic structure doctrine to judicial actions is taking it far beyond the limits within which it was intended to apply.

To complicate matters further, the Court concluded that “*any law that abrogates or abridges [fundamental] rights would be violative of the basic structure doctrine*”. This can have two far-reaching implications: first, that the fundamental rights are part of the basic structure; and second, that even ordinary legislations are now subject to the basic structure doctrine. The applicability of basic structure doctrine to ordinary legislation has been debated before. In *Indira Gandhi v. Raj Narain*,<sup>7</sup> the majority, refuting the contrary arguments of Beg, J., held that the Constitution already imposes restrictions on ordinary law-making power, and to subject such statutes to basic structure would mean rewriting the Constitution and robbing the legislature of acting within the Constitutional framework. This view was accepted in later cases.<sup>8</sup>

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6 See, e.g., *Kesavanada Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461; *Indira Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299; *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789; *Waman Rao v. Union of India*, () 2 S.C.C. 362; *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861.

7 A.I.R. 1975 S.C. 2299.

8 *State of Karnataka v. Union of India*, [1978] 2 S.C.R. 1; *V.C. Shukla v. Delhi Administration*, (1980) 2 S.C.C. 665; *Minerva Mills (II) v. Union of India*, (1986) 4 S.C.C. 222; *Kuldip Nayyar v. Union of India*, (2006) 7 S.C.C. 1. However, after *Waman Rao v. Union of India*, (1981) 2 S.C.C. 362, followed by *I.R. Coelho v. State of Tamil Nadu*, I.R. 2007 S.C. 861, position has changed with regard to statutes enjoying the immunity of Ninth Schedule of the Constitution.

The Court has unreasonably expanded the scope of the basic structure doctrine by bringing within its ambit legislative and judicial actions, without even examining these earlier decisions or discussing the implications of such an expansion. Any further expansion of the doctrine, by including even executive actions within its purview, would virtually replace or equate the fundamental rights with the basic structure doctrine, subjecting any state action, legislative, executive or judicial, to the basic structure.

#### **IV. Powers of the High Court**

Article 226 gives High Courts the power to issue directions, orders or writs for the enforcement of fundamental rights and for any other purpose. In the present case, the Court expanded the scope of Article 21 and held that Article 21 protects not only the “rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence”. In certain situations, even a witness to the crime may seek such protection. This is a significant step in the jurisprudence of Article 21 in relation to criminal law which till now has focused much more on the rights of the accused than of the victim.<sup>9</sup>

Hence, the judgment implies that if the right of a victim to a fair and impartial investigation is being violated, the High Court can issue directions to the CBI by exercising powers of judicial review under Article 226. What needs to be examined is whether this power gets whittled down by any of the arguments put forth by the petitioner in relation to the federal setup and separation of powers. Instead of examining these arguments under the basic structure doctrine, it needs to be seen whether any such restriction has been provided by the Constitution on the High Court's power of judicial review.

##### *A. Federal Setup*

The petitioner argued that if the Parliament passes a law authorizing the police of one State to investigate in another without its consent, such law would be invalid. Hence, even the judiciary, being subservient to the Constitution, cannot pass any such direction disturbing the federal setup provided under the Constitution. In the context of the federal setup, the

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<sup>9</sup> E.g., various aspects of rights of prisoners and arrestees have been read under Article 21 in *State of Maharashtra v. Prabhakar Pandurang*, A.I.R. 1966 S.C. 424; *Sunil Batra v. Delhi Administration*, A.I.R. 1978 S.C. 1675; *D.K. Basu v. State of West Bengal*, A.I.R. 1997 S.C. 610; *PUCL v. Union of India*, A.I.R. 1997 S.C. 1203; right to legal aid to an accused has been recognized in *Hoskot v. State of Maharashtra*, A.I.R. 1978 S.C. 1548; *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1369; *Khatri v. State of Bihar*, A.I.R. 1981 S.C. 928; *Suk Das v. Union Territory of Arunachal Pradesh*, A.I.R. 1986 S.C. 991.

Court concluded that since the judiciary itself is the protector of the federal structure of the Constitution, a direction under Article 226 to uphold the Constitution cannot be termed as violating the federal structure.

The Court has not adequately analyzed the power of the High Courts under Article 226. While the petitioner is correct in asserting that such a law, if passed by the Parliament would be invalid, it needs to be understood that this illegality is not because of violation of a basic feature, but because the Parliament lacks *legislative competency* to enact such a law as per Article 246. The issue has to be examined within the framework of the Constitution, which itself provides for the federal setup. It provides for distribution of legislative and executive powers between the Centre and the States.<sup>10</sup> But it provides for an integrated judiciary wherein both the High Courts and the Supreme Court interpret State and Union laws, having jurisdiction and providing remedies in all Constitutional law cases.<sup>11</sup> With the insertion of clause (2) in Article 226, a High Court within the territorial jurisdiction of which the cause of action arises, can issue directions to any government or authority situated even beyond its territorial jurisdiction.<sup>12</sup> Hence, where an explicit restriction has been placed on the Parliament's powers under Article 246 read with Seventh Schedule, and in the absence of any such restriction over the powers of the High Court, the analogy drawn by the petitioner is flawed. It is by reason of such a Constitutional setup that the High Court's direction under Article 226 is valid and not merely because the judiciary itself is the protector of the federal setup, as held by the Court.

### *B. Separation of Powers*

One of the questions involved in the case is whether the judiciary can exercise the executive power of directing the police force of another State to carry out investigations without the consent of that State, and can the doctrine of separation of powers curtail the power of judicial review. The Court once again used its trump card of judicial review and held that the exercise of the power of judicial review by the High Court would not amount to an infringement of the separation of powers principle.

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10 *State of Karnataka v. Union of India*, A.I.R. 1978 S.C. 68; *State of West Bengal v. Union of India*, A.I.R. 1963 S.C. 1241; *Ramanaiah v. Superintendent of Central Jail*, A.I.R. 1974 S.C. 31; *S.R. Bommai v. Union of India*, A.I.R. 1994 S.C. 1918.

11 *State of West Bengal v. Union of India*, A.I.R. 1963 S.C. 1241; *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149; *State of Bihar v. Bal Mukund Sah*, A.I.R. 2000 S.C. 1296; Constituent Assembly Debates, Vol. 7 (1948-49) at 34, 36-37.

12 See *O.N.G.C. v. Utpal Kumar Basu*, (1994) 4 S.C.C. 711; *Navinchandra Majithia v. State of Maharashtra*, (2000) 7 S.C.C. 640; *Kusum Ingots and Alloys Ltd. v. Union of India*, A.I.R. 2004 S.C. 2321.

The trump card has been correctly used here as judicial review can be seen as an exception to the separation of powers principle.<sup>13</sup> The Court examined that in the modern times, this doctrine no longer restricts itself to a rigid separation of powers between the three organs. It ensures a limit on active jurisdiction of each organ, check and balance over the activities of other organs, and is also meant to check government inaction.<sup>14</sup> According to retired Supreme Court Judge Ruma Pal, the Constitution allows for parallelism of power,<sup>15</sup> with hierarchies between the three organs in particular fields which must be maintained and balanced by each organ subject to checks by the other two.<sup>16</sup> Where there is inaction by the executive for whatever reason, in exercise of its Constitutional obligations the judiciary can provide a solution till such time as the legislature or the executive act to perform their roles.<sup>17</sup> The judiciary has not only issued directions to the executive to perform its functions,<sup>18</sup> but has also exercised executive power often, an example being the judiciary's active role in environmental matters.<sup>19</sup> Hence, the judgment of the Court is in tune with the Constitutional interpretation and modern understanding of separation of powers doctrine.

### *C. Limits on the Powers of the High Court*

This judgment may raise concerns about the limits of the power of the High Courts to give directions to CBI and about the flooding of courts and CBI from cases seeking investigation by the CBI. Realizing this, the Court cautioned that this power should be exercised sparingly, "*where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights*". It has been alleged that this disclaimer has been couched in too wide terms to be of any purpose.<sup>20</sup> However, where an individual is in principle or by right entitled to relief, it would be wrong for the judiciary to deny relief on

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13 B.N. Srikrishna, *Skinning a Cat*, (2005) 8 S.C.C. (J.) 3.

14 *State of Uttar Pradesh v. Jeet S. Bisht*, (2007) 6 S.C.C. 586.

15 See S.P. SATHE, ADMINISTRATIVE LAW, 22 (7th ed. 2006), who argues that each organ is required for all three functions.

16 RUMA PAL, JUDICIAL OVERSIGHT OR OVERREACH: THE ROLE OF THE JUDICIARY IN MODERN INDIA (Centre for the Advanced Study of India, Case Working Paper No. 03/2008).

17 *Vineet Narain. v. Union of India*, (1998) 1 S.C.C. 226.

18 See, e.g., *B.L. Wadehra v. Union of India*, A.I.R. 1996 S.C. 2969; *M.C. Mehta v. Union of India*, (1998) 6 S.C.C. 60.

19 See, e.g., *Litigation and Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652; *Law Society of India v. FACT*, A.I.R. 1994 Ker. 308; *Vijay Singh Punia v. RSPCB*, A.I.R. 2003 Raj. 286.

20 Rajeev Dhawan, "SC Errs on CBI Verdict", Mail Today, Feb. 22, 2010, available at <http://epaper.mailtoday.in/2222010/epaperpdf/2222010-md-hr-10.pdf> (last visited: April 10, 2010).

such grounds of policy like preventing excessive litigation.<sup>21</sup> Hence, the Supreme Court's approach rightly allows the courts from granting relief where a right has been violated, while also expecting some extent of self-discipline from them.

## V. Conclusion

There is no doubt that judicial review is one of the most important aspects of the Indian Constitution and must be actively used by courts to ensure the protection of the rights of the people. However, the courts should not rely only on the principle of judicial review to trump any argument that may be presented before it. In this case, the Court emphasized and relied a little too much on the concept of judicial review in order to justify its powers of giving directions to the CBI. For example, it quoted the opinion of Y.K. Sabharwal, C.J, expressed in *I.R. Coelho v. State of Tamil Nadu*<sup>22</sup> stating that “*Courts may be forced to modify the principle of parliamentary sovereignty...in cases where judicial review is sought to be abolished*”. The Court also concluded that “*judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity*”. Such overemphasis on judicial review was not only unnecessary in the circumstances of the case, but may also invite criticisms of over-activism by giving an implication of usurpation of powers and self-declared supremacy over the other organs.

The application of the basic structure doctrine by the Court without adequate debate on the established jurisprudence on the same, and declaring the law through various propositions mentioned only in the conclusion without backing them with any reasoning in the main judgment can have far-reaching implications. With due respect to the Supreme Court, it is submitted that the Court should have rather addressed the arguments directly, seeking answers from within the framework of the Constitution and its provisions. On the contrary, while the Court discussed celebrated doctrines of judicial review, basic structure, independence of judiciary, the expanding scope of Article 21, etc.; it barely touched upon how the right of a victim to a fair investigation falls within Article 21 and mentioned it only in the conclusion. The Court declared that the High Court's direction under Article 226 is valid even without examining whether this right had actually been violated in the present facts.

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21 RONALD DWORKIN, *LAW'S EMPIRE* 154 (1986).

22 A.I.R. 2007 S.C. 86.

Even though the final decision of the Court is correct, the flawed reasoning poses various questions which are not merely academic in nature, but can have serious practical implications. A higher reliance on legal and Constitutional provisions than on broad doctrines to reach the same conclusion might have resulted in greater acceptance of the judgment.