January 1, 2005

Vineet Narain v Union of India: A Court of Law and Not Justice: Is the Indian Supreme Court Bound by the Indian Constitution

Shubhankar DAM, City University of Hong Kong

Available at: https://works.bepress.com/shubhankar_dam/12/
**Vineet Narain v Union of India:** “A court of law and not of justice”—is the Indian Supreme Court beyond the Indian Constitution?

### Activist Courts: an introduction

The last twenty five years are an “impressive” chronicle of the Indian Supreme Court in action. Its novel functioning has changed the internal dynamics of Indian polity in a manner unknown to constitutional democracies. From an institution entrusted with the task of adjudicating disputes between parties, the Indian Supreme Court has transformed itself into an institution enjoined to promote the ideals of a socio-economic and political justice. Its prior role as an “adjudicator” has undergone reappraisal. The judges therein are no more adjudicators but activists, energetically contributing to the accomplishment of India’s constitutional vision. In this new creation, they not only interpret law, but also make and implement it, or at least try to do so. Within this supra-constitutional denotation, judges now function as searchlights constantly probing the actions of the legislature and executive, often acting on their behalf. “Social Action Litigation,” variedly known as “Public Interest Litigation,” has largely achieved this functional recast.

Social action litigation has so deeply affected constitutional adjudication in India that judicial functioning today sans it is almost incomplete. The role that began with freeing undertrial prisoners from jails in remote districts of Bihar has engulfed many areas of crucial importance in subsequent years. Indeed there is hardly any area of constitutional importance that has remained untouched by the passion of social action litigation. Three concurrent phases have dominated the development of social action litigation in India. Firstly, the “creative” phase wherein the Court employed social action litigation to widen...
the repertoire of fundamental rights under the Constitution. Secondly, the
lawmaking phase wherein it “legislated” on areas of constitutional importance
by developing new jurisprudence or importing principles from the inter-
national corpus of law9 and finally the “super-executive” phase, making
policies and implementing them. The “least dangerous branch”10 in history
became India’s most assertive organ.11

This chronicle of an activist judiciary, however, is not restricted to Indian
frontiers. The performance of the Constitutional Court under the South
African Constitution has illustrated similar approaches to constitutional adjudica-
tion. The Constitutional Court has actively promoted the integration of
socio-economic rights with the civil and political rights under the South
African Constitution. In the Government of the Republic of South Africa v
Grootboom12 discussing the nature of judicial obligation in enforcing the right
to housing, Judge Yacoob held that the “Constitution entrenches both civil and
political rights and social and economic rights . . . There can be no doubt that
human dignity, freedom and equality . . . are denied to those who have no
food, clothing or shelter . . . “13 Explaining that the right of access to adequate
housing cannot be seen in isolation, he held that the “state is obliged to take
positive action to meet the needs of those living in extreme conditions of
poverty, homelessness or intolerable housing . . . “14 In Soobramony v Minister
of Health (Kwo Zule-Natal), the Court went a step further holding that “the
State is obligated to devise and implement a coherent and coordinated
programme to meet its obligations . . . Where the state does not any programme, the
Court will not hesitate in holding the state in breach of its obligations”.15

The activist approach of the Constitutional Court has, however, been
tempered by the recognition that social welfare provisions are resource
driven.16 The approach, though progressive in nature, acknowledges the
limitations of the role of a judiciary in a constitutional democracy. The juristic
endeavors of the Indian Supreme Court, on the other hand, are a study in
contrast. The decisions increasingly defied legal basis, lacked jurisprudential
soundness and contradicted constitutional provisions. The cause of justice
became the ultimate credo of the Indian Constitution and the Supreme Court,
the temple of justice. But there arises a question: is there anything that restrains
the Supreme Court in its pursuit of justice? Can the Supreme Court,

8 The right to “life and personal liberty” under Art.21 of the Constitution has been expanded to
strange limits to include, amongst others, right to shelter, right to health, right to work, right
to environment, right to clean air, right to clean water, right to privacy, right to information, right to
speedy trial, right to fair trial, right to fair hearing, right against unnecessary handcuffing, right against
cruel punishment, right to legal aid and even right to medical aid in government hospitals.
10 See Alexander Hamilton, Federalist No.78.
at 5 (Jour).
12 2000 (1) S.A. 46 (CC)
13 ibid para.23
14 ibid para.24
15 ibid para.95
16 32/97 para.11

[2005] P.L. Summer © Sweet & Maxwell and Contributors
purportedly acting under a constitutional framework, override the same in ensuring justice? In other words, is the Indian Supreme Court bound by the Indian Constitution? *Vineet Narain v Union of India*\(^1\) illustrates how the Supreme Court has systematically violated the provisions of the Indian Constitution in its quest to serve the ends of “justice.” It demonstrates the Court’s contempt for substantive limitations and its refusal to be bound by them. But this metamorphosis from a “court of law” to a “court of justice”, I will argue, is itself a violation of the role the Constitution assigns to the Court. Unless the Supreme Court exercises restraint; the activist profile may be the first footprints of an impending constitutional lawlessness in India.

**Vineet Narain v Union of India: facts and beyond**

The writ petition has its history in the interrogations and raids conducted by the Central Bureau of Investigation (“CBI”) consequent to the arrest of an alleged Hizbul Mujahideen official, Askaf Hussain Lone, on March 25, 1991. The raids led to the seizure of two notebooks containing detailed accounts of vast payments made to persons identified only by initials. They corresponded to the initials of various high ranking politicians, in and out of power, and of high ranking bureaucrats. Nothing having been done in the matter of investigating the contents of the diaries, a writ petition was filed in “public interest” under Art.32(2). The allegations in gist were that the government agencies like the CBI and the revenue authorities had failed to perform their duties and legal obligations inasmuch as they had failed to investigate the matters; that the apprehension of terrorists has led to the discovery of financial support to them by clandestine and illegal means using tainted funds; that the matter disclosed a nexus between crime and corruption at high places in public life and it posed a serious threat to the integrity, security and economy of the nation and that the Government agencies be compelled to duly perform their legal obligations and to proceed in accordance with law against every person involved, irrespective of where he was placed in the political hierarchy.\(^1\)\(^8\) To this, the Supreme Court thus responded:

> “The accusations, if true, revealed a nexus between high ranking politicians and bureaucrats who are alleged to have funded by a source linked with the source funding the terrorists . . . The continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer. In view of the persistence of that situation, it became necessary as the proceedings progressed to make some orders which would activate the CBI and some other agencies . . .”\(^1\)\(^9\)

The sympathetic Supreme Court again added:

> “The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold . . . It cannot be doubted that there is a

\(^1\) AIR. 1998 S.C. 889.
\(^8\) n.13 above, para.10.
\(^9\) ibid. at [9].
serious human rights aspect involved in such a proceeding because the prevailing corruption in public life, if permitted to continue unchecked, has ultimately the deleterious effect of eroding the Indian polity.”

While the concerns the Court raised were important from a nation’s perspective; nothing it said explained the basis of its jurisdiction. The issues were both important and compelling. But do all important issues justify judicial intervention? While the Supreme Court referred to “serious human rights” in general, it did not explain any particular fundamental right that the petition sought to enforce. As will be argued below, the Supreme Court took cognisance of this “public interest” matter but at a serious cost of disregarding constitutional provisions.

Article 32: the Supreme Court is not a “bureaucracy” in black robes

The jurisdiction of the Supreme Court under Art.32(2) is limited to the enforcement of fundamental rights guaranteed in Pt III of the Constitution. Since the writ petition was filed under Art.32, it becomes obligatory to ask the most elementary question: which fundamental right was the Supreme Court seeking to enforce in the petition? The Court does not address the question until the judgment nears its conclusion. The Supreme Court tried only cursorily to justify its intervention in this petition on grounds of enforcing the fundamental right to equality. But whose right to equality was the Court enforcing? The Court noted: “... the need of equality [is] guaranteed in the Constitution. The right to equality in [such] a situation... is that of the Indian polity and not merely of a few individuals.” Right to equality under Art.14 of the Constitution is granted to persons only. Was the Court according “person” status to the “Indian polity”? If so, who is representative of the Indian polity: all the people of India, a few groups of people, a few people? Does the “Indian polity” have a separate existence from the individual persons who constitute the polity in a way that it can enforce a fundamental right to equality? Is it a juridical entity as commonly understood in corporate theory? The thoughtless statement by the Court reflects, on the one hand, a complete non-application of the mind to the basics of constitutional law and on the other, a poor attempt to justify its jurisdiction. Such unmindful comments are illustrative of the larger pathology that ails the Indian judiciary.

Neither did the Supreme Court ask the second elementary question. Did the petitioner, Vineet Narain, have the standing within the liberal standards of locus standi to pursue the matter? The petition, the Supreme Court noted in the

---

20 ibid. at [52].
21 The text in full reads: “The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part”.
22 n.7 above, at [50].
23 ibid.
24 The text in full reads: “The State shall not deny to any person equality before law or the equal protection of law”.

[2005] P.L. Summer © Sweet & Maxwell and Contributors
very beginning, was filed by a “public spirited” journalist in the “public interest”.26 Yet it is not irrelevant to ask the question: whose “public interest” was the journalist seeking to promote? The test for the expanded rule of _locus standi_ under Art.32 was laid down in _S.P. Gupta v Union of India_27 in the following words:

“Where a . . . person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position; unable to approach the Court for relief, any member of the public can maintain an application for an appropriate . . . writ . . . in case of breach of any fundamental right . . . in this Court under Art.32 . . .”

The liberalised principle of standing in _S.P. Gupta_ institutionalised “public interest litigation”; but it is not the same as matters involving the “public interest”. The test of “public interest litigation” relates to the _person_ who approaches the Court rather than the matter in which he seeks a remedy. The subject-matter under Art.32(2), as mentioned earlier, is limited only to enforcing fundamental rights. Quite clearly the Court was unable to make a distinction between a writ _filed in_ the “public interest” and a “public interest” writ. While the former refers to a writ filed by a _person_ on behalf of individuals who, for certain specified reasons, are unable to access the Court, the latter pertains to a writ where the _subject-matter_ is one of “public interest”. The Court has the jurisdiction to deal with a matter filed _in_ the public interest but not with all matters of public interest. Only those matters _filed in_ the public interest that include a violation of fundamental rights are within the jurisdiction of Art.32(2). The petition by the “public minded” Vineet Narain, in substance, involved issues only of “public interest” and _not_ the enforcement of any fundamental rights under Pt III. Could the Supreme Court have entertained the petition under Art.32(2)?

**Judicial governance: seeds of constitutional lawlessness?**

The Supreme Court partly sought to explain its intervention in “view of the common perception shared by everyone including the Government of India . . . of the need for the insulation of the CBI from extraneous influence of any kind”.28 This “common perception”, the Court felt, made it “imperative that _some action [be] urgently taken_ to prevent the continuance of the situation with a view to ensure proper implementation of the rule of law”.29 It is undeniable that it is a “common perception” that the CBI must be insulated from extraneous influences of the bureaucracy. But must all “common perceptions” be the subject-matter for the Supreme Court to adjudicate upon and find a remedy? Does it follow from the proposition that there exists a

---

26 n.7 above, at [1].
28 n.7 above, at [50].
29 _ibid._

“common perception” that “some action [be] urgently taken” to remedy the problem of the “common perception”?

There is a “common perception” shared by everyone including the Government of India in the existing political scenario that there exists a threat to the security of the State from terrorist activities. Should the Supreme Court find a solution to terrorism in a petition under Art.32(2)? Judge Verma in his judgment rightly pointed out that the petition “required innovation of a procedure within the constitutional scheme of judicial review to permit intervention by the Court to find a solution to the problem”. If the petition required “innovation”, clearly the judge recognised that the petition did not have a remedy to begin with. Was the “innovation” within the constitutional scheme as the Court said it was? Rather than justifying the constitutionality of the “innovation”, the learned judge presumed it. Should the Supreme Court “innovate” remedies every time it is confronted with a “common perception”?

The crisis, as I see it, is in two processes not wholly unrelated. First, the Supreme Court has gradually transformed the jurisdiction under Art.32 from enforcing fundamental rights to enforcing a novel system of constitutional governance, visualising itself as an equal, if not a more important organ, in the governance of the Indian State. The authority to issue writs for the enforcement of fundamental rights under Art.32(2) has been interpreted as an authority to issue writs for any purpose. Secondly, there seems to be a tacit assumption that every problem plaguing governance in particular and the Indian polity in general is the subject-matter of the Court’s concern under Art.32. This is in many ways a reflection of the inability of the Supreme Court to appreciate the limitations of the constitutional consciousness it found for itself in the late 1970s. The distrust in the bureaucracy that started the “humanising” process has outgrown itself and engulfed all aspects of public life. Unless the Supreme Court appreciates that all problems plaguing the Indian polity are not judicial problems that require judicial attention, the Supreme Court shall in the near future have to bear the burden of the nation’s fragile governance and its inadequacies.

That the jurisdiction of the Supreme Court under Art.32 is not universal but is limited to the purpose of enforcing fundamental rights is clearly borne out by Art.139. Article 139 empowers “the Parliament to confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of Art.32”. The text of Art.139, without any interpretative aid, when read in conjunction with Art.32(2), unequivocally suggests that the purposes for which the Supreme Court may issue writs are not unlimited; on the contrary they are limited to the enforcement of fundamental rights. Given that the Indian Parliament has not enacted any law conferring upon the Supreme Court the power to issue writs for any other purpose, the decision of the Court in Virend Narain is undeniably in contravention of the limitations imposed by Art.139. When the Court issued a writ of mandamus requiring the CBI continuously to report the course
of its investigation, it was issuing a mandamus for purposes “other than those mentioned in clause (2) of Art.32”. Without a law conferring such power, could the Court have done it? A “continuing mandamus”, as the Supreme Court proudly claimed it, even if motivated by a noble cause, is a gross disregard of a constitutional provision. The Court must let go of its obsessive overemphasis on justice as the purpose of judicial adjudication. While a large part of this “justice” jurisprudence was shaped by specific historical events involving the bureaucracy, it is time that the Court evaluates its “justice” jurisprudence independently of the history that shaped it.

“Complete justice”: is the Supreme Court a “court of law” or a “court of justice”?

A feeble attempt was also made by the Supreme Court to justify its intervention under Art.142(1) as the “power to complete justice”. The judgment noted that “there [were] ample powers conferred by Art.32 read with Art.142 to make orders which have the effect of law by virtue of Art.141 . . . ”. The Court added: “In a catena of decisions of this Court, this power has been recognized and exercised, if need be, by issuing necessary direction . . . ”. Was the Supreme Court correct in deriving the source of power for intervening in this matter from Art.142(1)? I would argue that Art.142(1) cannot be the fountain head of a power to entertain a matter involving issues such as in Vineet Narain and nor do the “catena of decisions” justify this intervention by the Court.

However, it may be apt to make a few introductory comments before analysing the law previously laid down in this regard. The “power to do complete justice” under Art.142(1) is in itself a recognition of the jurisprudential position that the Indian Supreme Court was conceived by the framers as a “court of law” and not a “court of justice”. This power “to do complete justice” recognises that the application of law may on certain occasions produce patent injustice. It recognises that a rigid application of law or legal principles may lead to unconscionable results. The power to do complete justice is, therefore, in the nature of a residual power to do justice when a given fact situation warrants its application. In other words, while the Court is usually a court of law, in exceptional cases of manifest injustice it may derogate from law to provide succour to the parties before it. It follows from this that the exercise of the power, being strictly in the context of particular fact situations, cannot be a precedent in the usual sense. But the more important question that warrants discussion is the nature and extent of derogation that the Court is permitted in pursuing the ends of justice. In other words, what is the

---

30 Ibid. at [14].
31 The text in full reads: “The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decrees passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may be order prescribe”.
32 n.7 above, at [51].
33 Ibid.
nature of the law the Court can derogate from in exercising its power to do complete justice under Art.142(1)?

In Prem Chand v Excise Commissioner, the first authoritative interpretation of Art.142(1), the Court noted that “the wide powers which are given to this Court for doing complete justice between the parties can be used by this Court for instance, in adding parties to the proceeding pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken up for the first time”. Clearly, the scope of power under Art.142(1), as the Court saw it, was limited to deviation from mere rules of procedure. The Court could, in other words, disregard procedures laid down in statutes to do complete justice between the parties. This view of the limited scope of the “power to do complete justice” was reiterated in A.R. Antulay v R.S. Nayak when the Supreme Court observed that “however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to, or in violation of the specific provision of any statute”. This limited view, however, did not find favour with the judges subsequently. In Union Carbide Corp v Union of India, reversing the substantive limitation, the Court held that “the ... power under Art.142(1) is at an entirely different level and of a different quality. Prohibitions or limitations on provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Art.142 ...” In Re Vinay Chandra Mishra, the Court referred to its power as “undefined and uncatalogued” and, in a way, “a constituent power transcendental to statutory prohibition”. But this view was reconsidered by the Supreme Court when the matter was raised again in Supreme Court Bar Association v Union of India. Imposing a self-limitation on the scope of Art.142, the Court laid down that “the power to do corrective justice under Art.142 is in a way, corrective power, which gives preference to equity over law ... [but] the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Art.142”.

The law on the power to do complete justice as it now stands does not permit the Court absolutely to ignore substantive statutory limitations. If the exceptional power to do complete justice does not authorise the Court absolutely to ignore constitutional provisions, can the Court in exercise of the same power absolutely ignore constitutional limitations? I have already argued that the Constitution in Art.139 read with Art.32(2) imposes a substantive limitation on the purposes for which the writ jurisdiction of the Supreme Court may be invoked. It is an elementary principle of constitutional law that

32 ibid. at 1003.
34 ibid.

[2005] P.L. Summer © Sweet & Maxwell and Contributors
in a legal system, the Constitution, legislation, delegated legislation and executive orders stand in a hierarchy. If the power to do complete justice cannot be exercised while absolutely ignoring substantive statutory limitations, can the same powers be exercised while absolutely ignoring substantive constitutional limitations? More importantly, can the Court derogate from provisions of the Constitution of which it is itself a creature? Is the Supreme Court bound by the Constitution or beyond it?

I would argue that the “power to complete justice” cannot in any circumstances be exercised in a manner that contradicts provisions of the Constitution. The power of the judges to do justice, being residual in nature, cannot override constitutional provisions. And in this sense, when the Court sought to do complete justice by interfering in the petition by Vinnet Narain, the Court was clearly dispensing “justice” at the cost of constitutional provisions. Judicial reluctance to be bound by provisional limitations as in Vinnet Narain has been systematically practised by a Supreme Court whose judges are under oath to “bear true faith and allegiance to the Constitution” and uphold the same. The new constitutional consciousness which the Supreme Court discovered in the mid-1970s has limitations; the judges must recognise them. This lack of faith in the provisions of the Constitution, justified on grounds of an activist credo, is taking India to a crisis of governance. The task of the Supreme Court is to administer justice according to law save in exceptional cases. By seeking to use the power under Art.142 as an excuse to interfere with the investigative process under Art.32, the Supreme Court has supplanted the rule with the exception. Judicial insensitivity should be condemned, as should judicial arrogance. By seeking to position itself as constitutional supervisor of institutional functioning, the Supreme Court has sought to redefine the status of the judiciary in a constitutional democracy.

Conclusion

As the organ of the State entrusted with the task of upholding the Constitution, the judiciary undeniably has a role to play. But it does not follow that every role assigned to the executive or the legislative branches, when not performed appropriately, must be usurped by the Supreme Court. Every noble cause does not justify a corresponding judicial interference to correct the inadequacies of the institutional process. There are provisional limitations to the extent to which the Supreme Court may stretch itself to correct the institutional failures of Indian democracy. To recognise them will serve the cause of Indian constitutional dynamics better than to disregard them as if non-existent.

Vinnet Narain exemplifies the Indian Supreme Court’s contempt for limitations, constitutional or otherwise, in fulfilling what it sees as the rightful task of the judiciary. The “creative” activism of the Supreme Court in the 1980s has now evolved into a form of judicial arrogance. The Supreme Court, within the framework of the Constitution, is a court of law and not a court of justice. Its function is to apply laws and not to dispense justice, save in exceptional cases. Vinnet Narain, as argued above, does not satisfy the exceptional test either. By
choosing “justice” over “law” in its quest for legitimacy as a people’s institution, judges have driven the final nail in the coffin of the very Constitution they are under oath to uphold, preserve and protect. To “bear allegiance” to the Constitution is not synonymous with the dispensation of justice. By choosing to uphold popular values while disregarding constitutional mandates, the judiciary may deflect the momentary crisis, but cannot absolve itself of the charge of perpetrating constitutional lawlessness. The Supreme Court will remain privy to the challenge of undoing the structures, principles and provisions of the Constitution. As a creature of the Constitution, the Indian Supreme Court is not beyond it but bound by it and must remain so.

Shubhankar Dam*