

THE DOCTRINE OF PRESUMPTION OF CONSTITUTIONALITY IN INTERPRETATION OF STATUTES IN INDIA -ADDRESSING THE REPERCUSSIONS BY TRACING THE JUDICIAL PRONOUNCEMENTS

Shuwakitha Chadrsekaran

Tamil Nadu National Law School, Trichy

Presumption of constitutionality is one of the judiciary's self-imposed restrictions on the power of judicial review. The justification behind this doctrine is stated to be the need to provide deference to the legislature for its intention to draft laws that are in compliance with constitutional barriers. Presumption of Constitutionality is made on grounds that a coordinate branch of the Legislature determined that the law was constitutional before enacting it and that they do not intend to make laws that are ultra vires to the Constitution. The paper, with the help judgments in law and judicial opinions, provides a critical analysis of the unintended consequences that arise out of the applicability of the doctrine. The researcher also puts forth suggestions to address these repercussions.

Keywords: Self-imposed restriction, deference, legislature, intention, constitutional barriers, unintended consequences

INTRODUCTION

Presumption of Constitutionality is a legal theory that was developed by Common Law Courts to deal with the cases challenging the constitutionality of statutes. The presumption of Constitutionality was first employed in the case of *O'Gorman & Young v. Hartford Fire Insurance*¹ in 1931 in which Justice Brandeis wrote, "*The presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.*"

However, even before the concept of presumption of constitutionality could evolve into a doctrine, it was observed, "*It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt.*"² It has also been observed³ that this principle of presumption of constitutionality of a statute is but a particular application of the canon of construction embodied in the Latin Maxim, '*ut res magis valeat quam pereat*'⁴

¹ 282 U.S. 251 (1931)

² A.G. v. Momodou Jobe (1984) 1 AC 689, 702

³ Hector v. Antigua and Barbados (1990) 2 All ER 103, 107

⁴ It means: it is better for a thing to have effect than to be made void; the construction must therefore be such as will preserve rather than destroy. (Broom's Legal Maxims)

Presumption of Constitutionality of a statute or provision is followed when two possible interpretations of a statute occur –one in violation of the Constitution and one in favor of the Constitution. In such a case, the interpretation that favors the Constitution is considered valid until the petitioner proves otherwise, in a manner that convinces the Court beyond reasonable doubt, laying the burden of proof on the petitioner.

The presumption of Constitutionality is made on grounds that a coordinate branch of the Legislature determined that the law was constitutional before enacting it and that they do not intend to make laws that are *ultra vires* to the Constitution. Thus, it can be said that the principle is also based on the principle of separation of powers. While the importance of the theory of presumption of Constitutionality is emphasized upon, its usage could also be argued upon. Hence, the researcher intends analyze the drawbacks of this doctrine with the help of case laws.

In light of the above, the aim of the paper is to study the arguments against the usage of the presumption of constitutionality. The objective is to provide a critical analysis on the doctrine of presumption of constitutionality employed by the Judiciary. The researcher intends to employ the doctrinal method of research with a descriptive and analytical method of writing. The researcher will rely on both primary and secondary sources of data.

AN OVERVIEW ON ‘THE PRESUMPTION OF CONSTITUTIONALITY’

PRINCIPLE ON THE APPLICABILITY OF THE DOCTRINE

If a provision of a statute leads to absurdity or ambiguity and is questioned on its constitutional validity, it gives possibility to two meanings –one which gives effect to the provision and one which renders the provision inoperative. In such a case, the meaning which gives effect to the provision will be taken into interpretation. While applying the doctrine of presumption of constitutionality, the Courts usually apply the concept of ‘reading down’ while interpreting provisions under question. The circumstances under which the need for the applicability of the doctrine arises can be understood through the case of *Kedar Nath Singh v. The State of Bihar*⁵-

“It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favor of the former construction.”

When the presumption of constitutionality is taken up by the Court while interpreting the provision under question, the burden of proof falls upon the petitioner to prove beyond reasonable doubt that the provision is unconstitutional. Once this has been established, the burden falls upon the State to prove the Constitutionality of the provision. If the Court is satisfied with the arguments put forth by the State, the provision would be upheld and if the State does not put forth a convincing case, thereby making the petitioner’s case

⁵ AIR 1962 SC 955

stronger, the provision would be struck down as unconstitutional. In *Charanjit Lal v. Union of India*⁶, the Supreme Court stated-

“...the presumption is always in favor of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.”

The principles on the applicability of this doctrine laid down in the case of *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & Ors*⁷. are employed by the court in determining the constitutionality of any particular statute challenged as violative of the Constitution of India, 1950.

EXISTING JUSTIFICATIONS FOR THE PRESUMPTION

Since the justification of the doctrine of presumption of constitutionality in India solely relies on paying deference to the wisdom of the Legislature, reference is being made to the works of the foreign academician, Andrew Hessik.

Based on Hessik's work, it can be said that there could possibly exist three justifications behind the existence of the doctrine of presumption of constitutionality. Hessik also puts forth the idea that all three justifications have not been built up on strong foundations and have been criticized by many scholars⁸

The three reasons, as laid down by Hessik⁹, are-

1. The presumption shows due respect to legislators, who are bound by an oath to support the Constitution.
2. It promotes republican principles by preventing courts from interfering with decisions rendered by the elected legislature.
3. The presumption recognizes the legislature's institutional superiority over the courts: Courts defer to legislative determinations of facts because the legislature is better equipped than courts to resolve those facts.

This researcher rules out these justifications and criticizes the doctrine of presumption of constitutionality in India on the basis of three grounds-

1. Mere judicial deference to the Legislature to honor separation of powers affects the independence of the judiciary which in turn affects the power of Judicial Review
2. The absurdity in the applicability of the doctrine to pre-constitutional laws or colonial legislation

⁶ AIR 1951 SC 41

⁷ 1958 AIR 538

⁸ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 224–52 (2004); David M. Burke, The “Presumption of Constitutionality” Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty, 18 HARV. J. L. & PUB. POL'Y 73, 83–153 (1994); James R. Rogers et al., Why Expert Judges Defer to (Almost) Ignorant Legislators: Accounting for the Puzzle of Judicial Deference, in INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 24, 27–33 (2006).

⁹ Supra note 5 at p.1461

3. The doctrine's lack of regard to changing societal conditions in the country.

These criticisms will be addressed in the chapter titled, "Ruling out the Doctrine"

RULING OUT THE DOCTRINE

MERE DEFERENCE TO THE LEGISLATURE AFFECTS THE POWER OF JUDICIAL REVIEW

The doctrine of presumption of constitutionality is premised on the concept of judicial deference to the legislature. Operating under this presumption not only restricts the independent exercise of the opinion of the judiciary in interpreting laws but in turn affects the power of judicial review since the Courts place complete reliance on the opinion of the Legislature.

The importance of judicial review can be understood through the case of *Minerva Mills Ltd. & Ors v. Union Of India & Ors.*,¹⁰ where C.J. Chandrachud stated-

"I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution."

In *L. Chandra Kumar v. Union of India*¹¹, it was laid down that-

"The power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure"

With the intention to abstain from interfering with the Legislature's functions, the judiciary has, through this doctrine, permitted the Legislature's opinion to interfere with that of its own in the process of judicial review.

To put into simple words, the Judiciary, under this doctrine, instead of judging the constitutional validity of statutes, goes on to rely on the Legislature's judgment on the constitutional validity of the statute in question. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality.¹²

ABSURDITY IN THE APPLICABILITY OF THE DOCTRINE TO PRE-CONSTITUTIONAL LAWS

The doctrine of presumption of constitutionality is based on the assumption that the legislature intends to enact laws that do not contravene the provisions of the Constitution.

¹⁰ (1980) 3 SCC 625

¹¹ (1997) 3 SCC 261

¹² *Supra* note 11

While this assumption may not be justifiable because it is an insufficient ground for justification of the doctrine and tampers with the independence of the Judiciary, it is understandable for the Judiciary to see the need to have a self-imposed restraint. However, what is absurd is that the Judiciary has ruled that the presumption of constitutionality also be applicable to pre-constitutional laws. This decision only weakens the already insufficient justification for the presumption. The intention of the Legislature to act within constitutional barriers could not possibly be assumed for a time period in which there existed no such barriers to begin with.

As held in *Namit Sharma v. Union of India*¹³, it has become a settled position that the provisions of a pre-constitutional law can be read down by interpretation to prevent it from being declared unconstitutional. The relevant excerpt from the judgment reads-

*“Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of ‘reading down’ or ‘reading into’ the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this court in its various pronouncements.”*¹⁴

The criticism against the applicability of this doctrine to pre-constitutional laws emerged as a result of the Supreme Court Judgment delivered in the case of *Suresh Kumar Koushal and Anr. v. Naz Foundation and Anr.*¹⁵ In order to understand the criticism that arose after this judgment, it is essential to have an overview on the Delhi High Court judgment in the case of *Naz Foundation v. Government of NCT of Delhi & Ors.*¹⁶ Naz Foundation (India) Trust, an NGO based in Delhi, concerned with the work relating to AIDS and Sexual Health filed a writ petition in the Delhi High Court challenging the validity of Section 377¹⁷ of the Indian Penal Code, 1860. The petitioner’s contended that the said section of the colonial legislation encroached upon Articles 14, 15, 19 and 21 of the Constitution of India, 1950. The Delhi High Court held that Section 377 is only applicable in the case of penile non-vaginal sexual intercourse that is non-consensual and in the case of minors. The Court stated that the Section would not be applicable in the case of penile non-vaginal sexual intercourse between consenting adults. With regard to the applicability of the presumption of constitutionality, the Court relying on *Anuj Garg v. Hotel Association of India*¹⁸ rightly held that the doctrine is not applicable to colonial legislation. However, the decision delivered in the Delhi High Court favoring Naz Foundation was appealed in the Supreme Court of India in the case of *Suresh Kumar Koushal and Anr. v. Naz Foundation and Anr.*¹⁹ In this landmark verdict, the Division Bench of the Supreme

¹³ (2013) 1 SCC 745

¹⁴ *Id.* at para 47

¹⁵ (2014) 1 SCC 1

¹⁶ 2009 (160) DLT 277

¹⁷ Section 377 in the Indian Penal Code- Unnatural Offences

¹⁸ (2008) 3 SCC 1

¹⁹ *Supra* note 16

Court set aside the Delhi High Court judgment. The criticism on the presumption of constitutionality, as a result of this judgment was based on the rationale that-

“Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. There is nothing to suggest that this principle would not apply to pre-Constitutional laws which have been adopted by the Parliament and used with or without amendment. If no amendment is made to a particular law it may represent a decision that the Legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law. In light of this, both pre and post Constitutional laws are manifestations of the will of the people of India through the Parliament and are presumed to be constitutional.”²⁰

The Supreme Court, whose judgments hold a binding value on all the lower Courts, has set a dangerous precedent, through the above rationale. The doctrine of presumption of constitutionality ought not to apply to pre-constitutional laws or colonial legislation and if applied *strictly* would only result in absurdity.

LACK OF REGARD TO CHANGING SOCIAL NORMS

The human is no constant formula and the physical, mental and even the biological nature undergoes changes resulting in an ever-changing societal condition. While it may not be possible to keep track of immediate changes in societal conditions to draft laws accordingly, it is essential to amend laws when there emerges a clear need to do so over time. Until the Legislature makes essential amendments to laws, it falls upon the judiciary to interpret the laws in a manner that protects and safeguards the fundamental rights of the people. One among the many factors that have to be taken into account while doing so, is the changing norms in the society and the changing needs of the people, even if that societal change is demanded by a minority seeking priority over their fundamental rights that the existing law violates. Even though the intentions of the drafters, in the case of colonial laws, was in compliance with the social norms at the time of the commencement of the law, the changes in the current scenario, not only from a domestic aspect but also from an international aspect must be taken into account while interpreting such colonial laws. The Judiciary has delivered several judgments that emphasize the need for the same. Two of the most relatable observations made by the judiciary are highlighted below-

In the case of *Charan Lal Sahu v. Union of India*,²¹ the Supreme Court was of the opinion-

“In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into.”²²

²⁰ *Id.* at para 28

²¹ (1990) 1 SCC 614 (667)

²² *Id.* at para 13

In the famous case of *John Vallamattom v. Union of India*,²³ it was observed that-

*“The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time.....the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.”*²⁴

Similar observations were made in the cases of *The State of Maharashtra and Anr. v. Indian Hotel and Restaurant Association and Ors.*,²⁵ *IMF Ltd v. Inspector, Kerala Government*²⁶ and *The State Of Uttar Pradesh v. Kaushaliya and Ors.*²⁷ Moreover, in *The State of Madras v. V. G. Row and Ors.*,²⁸ the Supreme Court opined that-

“The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.”

Despite these observations made by the Supreme Court, the very same Court, in the case of *Suresh Kumar Koushal and Anr. v. Naz Foundation and Anr.*²⁹ delivered a judgment that does not pay heed to the prevailing societal condition.

The Judiciary, under the presumption of constitutionality, has fallen out of track by following the concept of paying deference to the Legislature. By placing value to social norms that prevailed at the time of enactment of the Legislation, it has, in the current scenario, ignored the need to look at the Legislation with respect to the societal changes at the time of interpretation.

Moreover, the Judiciary also places value on the Legislature’s lack of regard to changing social conditions rather than on reviewing the un-amended piece of Legislation under question. Section 377 of the Indian Penal Code is the accurate example to this aspect of criticism. Even when the High Court interpreted the section in a manner that would serve justice, the Supreme Court over ruled the much progressive judgment.³⁰ Thus, the Judiciary has yet again, set a dangerous precedent by placing no regard to changing societal conditions.

SUGGESTIONS

In light of the above criticism on the doctrine of presumption of constitutionality, it has become necessary to address the discrepancies in the application of the doctrine in the

²³ (2003) 6 SCC 611

²⁴ *Id.* at paras 28 & 33

²⁵ (2013) 8 SCC 519

²⁶ (1998) 8 SCC 227

²⁷ 1964 AIR 416

²⁸ 1952 AIR 196

²⁹ *Supra* note 16

³⁰ *Supra* note 17

Indian context. The following content addresses the issues in the application of the presumption with the intention of providing two suggestions, namely –widening the scope for judicial review and upholding the strict scrutiny test.

WIDENING THE SCOPE FOR JUDICIAL REVIEW

The presumption of constitutionality is employed by applying the concept of “reading down” through which the statute is interpreted in such a manner to confer upon it constitutional validity. While this usage may be essential to avoid acts of overthrowing most provisions that come up before the Court on question of constitutional validity, this concept should not be used to protect the Legislative discrepancies. This issue could be dealt with by applying the limitation to the rule of reading down, as laid down in *Minerva Mills Ltd. & Ors v. Union Of India & Ors.*³¹⁻

“The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers”

Discrepancies that arise out of drafting should not be ignored in an attempt to maintain the constitutional validity of the provision. The Judiciary cannot be under the assumption that the acts passed by the Legislature always represent the will of the people. Neither can it make this assumption in the case of pre-constitutional laws, on the reasoning that they have remained un-amended because the Legislature deems them fit. Such assumptions tarnish the independence of the judiciary in performing its crucial function of judicial review.

The role of the judiciary as protector of fundamental rights can be understood through the observations made in the case of *Peerless General Finance and Investment Co. Ltd. and Anr. v. Reserve Bank of India*³²⁻

“Wherever a statute is challenged as violative of the fundamental rights, its real effect or operation on the fundamental rights is of primary importance. It is the duty of the court to be watchful to protect the constitutional rights of a citizen as against any encroachment gradually or stealthily thereon.”

The Judiciary, in order to value the function of judicial review while deciding the constitutional validity of the cases, must judge the validity of the provisions independently and should not be influenced by the Legislature’s opinion on the law under questions. To achieve this, the Courts should rely on the observations made in the two cases that follow-

In *I.R. Coelho (Dead) by LRs v. State of Tamil Nadu & Ors.*,³³ the Supreme Court observed that-

³¹ *Supra* note 11

³² (1992) 2 SCC 343

³³ (2007) 2 SCC 1

"...the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.....It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution."

In *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha & Ors.*,³⁴ the Supreme Court observed that-

"Parliament indeed is a coordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny.....mere coordinate constitutional status....does not disentitle this Court from exercising its jurisdiction of judicial review...."

Thus, in the process of interpreting the laws, the courts must exercise their function of judicial review to the fullest extent, keeping in mind the need for judicial deference to the Legislature but not holding the same as the premise under which the laws are to be judged.

UPHOLDING THE STRICT SCRUTINY TEST

The 'strict scrutiny test' puts forth the notion that the constitutional validity of legislations should not be judged solely on the basis of the object it seeks to achieve but should rather take into account the effect of the legislation or the insinuation resulting from the act in question, irrespective of the object sought to be achieved through it.

The test was employed in the case of *Anuj Garg v. Hotel Association of India*³⁵ in the year 2007. In this case, Section 30 of the Punjab Excise Act, 1914 prohibited the employment of "any man under the age of 25 years" and "any woman" in any premise where liquor or any other intoxicating drug was being consumed. This provision was challenged and the court ruled in favor of the appellants by employing the strict scrutiny test to rule out the possible defense of *protective discrimination*. The Court, with regard to strict scrutiny test laid down that³⁶-

"It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects."

However, in 2008, in the case of *Ashoka Kumar Thakur v. Union of India and Ors.*,³⁷ the division bench of the Court expressly rejected the strict scrutiny test. Consequently, in the

³⁴ (2007) 3 SCC 184

³⁵ *Supra* note 19

³⁶ *Id.* at para 44

³⁷ (2008) 6 SCC 1

case of *Naz Foundation v. Government of NCT of Delhi & Ors.*,³⁸ the Court, on a harmonious construction of the two judgments, upheld the validity of the principle of strict scrutiny. Subsequently, the Court ignored the validity of this principle in the case of *Suresh Kumar Koushal and Anr. v. Naz Foundation and Anr.*³⁹

The Supreme Court on a harmonious construction of the above judgments, must employ the principle of 'strict scrutiny' in order to avoid repercussions that would arise out of the doctrine of presumption of constitutionality.

CONCLUSION

The increasing significance of the role of the justice delivery system is the result of the increasing awareness in the rights of the people -which highlights the need to scrutinize every significant law; and the involvement of the executive in seeking advice on matters of national importance. Since the presumption of constitutionality operates on the premise that the legislature, a co-ordinate branch of the Government would operate within constitutional barriers while drafting laws, the independent wisdom of the judiciary is negated and the function of judicial review is strongly affected, leaving the justice delivery system to be questioned on the satisfaction of its objective.

Moreover, the applicability of the doctrine to pre-constitutional laws, without any regard to changing societal conditions has resulted in serious repercussions where this doctrine, *inter alia*, leaves the infringed minority interests, at the mercy of the drafters of the legislation, the intolerant majority and stringent policies of the court. Hence, widening the scope of judicial review under this doctrine and upholding the principle of strict scrutiny while employing the doctrine can be methods of addressing the repercussions in order to make reparation and to re-instate the fading faith in the justice delivery system.

While it is essential for the Courts to defer to the wisdom of the Legislature while exercising the power of judicial review, in an attempt to impose a self-restraint, it is also important to restrict the extent to which deference is placed on the Legislature, so as to make sure that the judiciary exercises its independent power in interpreting the legislation under question.

To conclude-

*"When matters of "high constitutional importance" such as constitutionally entrenched human rights - are under consideration, the courts are obliged in discharging their own sovereign jurisdiction, to give considerably less deference to the legislature than would otherwise be the case."*⁴⁰

³⁸ *Supra* note 17

³⁹ *Supra* note 16

⁴⁰ *Supra* note 17 at para 118.