
ARTICLE 136: A CRITICAL ANALYSIS

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ABSTRACT

Special Leave Petitions were introduced to the legal landscape under Article 136 to ensure maximum justice to the contesting parties by the apex court. However, an unprecedented onslaught of cases in the form of Special Leave Petitions causes concern to the principle and promise of speedy justice by the judiciary of India. Moreover, the subjectivity of the ‘discretionary powers’ as well as the ‘special circumstances’ pose an influence over the appellate process eventually leading to accusations of arbitrariness and discrimination. Such possibility paired with the backlog of existing and pending cases in the Supreme Court exhibits a requirement to set a criterion for cases that the Supreme Court can decide to take up, to instate an alternative system, and to question whether fair and timely justice is in fact granted via this process.

This article presents a comprehensive and critical analysis of Article 136 of the Indian Constitution within the context of its legal and sociological ambit. The power of the Supreme Court is dissected basis its discretionary powers, the real impact of the powers and the risks or potential abuse of such power which, if left unchecked, may ultimately cast a huge question mark on judicial accountability. We will delve into the issue of the increased influx of Special Leave Petitions, connecting it to the increasing pendency of existing and newly filed cases in the Supreme Court, most of which may be for petty causes hence diverting the apex courts attention from cases of actual national importance. The article traces the potential explanations used by courts to define the ‘discretionary power’ mentioned in the constitution as well as the ‘special circumstances’ which may invoke Special Leave Petitions. Lastly, the article also recommends an alternative system to deal with the pendency issue while acknowledging both the merits and demerits of the suggested approach.

Introduction

Part 5, Chapter 4 of the Constitution of India elaborates on the functions and jurisdiction of the Supreme Court of India. Within this chapter lies Article 136, which provides a remedy to all those unsatisfied with the decision of any lower court or tribunal of the country, except the military courts, leading such cases to the Apex Court for a conclusive decision. However, this is done only in certain special or extenuating circumstances. The provisions under Article 136 must not be misconstrued as a right to appeal, rather it is the right to apply for an appeal in the form of a special leave petition. We say so because it is not a right, but a privilege granted at the discretion of the Supreme Court, over and above the regular forum of appeal.¹ It is safe to say that Article 136 is of extraordinary nature.

Supreme Court's Burden and Subjective Authority

Discretion involves the dominant element of subjectivity; however, law must solely rely on methods where a line can be drawn between the objective and subjective to reach a middle ground to reach an ideal solution.

There are no set criteria to prove the eligibility of any special leave petition under Article 136, except informal and uncodified reasons stated by the Supreme Court while accepting or rejecting an appeal. This opinion is supported by Justice M.C. Mahajan in the *Dhakeswari Cotton Mills Ltd. v. CIT* judgment, wherein he explains that *"It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in this Court by the constitutional provision made in Article 136. The limitations, whatever they be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it must be exercised sparingly and with caution and only in special and extraordinary situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule. All that can be said is that the Constitution having trusted the wisdom and good sense of the Judges of this Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice, and that its exercise will be governed by well-established principles which govern the exercise of overriding constitutional powers"*.² As its jurisdiction keeps expanding, the responsibility of the Supreme Court increases manifold and may reach a point where the influx of workload

¹ *N. Suriyakal v. A. Mohandoss & Ors*, (2007) 9 SCC 196

² *Dhakeswari Cotton Mills Ltd. v. CIT*, (1955) 1 SCR 941

will become unsustainable. As of 2022, nearly 70,000 cases are pending in the top court, a steady increase from the last record of 2021 at 69,000 as per the Minister of Law and Justice, Kiren Rijju³. Of these, 20,000 are pending civil and criminal SLP cases.⁴ This has led to the Supreme Court drastically reducing responses to cases involving judgments pertaining to constitutional matters with sufficient questions of law. Moreover, with the increase in filing of Special Leave Petitions, the pendency of 'regular matters' has increased consequently.⁵ We cannot fail to question in such circumstances that the supreme court may be exercising its discretion towards cases that may be frivolous concerning the possibility of not possessing sufficient question or interpretation of law. These include requests for bail, quashing, minor offences, torts which may be regarded as frivolous as they do not raise sufficient question of law.⁶ It may so be that due to the overburden of cases and the paucity of personnel to counter such an influx, the Supreme Court may be approaching the point of unsustainability where it is unable to exercise its discretion and function within its original jurisdiction to the fullest, especially without any codified and formal eligibility criteria in place. Furthermore, the discretionary nature of the Article may encourage forum shopping hence undermining the existing hierarchy of courts.

Possible Solutions and their Counter Arguments

Considering the major critiques towards Article 136, it is imperative to bring in necessary solutions. One such suggestion could be the setting up of separate constitutional and non-constitutional benches or even an independent Courts of Special Appeal at the National level which will be considered at par with the Supreme Court and Special Leave Petitions can be redirected to the same. This will lead to speedier redressals and reduce the pendency of cases with the Supreme Court consequently reducing the burden on the Supreme Court hence restoring its concentration on the 'regular constitutional cases' while exercising original jurisdiction to the fullest. The USA set up an independent tier of courts of appeals which helped reduce the total cases filed before the US Supreme Court. Between 2005 and 2014, the US Supreme Court has steadily witnessed a declining rate of case filings. During the same period, the Indian Supreme Court has experienced an increase of 97% in fresh filing of cases.⁷

³ 'Nearly 5 Crore Pending Cases In Courts, Over 69,000 In Supreme Court' <<https://www.ndtv.com/india-news/nearly-5-crore-pending-cases-in-courts-over-69-000-in-supreme-court-3768720>> accessed on 6th August

⁴ VIDHI (Centre for Legal Policy), *Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access* (www.vidhilegalpolicy.in 2016), Pg. 16-17

⁵ VIDHI (Centre for Legal Policy), *Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access* (www.vidhilegalpolicy.in 2016), Pg. 5

⁶ VIDHI (Centre for Legal Policy), *Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access* (www.vidhilegalpolicy.in 2016), Pg. 16

⁷ Nick Robinson Quantitative Analysis (n 9), p. 3-4.

To counter the subjectivity of the Supreme Court's discretionary powers, a provision should be added to the constitution, codifying reasonable limitations to the Supreme Court and consequent benches set up to ensure the non-interference of frivolous cases. Special Leave Petitions Cases involving a sufficient question of law, that inspire the legal mind, to the point where the bench, majority-wise believes that its subject matter is of public importance, hence requires sufficient interpretation, or when a lower court has erred tremendously, shall be considered for special leave to appeal. A proper test for whether a matter truly raises a substantial question of law must imperatively be brought into practice so as to determine whether a matter is to be considered by the Supreme Court, an opinion affirmed by *Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd* back in 1962. *'The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.'*⁸ Such cases may include questions raised on the basic structure of the constitution, the validity of laws, judicial review of constitutional amendments and where there is satisfactory evidence of grave miscarriage of justice. Even when the new Court of Appeals commences operations. it will have a huge influx due to redirection from SC hence is necessary in both scenarios.

This reform is not to 'limit' the court's jurisdiction per se but to suggest that discretion must be based off something concrete. The *State Bank of India v. Sundara Money* case adjudged that *'A substantial question of law is to certify fitness for hearing by the Supreme Court, the question, must be of such pervasive import and deep significance that it imperatively needs to be settled at the national level by the highest Bench'*⁹. In the case of *Jamshed Hormusji Wadia v. Board of Trustees*, it was held that the *'Supreme Court must exercise its powers under Article 136 only in exceptional circumstances, when a question of law of public importance arises'*.¹⁰ In *Bihar Legal Support Society v. Chief Justice of India*, "Apex court

⁸ *Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.*, 1962 Supp (3) SCR 549

⁹ *State Bank of India v. Sundara Money*, (1976) 1 SCC 822

¹⁰ *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214

may interfere when lower courts or tribunals had not enunciated law correctly .. extraordinary purpose to be availed only in instance miscarriage of law hence its exceptional nature".¹¹ The Canadian Supreme Court also grants leave when a case raises a question of public importance, or a critical question of law, or if it is generally of a significant nature. Nevertheless, application of these criteria must be strict if not stringent.

A possible counter to the arguments is the Supreme Court stating that the question of law is open and limiting the definition could create hindrances, there is a sufficient need to reasonably sort out from within the vast sea of Special Leave Petitions which case should be given sufficient importance that there it "needs to be decided by the Supreme Court". The procedure right now is largely implicit however certain guidelines if not complete codification helps in better judicial administration. Presently, consideration of frivolous or petty Special Leave Petitions is resulting in wastage of this extraordinary overriding power where cases can very well be handled by a lower court. Another counter could be that Article 136 is a part of the basic structure of the Constitution. However, the suggestions above are not to eradicate the article completely but just to tweak the process of judicial review in special leave appeals to ensure speedy justice to those cases with actual legal merit.

Conclusion

To conclude, the extraordinary powers of Article 136 may not be able to completely let go of their subjectivity and the suggestion of an independent Court of Appeal or a separate bench for the same may seem far-fetched among its many possible critiques. However, attempting to create guidelines to clarify the basis for discretion of the supreme court is necessary to enable the rejection of cases without substantial legal importance. The discretionary power of the Supreme Court under Article 136 is ended when the petition is rejected, rendering no window for the above-explained issue to arise.

¹¹ *Bihar Legal Support Society vs The Chief Justice of India & Anr*, (1986) 4 SCC 767