



## BALANCING THE SCALES: JUDICIAL ACTIVISM VS POWER OF LEGISLATURE

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### Abstract

*This article explores the dynamic interplay among the three branches of government in India and their evolving roles in shaping the country's democracy. It begins by highlighting the foundational principles of the Indian Constitution, emphasizing the importance of the basic structure doctrine, separation of powers, and judicial review. The essay traces the historical development of judicial activism in India, showing how the judiciary has stepped in to address issues when the executive and legislature falter.*

*The article also discusses landmark cases, including Kesavananda Bharati Case, which limited the power of Parliament to amend the Constitution, and the emergence of Public Interest Litigation (PIL) as a powerful tool for social justice. It also touches upon instances of judicial overreach and the need for a balanced approach.*

*The concepts of judicial appointments, activism and overreach are explored in depth and substantiated with relevant case laws. The essay underscores the importance of transparency and accountability in the judiciary while acknowledging the need for a comprehensive dialogue between the branches of government. Ultimately, exploring strategies for achieving an optimal balance among governmental organs forms the objective of the essay. It calls for a thoughtful approach to reforms in judicial appointments and a commitment to upholding democratic principles.*

**Keywords:** Doctrine of Basic structure, Judicial Overreach, Transparency, Judicial Review, Judicial activism.

### Introduction

*“The basic structure or the philosophy of our constitution is premised on the supremacy of the constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom*

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*and the dignity of the individual and the unity and integrity of the nation”- CJI D.Y. Chandrachud, on Basic structure. Nani Palkhiwala Memorial Lecture, Jan’23, Mumbai.*

The above statement was given by Hon’ble CJI, 10 days after the comment of Hon’ble Vice President *Sh. J. Dhankar* wherein he questioned the validity of basic structure. The Vice President had expressed objection over the cap on power of the legislature to amend the Constitution. Thereafter a fresh debate has been ignited on the validity of basic structure. The Legislature which naturally assumes the role of executive has been tussling with Judiciary on the other end of rope. The same can be seen with the recent comments of the Law minister *Sh. Kiren Rejju* questioning sole control of judges over judicial appointments. The recent judgement in *Anoop Baranwal v UOI*<sup>3</sup> saw judicial directive to appoint a Leader of Opposition (Lok Sabha) and CJI in the board of selectors for Chief Election Commissioner. These actions are being popularly perceived as another confrontation between the organs of State.

On completing half a century since its officiation it's only apt that the landmark judgement (*Kesavananda Bharati V. State of Kerala, 1973*)<sup>4</sup> and its fruits are brought back into public scrutiny. After all, the solution to present problems can be solved by revisiting the past but not reveling in it. As subjects of extensively written Constitution, vibrant politics and powerful judiciary we get to re-interpret and re-model original provisions governing us.

## **Background**

Fundamental rights under part III of the Indian Constitution are granted against the state as mentioned under article 12 of the constitution which mandates the state to honour and enforce the fundamental rights. Article 13 also incorporates judicial review implicitly and is considered part of the basic structure of the constitution. Judicial review was first identified in *Marbury V. Madison*,<sup>5</sup> 1803 USA and first mentioned in India in *Kesavananda Bharati case* where it was held by the court that it is the obligation of the judiciary to protect fundamental rights of citizens when the executive fails to do the same. The Constitution obliges the judiciary, legislature and executive equally to uphold the spirit of the constitution. Judiciary is the guardian and protector of citizens and such power is conferred under article 32 to Supreme Court and 226 to High courts of the constitution. The judiciary cannot let the executive make the Constitution a tool to fulfil its agendas. The Constitution was made supreme law of the land by the founding fathers of the constitution. All the three organs derive their powers from the Constitution and the Court

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<sup>3</sup> Anoop Baranwal vs Union of India 2023 (SC) 155

<sup>4</sup> Kesavananda Bharati vs State of Kerala (1973) 4 SCC 225

<sup>5</sup> Marbury v. Madison, 5 U.S. 137

is empowered with interpreting the Constitution.

In *AK Gopalan's case 1950*<sup>6</sup>, the Court followed a narrow perspective in interpreting procedures established by law and refused to infuse principles of natural justice. The same was reversed after two decades in *Bank Nationalization cases*<sup>7</sup> and *Hardhan Saha's case*,<sup>8</sup> where the court interpreted the constitutionality of preventive detention with reference to article 19. In *Maneka Gandhi vs Union of India*,<sup>9</sup> the right to personal liberty was considered part of the right to life under article 21.

The changing perspective of the Court can be seen in dissenting judgements of *Sajjan Singh*<sup>10</sup> and *Golaknath*<sup>11</sup> cases. In *Sajjan Singh*, it was held to be parliament's exclusive power to amend any part of constitution under article 368, which was reversed in the *Golaknath* case stating only procedure to amend is present in article 368 and no power to amend the constitution is conferred. It was finally settled in the landmark case *Kesavananda Bharati* that parliament's power to amend the Constitution was not unlimited and basic structure cannot be tampered with. Some of the judges put forward a few basic features by way of illustration. These included supremacy of the Constitution, democratic republican form of government, secular character of the Constitution, separation of powers among the legislature, the executive and judiciary, the federal character of the Constitution, rule of law, equality of status and of opportunity. The doctrine led to the landmark case which created history and imposition of emergency.

In *Indira Nehru Gandhi vs. Raj Narain*<sup>12</sup> the Supreme Court declared the Constitution (39th Amendment) Act, 1975<sup>13</sup> void on the ground of violation of basic structure. In this case the High Court of Allahabad declared that the amendment was ultra vires the constituent power and the election of Smt. Indira Gandhi to the Parliament as illegal.

Subsequently, power of judicial review was declared as a basic feature of the Constitution.

## Judicial Activism

Basic structure doctrine gave birth to judicial activism. Judicial activism is a tool in the hands of the judiciary to deliver justice when executive and legislature lapses on their part of the job.

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<sup>6</sup> A.K. Gopalan v. State of Madras, AIR 1950 SC 27

<sup>7</sup> Rustom Cavasjee Cooper vs Union Of India 1970 AIR 564

<sup>8</sup> Haradhan Saha & Another vs The State Of West Bengal 1974 AIR 2154

<sup>9</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>10</sup> Sajjan Singh vs State Of Rajasthan 1965 AIR 845

<sup>11</sup> Golaknath v. State Of Punjab 1967 AIR 1643

<sup>12</sup> Indira Nehru Gandhi vs Raj Narain (1975) AIR 865

<sup>13</sup> The 39th CAA placed the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of the Indian courts.

In this context, the former Chief Justice of India A. M. Ahmadi, has rightly said;

*“In recent years, as the incumbents of Parliament have become less representative of the will of the people, there has been a growing sense of public frustration with the democratic process. This is the reason why the Supreme Court had to expand its jurisdiction by, at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner.”*

To others it is a fruit of basic structure, and the constitution is a living document giving birth to new concepts with the need of time. Judicial activism is the way to provide distributive justice. It is guided by theories of vacuum filling and social wants. It has filled the vacuum left by executive and legislature by way of issuing guidelines as pronounced in *Madhav Hoskot's* case<sup>14</sup> by providing free legal service to the poor and needy as an integral part of the ‘reasonable, fair and just procedure,’ and making speedy trial as an integral part of article 21 in *Hussainara Khatoon's* case.<sup>15</sup> In *Sheela Barse v. State of Maharashtra*,<sup>16</sup> the court provided safeguards for arrested people and right to live with human dignity, free from exploitation was included under article 21 in *Bandhua Mukti Morcha* case.<sup>17</sup>

Public Interest Litigation (PIL) is another instrument for judicial review introduced by Justice Bhagwati and Justice Krishna Iyer in Indian Judiciary. The first PIL was filed in *Hussainara Khatoon's* case in 1979. The concept of *locus standi* was liberalized to make courts more accessible. PILs have changed the landscape of Indian polity by landmark judgements like banning triple talaq, opening doors for women in Sabarimala temple and the Haji Ali shrines, legalised consensual homosexual relations, legalised passive euthanasia, and many more. The objectives of our constitution to reach socio-economic justice are enabled by Judicial Activism. Judicial law making is interpretative, generally governed by common sense, practicability and the need to resolve disputes or grant immediate relief to the victim. The Court generally does not issue directions to the executive or judiciary to enact laws or exercise their powers in a certain manner. This form of law-making cannot be conceived as ideal but is corollary in efficient governance.

In *Vineet Narain vs. Union of India*,<sup>18</sup> the Supreme Court, after taking into account a large number of decisions in which the Court had laid down guidelines and issued binding directions, observed that it is now “a well settled practice which has taken firm roots in our constitutional

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<sup>14</sup> *Madhav Hayawadanrao Hoskot vs State Of Maharashtra* 1978 AIR 1548

<sup>15</sup> *Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar* 1979 AIR 136

<sup>16</sup> *Sheela Barse vs State Of Maharashtra* 1983 AIR 378

<sup>17</sup> *Bandhua Mukti Morcha vs Union Of India & Others* 1984 AIR 802

<sup>18</sup> *Vineet Narain v. Union of India* 1997 [1 SCC 226]

jurisprudence”. The court further stated that “this exercise is essential to fill the void in the absence of suitable legislation to cover the field.” The Court went on to state that:

*“it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.”*

One of the most significant judgments delivered on this concept was *Vishaka V State of Rajasthan 1997*<sup>19</sup>. The issue was regarding sexual harassment at work place where the Court found it necessary to lay down a set of binding rules and guidelines consistent with fundamental rights enshrined in the Constitution 14, 15, 19(1) (g) and 21. This landmark judgement later formed backbone of the POSH [Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal)] Act 2013.

In *L. Chandra Kumar vs. Union of India*,<sup>20</sup> 1980 the Court declared: “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”. The Court struck down clause (2) (d) of Article 323-A and clause (3) (d) of Article 323-B which excluded the jurisdiction of the High Courts to review the decisions of the Tribunals constituted under these Articles.

### **Legal Scrutiny of Sankal Chand Case**

In *UOI V Sankal Chand*,<sup>21</sup> in 1977 the arbitrary transfer of sixteen HC judges by the Government was challenged. The then Chief Justice of Gujarat HC had filed a writ challenging his transfer on the grounds that neither the CJI (effective consultation) nor he was consulted before the transfer. The executive order was deemed unconstitutional due to violation of Article 222(1). The executive was seen encroaching upon the independence of judiciary by transferring judges who delivered unfavorable judgments.

Justice P.N. Bhagwati cited the principle embodied in Article 217 that the test for suitability of a High Court judge is for once and all and he cannot be removed for anything less than proved misbehavior or incapacity. It is against public interest to retain a judge whose integrity is doubtful but even more so to curtail independence of the Judiciary. The transfer also undermined the Principle of Natural Justice since the Judges had no opportunity to be heard.

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<sup>19</sup> Vishaka and Ors. v State of Rajasthan AIR 1997 SC 3011

<sup>20</sup> L. Chandra Kumar v. Union of India AIR 1990 SC 2263

<sup>21</sup> Union Of India vs Sankal Chand Himatlal Sheth 1977 AIR 2328

The ghost of *Sankal Chand* judgement continues to follow even today with the executive sitting on recommended transfer or appointment of judges of HC by the Collegium for months at stretch. It is, then, often left to the CJI to resolve this deadlock on the executive or judicial side. Rather than looking for solutions it has to be ensured that the impasse does not occur at all. Efficient solutions may be devised by Judiciary itself for e.g. enforcing transparency in recommendation and its basis.

### **Legal Scrutiny of NJAC Case**

Appointment of judges has been another controversial issue in India. It has contributed most to the tussle between judiciary and union. Appointment of high court and Supreme Court judges is mentioned under article 217 and 124 of the constitution respectively. The Constitution mentions judges should be appointed by the president after consultation with the Chief Justice of India. The interpretation of the term consultation has led us to the 3 judges' cases namely *SP Gupta vs UOI*,<sup>22</sup> *Supreme Court Advocates-on Record Association vs UOI*<sup>23</sup> and *In re Special reference 1 of 1998*.

Prior to Judges Case, appointment of judges was done by the President (council of ministers) with due regard given to CJI'S advice. CJI was selected on seniority basis but in 1973 Justice AN Ray was appointed by the union government super passing three more senior judges just a day after *Kesavananda* judgement in which he was among the six dissenting judges in the case. It was considered as an attack on the independence of the judiciary. In *SP Gupta vs union of India*, the Supreme Court ruled against itself and held the CJI's opinion did not have supremacy and the union government was not obliged to act in accordance with his opinion.

The judgement came in the background of the Indira Gandhi government reclaiming power with a huge majority. The *First Judges case* was overridden by the *second Judges case*. The Collegium system was introduced and ruled that the judiciary's viewpoint was primary and the executive can nominate judges only if it was in conformity with CJI's view. In the *third Judges case* also, the same verdict was upheld and expanded the Collegium to include CJI as well as four senior most judges.

The National Judicial Appointment Commission Act was introduced in 2014 to replace the collegium system but was struck down by the Supreme Court declaring the act to be unconstitutional. Primacy to appoint judges was not given to the judiciary hence it violated the principle of independence of judiciary given in the Constitution.

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<sup>22</sup> S.P. Gupta vs President Of India And Ors AIR 1982 SC 149

<sup>23</sup> Supreme Court Advocates-on-Record Association and another vs Union of India (1993) 4 SCC 441

## Judicial Overreach

Indian Judiciary has an excellent streak of successful judicial activism which helps better the governance of the country but sometimes it oversteps into territory of other organs. This is the situation when judicial activism turns into judicial overreach. In the *Jharkhand Assembly Case*,<sup>24</sup> the Supreme Court issued directions to the speaker of the assembly to perform his duties and record proceedings in violation of article 212 prohibiting judicial intervention into the internal business of the state legislature. The Court in *national anthem case*<sup>25</sup> laid down strict rules to govern public behaviour in cinema halls, similarly monitoring investigation in *Gujarat fake encounter case (Ishrat Jahan case)* are few examples of judicial overreach.

The concept of independence of Judiciary does not connote freedom of the judge to substitute his 'will' to the judgement or exercise discretion where it is not provided. He cannot transcend limits set to judicial innovation in a judging process. Judges can only legislate on the gaps and interstices of law.

## Discussion

The independence of Judiciary is *sine qua non*<sup>26</sup> to a true democracy. Its power to strike down bad laws or issue directives to the State is in compliance with the idea of India as a welfare state. Judiciary might have freed itself from the domination of the executive but it still faces challenges of its own. Court has accepted its lack of transparency, it has turned into a closed institution where the outside world has no access. When the CJI upheld transparency while refusing to accept the 'sealed cover note' presented by the attorney general in *OROP case*,<sup>27</sup> it seems unfair that nobody is entitled to know what decision the collegium takes.

The existing matter of superimposition of powers needs to be looked at from people's perspective. The recent judgement in *Anoop Baranwal v UOI* Court laid down guidelines for appointment of Chief Election Commissioner by inserting the leader of opposition and CJI in the board of selectors. The failure of the government to make law governing appointment of CEC even after 73 years since the adoption of the Constitution does not preclude the Court from giving directions to the Executive to conduct the necessary exercise. SC has unequivocally democratized the office of the Election Commission by issuing directions to the executive.

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<sup>24</sup> Anil Kumar Jha vs Union Of India 2005 3 SCC 150

<sup>25</sup> Shyam Narayan Chouksey vs Union of India (2018) 2 SCC 574

<sup>26</sup> Sine qua non : an essential condition, a thing that is absolutely necessary

<sup>27</sup> Indian ex servicemen movement vs Union of India SC 289

The Legislature with the primary power to amend the constitution, grew protective of its powers by keeping laws under 9th schedule out of judicial review. Consequently in *Waman Rao V UOI 1981*<sup>28</sup> the SC ruled that there could not be blanket immunity from judicial review of the laws inserted in the 9th schedule. All acts included in the ninth schedule on and after the judgement of *Kesavananda Bharati Case* (24 April 1973) will not receive protection of article 31B. In the *IR Coelho* case, the Supreme Court reiterated its decision in the *Waman Rao* case. The Court ruled that Article 31B is valid and did not destroy the basic structure of the Constitution.

For the interpretation of constitution on the one hand, the statute concerned on the other hand and to determine if they accord fully and, if not, to determine the extent to which they discord involves the practice of a craft which is essentially judicial.<sup>29</sup> The legislature and the executive could not be expected to perform it. The interpretation of the Constitution is not just to maintain a structure of checks and balances but also to interpret it in a way which ensures maximum welfare to the people. This is because people primarily approach the Court when their rights are undermined, despite having laws put in place by the legislature and executive enforcing them. Article 142 resides in the Court residuary power which it can draw up whenever necessary to do complete justice between parties through due process of law. But it is not a despotic branch of State.

An elected legislature forms the executive thus forming a bone and flesh relationship between the two organs. Judiciary on the other hand is duty bound to abide by its functions perpetually. It is immune from periodic changes as opposed to the legislature and it is the organ most intimate with the citizens and their rights.

## Conclusion

The central idea in assessing the actions of the three organs should be the welfare of the people as mentioned under article 38(1) of part IV 'DPSP' of the constitution . The fruits of judicial activism have been plenty. The *Kesavananda Bharati* case restricted amending power of Parliament, a series of PILs were filed after the revolutionary *Hussainara Khatoon case*, guidelines with regard to sexual harassment at workplace in *Vishakha judgement*, and substantiating independence of the Election Commission in *Anoop Baranwal Case*. The judgements have protected people's rights and also given them new ones. The role of Judiciary

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<sup>28</sup> *Waman Rao And Ors vs Union Of India* (1981) 2 SCC 362

<sup>29</sup> Deshpande, S. (1975). *Judicial Review of Legislation*. Eastern Book Company.



has been satisfactory in filling up spaces left by the Parliament in governance. These actions cannot be looked at as superimposing other organs. If at all it should be concluded that the legislature and executive have their hands full with already existing functions. Judiciary extends a helping hand to uplift the values enshrined in the Constitution.

However, an all-powerful Judiciary is not free from criticism. Judicial activism, as much pro-citizen as it is, should not cross boundaries to manifest as judicial overreach. Co-opting functions of either two of the organs which do not lie in the ambit of control of the Judiciary is unconstitutional (*Jharkhand Assembly Case, 2005*).

Part-IV 'DPSP' Article 50 of the Indian Constitution mentions that, "the state shall take steps to separate the Judiciary from the executive in the public services of the state". The liberal intellectual principle is clearly suggestive that the Constituent Assembly was aware of the power tussle and the resulting confusion that improper separation of powers created. Hence it aimed to separate the powers of organs. The legislative and executive vacuums will remain unavoidable but the deadlocks often seen due to existence of customs rather than codified rule of law (as seen in judicial appointments or absence of specialised laws to deal with novel grievances of the people) should be eliminated by establishing of fresh rule of law.

Dr. B R Ambedkar had said "...If you state in the Constitution that the social organisation of the State shall take a particular form, you are taking away the liberty of the people to decide what should be the social organisation in which they wish to live". This substantiates the legitimate amending power of Parliament. Foundation of NJAC by the Parliament to codify the judicial appointments in 2015 was immediately struck down by the superior court. The contention of the Court that it will interfere with the independence of Judiciary was not completely wrong. But the popular nepotism, no transparency in recommendations and promotions in the Collegium system need a conclusive solution. The NJAC Act had issues like not clearly defining 'eminent person' and jeopardizing independence of judiciary. It hinted at executive stakes in the Judiciary. The NJAC Act needed more thorough framing with the help of constructive dialogue with the Judiciary itself.

The abrupt snatch of adjudicating power of Courts during the Emergency period has left a deep scar and bitter lesson for Judiciary (*Indira Gandhi vs Raj Narain*). However, the argument of independence cannot act as a shield to protect Judiciary from criticism since complete monopoly will set it apart as a parallel governing body rather than an organ of the state. It is right in its exercise of independence which it so fiercely protects. However, its non-transparency and arbitrariness is not in the larger public interest in the long run. It must give

itself to the democratic principles it so dutifully defends.

National Judicial Commission Bill 2022 has been in discussion which aims to regulate appointment, transfer, and removal of judges by laying down judicial standards, regulate transfers, and provide for accountability of judges and procedure to be followed for recommendations. The Legislature should not be able to have a stake in Judiciary rather it should lend a helping hand for better efficiency of the Court so that it functions in a democratic manner. Justice DY Chandrachud had termed basic structure doctrine of India as a rare success story which has been emulated in neighboring countries and across continents. This Indian brand of basic structure is one of a kind with proven Excellency and has changed the legal landscape of the country. The continued calibrations can make it a guiding light for the whole world.

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