



# The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2024

Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

---

## CAN JUDICIARY GO ULTRA VIRES?

### ABSTRACT

The present study examines the notion of judicial restraint in India, examining its origins, principles, and implications within the nation's constitutional structure. The introduction of the paper highlights India's democratic values and the division of powers between the legislative, executive branch, and judiciary as stipulated by the constitution. It recognises how interdependent these organs are, with each acting as a check on the others to maintain a stable and effective democracy. The historical background of constitutional challenges is then covered in the paper, with a focus on the judiciary's dynamic and significant role in preserving constitutional ideals.

The examination of the judicial review's relevance to state and federal laws is highlighted as a critical element of the Indian judiciary's independence. The Kesavananda Bharati case gave rise to the Basic Structure Doctrine, which examined and emphasises the judiciary's responsibility for upholding core constitutional principles such as the separation of powers. The research paper also discusses the possibility of judicial activism and overreach, highlighting situations in which the court may infringe on the authority of the legislative and executive departments in the name of justice. While judicial overreach is cautioned against as an undesired intervention into the operations of the other arms of government, judicial activism is defined as the judiciary's proactive role in enforcing social justice. The delicate balance needed to uphold the separation of powers and uphold the democratic values outlined in the Constitution is discussed in this article. The concept of judicial restraint is then introduced in the research paper, with an emphasis on how crucial it is in keeping the judiciary within reasonable bounds. It talks about how parliamentary sovereignty and the division of powers are compatible with judicial restraint. The paper's conclusion emphasises that judicial restraint promotes a cautious and respectful approach

towards the legislative and executive branches rather than relieving the court of its obligation to protect constitutional norms.

## **INTRODUCTION**

“One organ of the Government shouldn’t encroach upon the functions of the other two organs of the Government.” – Wade & Phillips <sup>1</sup>

India is the largest democracy in the world and being a democracy, which stands ‘for the people, by the people and from the people’<sup>2</sup>; its people govern the nation. The people of India worked for 2 years, 11 months, 17 days to draft their own constitution, which declared Republic of India as a Socialist, Sovereign and a democratic country. This meant that the powers and functions were to be divided amongst various organs and levels. The powers were then divided amongst the three organs viz a viz. Legislation, Executive and Judiciary and amongst the three levels viz a viz. Union or Centre, State and Local level. The roles, power and function of each organ and level has been clearly laid down in the constitution, where Legislature has the powers to make laws, executive implements and executes those laws and bring them into force while the judiciary reviews those laws and ensures their just and fair implementation. However, all the three organs work independently, yet are inter- dependent on each other and thus work coextensively and coherently. All the three organs keep a check on each other for better functioning and administration.

A good democracy, in order to function in a healthy manner must reflect some active and effective participation in public policy-making, the prevalence of the rule of law and an independent judiciary, besides a system of institutional checks & balances through horizontal and vertical separation of powers, and effective oversight agencies<sup>3</sup>. Consequently, there has been a natural clash between the legislative and judicial branches' different jurisdictions ever since our Constitution was drafted. Throughout the history of our parliamentary democracy, there have been several constitutional disputes and political battles about the exact legal foundation of the judiciary's authority to rule on the constitutionality of legislative acts. It is always seen that

---

<sup>1</sup> E.C.S. Wade & G. Godfrey Phillips, *Constitutional Law 22–34* (6th edition, Longmans, UK, 1960)

<sup>2</sup> Abraham Lincoln

<sup>3</sup> Justice Y.K. Sabharwal, *Chief Justice of India, ROLE OF JUDICIARY IN GOOD GOVERNANCE*, (Page no.4) [highcourthd.gov.in](http://highcourthd.gov.in)

judiciary comes up as the most evolving, active and the most powerful one. Constitution of India recognizes judiciary's role in gradual and orderly development of law by judicial interpretation<sup>4</sup>. Since it has been designated as the protector and keeper of the Constitution, the judiciary in India holds an extremely significant position. It protects everyone, both foreigners and Indians, against discrimination, the misuse of state authority, arbitrary conduct, and other wrongdoings by acting as a watchdog against constitutionally granted fundamental rights being violated. It is often seen that the judiciary overpowers the other two organs and in due course of keeping a check on them, it often encroaches upon their areas and in their ambits, which is against the principle of separation of power.

### **JUDICIAL REVIEW AND THE CONSTITUTION**

The judiciary in India is independent and its independence is reflected by its power or function of 'Judicial Review', for evaluation of both the law's constitutionality and the legality of administrative action. The state's bureaucracy and public authorities are subject to judicial review and the courts hold them accountable for the legality of their activities. A person may file an appeal with the supreme court under Article 226 if they believe their legal or basic rights have been violated. Additionally, a person may petition the Supreme Court under Article 32 for any infringement of a basic right or legal dispute. However, the Supreme Court, as the highest court, has the last say over how the constitution should be interpreted. Judicial review is applicable to both state and federal laws. Article 13(3) of the Indian Constitution states that all laws, orders, bye-laws, ordinances, and constitutional changes, as well as any other notifications, are subject to judicial review. Article 21 of the Indian Constitution states that "Procedure established by law" governs judicial review. Before a law may become a law, it must pass the constitutionality test. Conversely, the court has the authority to deem it invalid. Both the Supreme Court and the High Courts in India have the authority to conduct judicial review. The high courts' and the Apex Court's exercise of power over judicial review is subject to several restrictions. The Indian

---

<sup>4</sup> *Raj Krishna, A Case Study of Judicial Review in India, Volume 4 Issue1, The 19 (1) (A) Modern Law College Law Journal. 37, 37 (2018).*

Constitution grants the courts the authority to conduct judicial reviews in accordance with Articles 226 and 227 for High Courts and Articles 32 and 136 for the Supreme Court.

The renowned Basic Structure theory was established by the Indian Apex Court in the landmark case of *Kesavananda Bharati v. State of Kerala*<sup>5</sup>. According to the Basic Structure Doctrine, the legislature may amend the Constitution, but it may not alter the core principles that make it what it is. In the majority ruling, Chief Justice S.M. Sikri outlined five fundamental elements of the Indian Constitution that, in his opinion, cannot be changed by the Parliament. Out of these five elements, one of them was the principle of 'Separation of Powers'. Further in the case of *Minerva Mills Ltd. V. Union Of India*<sup>6</sup>, the scope and extent of the Doctrine of Basic Structure of the Constitution was reconsidered by the apex court, wherein it was interpreted that the phrase "limited power of amendment" was regarded as a fundamental component of the constitution, and as it excluded judicial review in its totality, it was thought that the legislature had attempted to avoid being scrutinised by the courts. This clarified that not only the legislature or the executive, but even judiciary cannot encroach onto their areas. It was finally laid down in case of *S.P SampathKumar V, Union of India*<sup>7</sup> that "Judicial Review is a basic and an essential feature of the Constitution.

### **JUDICIAL ACTIVISM AND JUDICIAL OVERREACH**

The intervention by the Court in a wide range of issues, including those involving economic, social and cultural rights, has generated a debate about the competence and legitimacy of the judiciary in entering areas which have for long been perceived as belonging properly within the domain of the other organs of state<sup>8</sup>. The Indian Judiciary has exhibited initiative and has vigorously and meticulously protected the Fundamental Rights and the Constitution. Judicial activism really refers to the excess of the judiciary into subjects that are permitted by the

---

<sup>5</sup> *Kesavananda Bharti v. State of Kerala* (1973) 4 SCC 225

<sup>6</sup> *Minerva Mills Ltd. V. Union of India*, AIR 1980 SC 1789

<sup>7</sup> *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124

<sup>8</sup> *Justice S. Muralidhar, The Expectations and Challenges of Judicial Enforcement of Social Right*(Page no. 21) ([delhidistrictcourts.nic.in](http://delhidistrictcourts.nic.in))

executive branch; on the other hand, judicial overreach can result from the continued abuse of power.

Judicial Activism signifies the pro-active nature of judiciary where it keeps a check on democracy. It is that active role of the judiciary to dispense social justice. Even in the absence of a complaint, the judiciary has been able to get involved in numerous public matters through *Suo Motos* and PILs (Public Interest Litigation). In the past, judicial discipline was the norm. But over time, judicial positivism gave way to judicial activism, and the court ultimately forge its own course in an effort to make legality more widely accepted. Judicial Overreach is the term used to describe when judicial activism crosses the line and turns into judicial adventurism. To simplify, it occurs when the court begins to obstruct the legislative or executive branches of the government's ability to carry out their mandates.

In a democracy, judicial overreach is undesirable because it violates the idea of the separation of powers. Judicial overreach is basically when the judiciary intervenes in the function of legislature or executive, organs of the Government. Numerous legal experts, practitioners, and judges themselves have criticised the Indian court for taking an excessively activist stance and going too far. There is a disagreement between the legislative and the judiciary since the latter tends to overreach in its duties while the former is falling behind. The idea of separation of powers, which upholds the spirit of the constitution, is in jeopardy. The public believes that the legislature is inert, and there is a lack of concord between the legislature and the courts. Judicial overreach may result in the judiciary expressing lack of regard for elective representation. This may make people less trusting of the democratic system as a whole. Therefore, courts have a duty to maintain their jurisdiction and respect the idea of the separation of powers.

### **JUDICIAL RESTRAINT**

In India, the idea of judicial restraint has its roots in the idea that courts ought to practise self-control and limit their own authority to interpret and implement the law. It highlights the judiciary's cautious and submissive attitude towards the other arms of government, especially the legislative and executive branches. Judicial restraint aims to preserve a delicate balance between the several departments of government by making sure that each one stays within its

constitutional bounds and does not infringe on the authority of the others. In 1950, Constitution of India established a system of checks and balances between the three departments of government: the legislature, the executive branch, and the judiciary. This structure forms the basis of Indian constitutional governance. As the protector of the Constitution, the court plays an essential role in maintaining the rule of law and defending citizens' rights. But there are obstacles in the way of using judicial power and concerns about judicial activism and overreach have sparked a debate over the necessity of judicial restraint. Judicial restraint suggests that when interpreting the law and the Constitution, judges should proceed with caution and discretion. It implies that courts shouldn't unnecessarily get involved in issues that belong more in the legislative or executive branches. Unless there is a clear violation of fundamental constitutional norms, the judiciary should instead accept the political process and the choices made by elected officials.

*S.R. Bommai v. Union of India*<sup>9</sup> is a well-known case that is frequently cited as evidence of the judiciary's restraint. According to the ruling, there are situations where judicial review is not feasible since the issue is political. The court, in this case denied judicial review, arguing that the authority of article 356 was a political matter. It was further declared that it would enter the political sphere if judicial norms were applied to political issues, and it would refrain from doing so.

The Indian constitutional framework incorporates the notion of separation of powers, which is one facet of judicial restraint. In order to prevent the concentration of power in the hands of one body, the Constitution gives each branch of government distinct duties and authorities. Judicial restraint ensures that each branch can carry out its duties independently by acknowledging the necessity of respect and non-interference amongst them. This strategy aids in preserving a harmonious balance by preventing the disproportionate dominance of any one branch. Parliamentary sovereignty and the principle of judicial restraint are closely related. Although the court is empowered to interpret laws and the Constitution, it should not replace elected representatives' preferred policies with its own. Courts are supposed to take a respectful stance when it comes to legislative concerns, assuming the validity of laws and only getting involved

---

<sup>9</sup> *S. R. Bommai v. Union of India* ([1994] 2 SCR 644: AIR 1994 SC 1918 : (1994)3 SCC1)

when there is an obvious breach of basic rights or constitutional provisions. It is important to understand that exercising judicial restraint does not absolve the court of its duty to uphold constitutional principles. It just necessitates paying close attention to the boundaries of judicial authority and making a deliberate effort to prevent excessive meddling in the operations of other departments. Judges are supposed to use their power sensibly, upholding people's fundamental rights and honouring the democratic process. Thus, the Indian judiciary is guided by the crucial concept of judicial restraint, which helps it preserve a careful balance within the confines of the constitution. It emphasises the necessity for less interference in the operations of the legislative and executive branches and encourages the courts to adopt a cautious and obedient stance.

## **CONCLUSION**

Despite being tasked with upholding constitutional norms, the Indian judiciary has occasionally come under criticism for intruding into areas designated for the legislative and executive departments. Judicial activism, in which the court actively participates in governance and policy issues outside of the conventional purview of law interpretation and implementation, is a common example of this intrusion. By giving directions on administrative and policy problems, the judiciary has occasionally strayed into the executive branch during public interest litigation (PIL) or suo motu interventions. Concerns about the court entering the legislative branch have also arisen as a result of judicial decisions interpreting and interpreting laws. A democracy cannot function well without the separation of powers. It protects against any abuses by guaranteeing that no single branch of government gets undue authority. The separation of powers is a fundamental and unchangeable aspect of the constitution that is oblivious to amendments, according to the Basic Structure Doctrine, which was established in the Kesavananda Bharati case. The desired balance between the branches is disturbed, according to critics, when the judiciary gets too involved in administration and policy-making, so going against this concept. A fundamental component of the Indian legal system is judicial review, which gives judges the authority to judge whether laws and government actions are lawful and constitutional. It acts as an essential check and balance system, guaranteeing that the legislative and executive branches' activities uphold the fundamental rights of citizens and are consistent with the values of the

constitution. The court protects the other arms of government from possible overreach and unconstitutional behaviour through judicial scrutiny. The judiciary's proactive role in interpreting and making laws to promote justice, particularly in areas where legislative action may be deficient, is referred to as judicial activism. It has played a crucial role in addressing social challenges, defending the rule of law, and defending human rights.

On the other hand, the idea of judicial restraint advises judges to refrain from unwarranted intervention in the legislative and executive branches. It promotes a more conservative stance, stressing that unless there is an obvious breach of constitutional norms, the judiciary should not replace the elected representatives' policy preferences with its own. It is believed that judicial restraint is essential to preserving the delicate balance that the constitution's authors intended and preventing the court from growing too powerful. Judicial overreach, according to critics, threatens the democratic system, particularly when considering the division of powers. The idea of the separation of powers is seen as a fundamental and unchangeable aspect of the Indian Constitution, serving as a key structural doctrine. Any judicial overreach undermines the framers' intention for each branch to function independently of the other.

Although some consider judicial overreach as a threat to the separation of powers, it is crucial to recognise the judiciary's role in preserving constitutional principles. In order to solve societal challenges and defend individual rights and to uphold justice even in situations where other branches could fail, judicial activism has proven vital. But there's a risk of overindulgence so it calls for careful balancing. A neutral stance recognises that an active judiciary is vital for a strong democracy. As vital as it is to preserve the idea of the separation of powers, it is also critical to acknowledge that the court serves as a protector of the constitution. Maintaining the judiciary's ability to effectively preserve constitutional values while preventing overreach requires striking a balance between judicial activism and restraint.

The Indian judicial system presents a prime illustration of how the judiciary can support effective governance. The finest aspect is that the other two major branches of government in India have consistently recognised the judiciary's authority to subject all State actions to "judicial review." As a result, they have either followed through on the decisions made or taken the necessary additional steps to support them.



Thus, the judiciary has been central to the growth and development of society as a whole as well as to the maintenance of good governance by those in positions of authority.