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# Political and Executive Dominance on Judicial Review: The Current Conflicts in India

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## ABSTRACT

*Judicial review is a vital provision of our Constitution that acts as a watch guard of our democratic society. The judicial review helps the state to serve the Directive Principles of the State policy, which is ensured to every citizen through the Constitution. When the concept of judicial review was introduced in the Constitution, the feature was accepted as well as criticized by many liberals. As time passed, the idea of judicial review also evolved and helped in keeping a check on the judiciary. This feature gave power to the public to question the judiciary. The only difference is that the usual participation in politics cuts the wings of the judiciary, and is a barrier to their independent working. In India, the stress between the judiciary and the executive isn't something that has recently come into existence. The objective of our research is to critically examine the dominance of politics and the executive on judicial review. Judicial review is the power of the judiciary to keep a check on the legislative body and its work. According to our constitution, the judiciary is an independent body in which the executive and the legislative should not interfere. However, in recent times, the executive is slowly trying to dominate the feature of the Constitution (judicial review).*

*The paper will analyse the current conflicts in India concerning the dominating nature of the executive. Judicial review is the basic structure of our Constitution that cannot be amended. The political interference in the process of judicial review is diminishing the primary objective of our Constitution. The paper tries to reflect on the above ideas with contesting and supportive arguments and will try to highlight the importance of judicial review in India as well as compare the status of judicial review in the UK and India. The study further provides suggestion as to how the situation can be upgraded and the essence of our Constitution can be preserved.*

**Keywords:** *Constitution, Judicial review, Rule of law, judiciary, Executive, legislative.*

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## **I. INTRODUCTION**

The three wings of our Constitution are the judiciary, legislature, and the executive, which keep a check on the functioning of the government. These pillars ensure the effective and efficient working of the government. Balance in the working of society helps in the smooth functioning of the country, which is essential for public welfare. In India, the ultimate power is in the hands of the Constitution. Judicial review is the power given to the judiciary to review the actions of the legislative. The judiciary must abide by the principle of rule of law and natural justice. The concept of rule of law provides a procedural aspect to our legal system. This concept includes various essential components such as uniform law for every individual, access to justice, accountability, accessibility, transparency, and judicial review. The concept of judicial review was established to keep a check on the working of the public bodies. In this feature, the rulers and subjects both should be accountable to the law, considered of absolute value.

India is a democratic country that opted for the parliamentary form of government. In this form of government, every wing of the government is involved in the process of policy and decision making; this further helps in a fair representation of society. Articles 226 and 227 of the Constitution of India designate the power of judicial review in the hands of the High Court. The Supreme Court is authorized with the power of judicial review in Articles 32 and 136 of our Constitution.

In *Kesavananda Bharati v. the State of Kerala*<sup>3</sup>, the landmark case of our Constitution, the Supreme Court laid down the principle that law is an essential ingredient that forms the basic structure of our Indian Constitution. The basic structure, which is the foundation of law, cannot be amended by any other Act passed by the legislature, making the law of the land above all the authorities. Therefore, the term judicial review was known to be the primary structure on which the Constitution of India is based. During the initial stages of adjudication, the judiciary decided that when a political question is involved, judicial review is not amendable but with time this gradually changed.

Therefore, in recent times, there have been many conflicts where the liberals debate the interference of politics and the executive on the judicial review. This paper critically examines the involvement of the external bodies in the feature of judicial review. It further analysis the dominance of the executive as the primary element of our constitution with recent conflicts in India.

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<sup>3</sup>*Kesavananda Bharati v. the State of Kerala*, AIR 1973 SC 1461

## **II. JUDICIAL REVIEW: THE INDIAN SCENARIO**

Common law is the root for judicial review fundamental feature of our constitution. The concept of judicial review came into existence through the flowing of events. The Indian constitution is based on the concept of supremacy of law. The doctrine of judicial review in India is considered fundamental to our constitution. It is one of the most important features of the constitution. However, it is not mentioned expressly in our constitution. The doctrine of judicial review is a concept to keep check and balances of the two pillars of our constitution i.e. the legislative and executive. The primary objective of judicial review is to provide fair and just treatment to the citizens of India by keeping a check on the dominance of powers by the executive authorities. The doctrine of judicial review is based on the concept of rule of law. The expression “Rule of law” means that law is superior to every individual, including governmental actions. The concept of the Rule of law is based on the supremacy of law where the government, as well as the individuals, are obligated to the law of the land. The Rule of law is a concept which helps in maintaining harmony in society. During any conflicts in society, rule of law is given the utmost importance.

The theory of the Rule of law was a historical concept that came into existence after a lot of developments and the rise of the democratic form of government. The subject is a comparative study of the formal meanings of the rule of law which includes that the state should make law in accordance with this concept. On the other hand, the idea has a broader definition that is more substantive, including the fairness and justice aspects. Further, its purpose is also adjusted according to the political ideologies of the state. Dr Jennings quoted that equality before the law means that all the citizens should be provided with equal laws and administrative procedures should be carried out in the same manner. Article 14 states two things, the first is equality before the law. This implies that the state shall not deny any person equal treatment before the law. Second, every citizen should be provided with equal protection of law within the territory of India. Article 14 prevents the citizens of the state from being discriminated against on the grounds of sex, religion, caste, place of birth, or any other reasons by the state itself. Article 14 also corroborates the principle of separation of powers, where the powers are separated between the executive, legislature, and judiciary; where the judiciary doesn't interfere in the working of the legislature and executive.

The mechanism was also strengthened through different judgments. The first landmark case which made an impact on the Indian legal scenario was *A D M Jabalpur v. Shivkanth Shukla*.<sup>4</sup>

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<sup>4</sup> AIR 1967 SC 1207

The argument which was put forward was that Whether or not the principle of the rule of law was expressly stated in the Constitution of India, apart from what is written under Article 21 of our Constitution. The question was with reference to the suspension of fundamental rights during the announcement of an emergency in the country.

Justice HR Khanna observed that *“Even in the absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning...Rule of Law is now the accepted norm of all civilized societies.”*<sup>5</sup>

In *Kesavananda Bharati v. the State of Kerala*,<sup>6</sup> the landmark case of our Constitution, the Supreme Court laid down the principle that law is an essential ingredient that forms the basic structure of our Indian Constitution. The basic structure, which is the foundation of law, cannot be amended by any other Act passed by the legislature, making the law of the land above all the authorities. Therefore, the ideology of the rule of law is the fundamental principle on which the Constitution of India is based.

The Indian Constitution authorizes powers and duties to the three wings of our modern democratic society, i.e. the legislature, the judiciary, and the executive. The authorities and powers of the legislature and executive are derived from the Constitution of India. Article 13 of our Constitution mentions that if a law is incoherent with the laws stated in our Constitution, the law will be held invalid.

*Maneka Gandhi v. Union of India*<sup>7</sup> in this case, the court made sure that the government should not misuse their power, as this could further violate the fundamental rights of the individuals. Through these judicial pronouncements and agencies monitor the working of the government, there have still been various scams and abuse of power by the officials.

Judicial Review of constitutional amendments may seem to involve the Court in political question, but it is the Court alone who can decide such an issue. The function of Interpretation of a Constitution being thus assigned to the judicial power of the State, the question of whether the subject of law is within the ambit of one or more powers of the legislature conferred by the Constitution would always be a question of interpretation of the Constitution.

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<sup>5</sup> *A D M Jabalpur v. Shivkanth Shukla*, AIR 1976 SC 1207, para 154

<sup>6</sup> AIR 1973 SC 1461

<sup>7</sup> AIR 1978 SC 597.

### III. JUDICIAL REVIEW IN INDIA AND UNITED KINGDOM

In the famous case of *R (on the application of Miller) v. The Prime Minister*<sup>8</sup>, the Supreme Court of United Kingdom was asked a pertinent question on whether it had the powers to adjudicate, and also did it possess the power to announce the advice given by the Prime Minister to the Queen with respect to the matter concerning proroguing of the Parliament?

It was of the opinion that the parliament was prorogued with an intention to align the timeline with Brexit Proceedings, which in effect would allow the government to bypass the approval needed by the parliament to give effect to the withdrawal agreement. The Supreme Court of the UK is coordinated with the principles of Parliamentary Sovereignty and accountability and was of the opinion that the Crown had the power to prorogue and was subject to the laws enacted by the Parliament, and hence it was not unlimited. The constitutional validity of such prorogue was whether it was within the bounds of parliamentary sovereignty and responsible government. Identifying the rules under the Constitution the Court was of the view that the power to prorogue was legally valid and justiciable, and it did not affect the separation of powers in any way.

The Constitutional amendment for the establishment of the National Judicial Appointment Commission (NJAC), in India had witnessed how both the Executive and the legislature had joined hands towards side-lining the Judiciary. But this in turn had compelled the Supreme Court to strike down the 99<sup>th</sup> Constitutional amendment via its power of judicial review, wherein the National Judicial Appointment Commission was struck down. This reflects on a detailed need for discussing the ambit of judicial review available to the courts in India.

According to Article 50 of the Constitution of India, it mandates the maintenance of the independence of the Judiciary. There must be much more clarity and definition on how and when the Courts could intervene into the branches of the states to exercise the power of judicial review. The UK is at a juncture to reassess the scope of its Judicial Review powers with the help of an independent panel of members including public lawyers to assess if any reforms are to be brought forward. It is all set to submit its report before the panel, hopefully India will have a chance to ponder upon the report and bring about the desired changes into its constitutional frameworks.

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<sup>8</sup> [2019] UKSC 41

#### **IV. THE DOMINANCE OF THE EXECUTIVE ON THE JUDICIARY: THE CURRENT CONFLICTS IN INDIA**

In the past four to five years there have been many controversies related to the appointment of judges and transfers where the higher authorities are tried to take control of the judiciary. Which is weakening the democracy and violating the fundamentals of the constitutions. Lately, there have been two questions put forwards in regards to the working of our judiciary. Firstly, the transparency and the arbitrariness of the function of the judicial bench and secondly, the independence of the functioning of the judiciary. It was seen their fundamentals of constitution i.e. the separation of powers in decaying to a certain extent. In the recent case *Record Association v. Union of India* (2015), the judgment taken by the Supreme Court India was seen to be influenced by the executive. This influence of the executive on the judiciary is arising from the concerns of violating the fundamental structure of our constitution. There is an increase in the studies conducted by the International Commission of jurist and various other institutes related to the independence of the judiciary and separating the judicial bodies from the governmental bodies

In recent cases, the Supreme Court of India has stated that the executive should not interfere in judiciary matters especially in the transfers and appointments of the judges as this can lead to a lack in the administration of justices. However, the current continuous events mark the opposite of the same. The Secretary-General of the Supreme Court of India recently issued a justification for the judgment with reasons. However, the sitting judge of Supreme court Justice D.Y. Chandrachud gave a logical perspective wherein he noted that transfers are no effective remedy for questioning the judiciary's accountability. Nevertheless, apprehensions regarding the unsatisfactory transparency in the working of the judicial body in India.

#### **V. ARE POLITICAL PARTIES AND THE EXECUTIVE BRANCHES OF THE GOVERNMENT TRYING TO BLUR THE CONCEPT OF RULE OF LAW BY ENCROACHING INTO THE DOMAIN OF JUDICIAL FUNCTIONS?**

The idea of judicial activism is not something that is new to our knowledge, it had evolved many years ago to be precise in the year 1804. The person who coined the term was Chief Justice Marshall, who decided the landmark case of *Marbury v. Madison*.<sup>9</sup> Marbury was the one who was appointed as a Judge under the then Judiciary Act of 1789 with the consensus of the then U.S Federal Government. The main issue evolved when the warrant even though it

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<sup>9</sup> 5 U.S. ( 1 Cranch) 137 (1803)

was signed could not be delivered, for which Marbury brought about an action in the form of a writ of mandamus. But by then, Marshall had become the Chief Justice of the Supreme Court, wherein he was appointed by the outgoing President who had lost the elections. In a very rare display of his assertiveness and the very boldness to determine the issue, Justice Marshall rejected the plea to issue the writ of mandamus in favour of Marbury, on the ground that there was an eminent violation of Constitutional provisions that is the original jurisdiction of the Supreme Court to issue the writ of mandamus. Chief Justice Marshall was of the opinion that Constitution must be observed as the paramount law of the land, and the courts are in a position to determine what the law is. He also mentioned that the above principle was in consensus with the principles and ideologies of the written constitution of the United States. A law that is against the principles and rules of a Constitution is void and all the public and non – governmental institutions must respect the Constitutional provisions. The judgment also highlighted the fact that if there is a conflict between the laws made by the Congress and the constitutional provisions, the constitutional provisions will outweigh the laws promulgated by the Congress, and from there on the concepts of Judicial activism and Judicial review were coined.

But lately, in India, we are witnessing evident clashes between Government and Judiciary in the arena of law-making powers. In the interesting exchanges of dialogue between The Attorney General of India wherein he mentioned that the courts have now taken over the executive powers, Justice Dhanajay Y Chandrachud was of a different opinion that Courts were only trying to implement Centre's policies.

In the case of *Madras Bar Association v Union of India*<sup>10</sup>, the three-judge bench comprising of Justices L. Nageswara Rao, Hemani Gupta, S Ravindra Bhat had brought forth a triggering trend on how the governments are not at par implementing the orders propounded by the Highest Court of India. The petitioners, that is the Madras Bar Association in the said case have approached the Supreme Court time and again with the motive to ensure that the High Courts and the Lower Courts should not be functioning as any other subordinates of the Centre (Executive), even after persistent orders from the respective Tribunals and Courts no actions are being taken by the executive to mend the existing situations. Its time to put an end to such disgraceful actions on the part of the executive, among other directions the Court has instructed the Centre for the formation of a National Tribunals Commissions which must act as an independent body that shall be responsible in appointments and will

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<sup>10</sup> (2015) 8 SCC 583



check the functioning of courts, which shall also play a pivotal role in taking disciplinary actions and proceedings against the members of courts and tribunals, also it will be in charge of taking due diligence in administrative procedures as well as infrastructural aspects of the courts. Also, the new committee coined as search cum selection committee will be responsible for filling up the vacancies in the tribunals, wherein the Chief Justice of India or any of his nominee will be taking the position of Chairperson who will also be conferred with voting power. These changes are very much necessary in the current scenario especially to mark the presence of the Judiciary in the committee, so as to outweigh the civil servants already existing in the committee.

Justice Chandrachud, comprising of other judges in a Constitution Bench in the case of **Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal**, was of the opinion that there must be absolute independence of Judiciary, which must be considered as the basic feature of the constitution, which rides along the fundamental right to free expression. In this case, the court held that when the file noting's taken care of by the constitutional machinery are revealed concerning the appointment procedures will in effect corrupt the independency of the judiciary. Also in a notable case of **Rojer Mathew v. South Indian Bank Ltd and Others**<sup>11</sup>, the apex court had carefully examined the constitutional validity of the Finance Act, 2017 which mainly lays down the frameworks on the organisation and structure of the tribunals. The petitioners in the case had challenged upon the structure of the act as a Money Bill. The Supreme Court in fact took the effort to completely strike down the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other Conditions of Service of Members) Rules, 2017 wherein indicating that the act was in complete contravention to the doctrines of separation of powers, and most importantly the basic structure of the constitution. This judgment from the apex court was to an extend a by- product of the judgement delivered by the same court in the Three Judges Case, wherein time and again the court was of the opinion that the executive cannot malign the dominance of judiciary in cases of appointment of its members, whereas the bench referred to the subject of money bill to a larger bench.

The values, rules and ideologies projected in our Constitution must be taken into account with the ever-changing scenarios in both social and economic contexts which takes up new dimensions every changing years. The main function of our Courts is to keep up with such periodic transitions with maligning the embedded constitutional values. On the other hand, it's

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<sup>11</sup> 2018 (10) SCJ 458

the very duty of the executive branch to take note and implement the laws which are made by the legislature and to consider the orders of the courts as supreme. Where the executive fails in discharging its eminent duties as per the law, then the judiciary has the authority to compel the executive to discharge its duties in a rightful manner. We have seen emerging complaints against the judiciary, where a crime is committed by persons at power and efforts are made to disassemble the said crimes by finding recourse in executive machineries. But here the role of the judiciary becomes very significant, it becomes the pivotal role of the judiciary to take actions against the executives and to mend the grievances of the public. It becomes the duty of the judiciary to issue appropriate orders so as to enable the proper functioning of the executive so as to perform its duties in accordance with the constitutional values. The judiciary must never fail in performing its duties rightfully no matter what, as the constitution is the embodiment of judicial responsibilities too.

The political parties which are in power who are responsible for bringing forth the frameworks of policies nor the servants of public institutions that is the civil servants who are equally responsible for the proper implementation and functioning of such policies should never act in a manner that is in contrast to the constitutional values jotted down in our Constitution. All the three organs of the State, that is the Legislature, the executive and the judiciary should join hands and work in harmony because the birth of such institutions was through our Constitution and no such organs should be treated above one another.

## **VI. CONCLUSION**

The framers of the Constitution established the Indian Constitution on the fundamentals of Rule of law. Still, now people and government officials must implement the same concept in their work. The Indian Constitution has provided enough statutes and laws which can ensure equal rights, separation of powers, judicial review, and right to life and liberty but mere laws cannot govern the state. The citizens of India should use their rights to the fullest and fulfill their responsibility as honest citizens of this country.

The strength of the judiciary is not affecting the independent structure of the judiciary but also question the ruling of the executive body. The political position of the executive is at stake due to the controlling nature of the government. It is adversely affecting the governance of the government and their ideologies are recently in question by the public. Gautam Bhatia the constitutional commentator of commented on the recent controversy of the Supreme court in the way they are handling the petition base on Article 370 of the Indian constitution, the state of Jammu and Kashmir and its special status stated that in this era which is supported by a

weak judiciary which is continuously failing and violating the fundamental principles on which is the constitution on India is written.

It is important that the supreme of India now realizes the essences of the strength of true independence and is in coherence with the ideals of late Justice HR Khanna because if in case the basic structure of the Indian constitution i.e. the separation of power is decayed then the rule of law on which the democracy works will change into rule by man. It will further change the whole idea of a democratic society. It is high time that the judicial body should take an independent stand and step out of the dominating shadow of the executive body. As the judiciary is known to be the protector of our Indian constitution, it should work and rise to the desired standards of the citizens. It should act as a watchdog of the constitution, not the executives.

In my opinion, it is imperative to improve the function of the judiciary and the legal system of India. The overcrowded courts and the high number of pending cases are decreasing the trust of the public in the working of the judiciary. Moreover, the Constitution should be the guardian of the Supreme Court, and no other form of force should affect the decisions of the judiciary. Establishments of law commissions and other digital portals are helping in keeping an eye on the legal system of India, making it more transparent. As the system as a whole becomes more prominent, the accountability of the system will also be enhanced.

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