

DOCTRINE OF SEPARATION OF POWERS AND JUDICIAL REVIEW: STRIKING A CONSTITUTIONAL BALANCE

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ABSTRACT

The doctrine of separation of powers is one of the fundamental tenets of constitutionalism, designed to avoid the concentration of power and to secure liberty through checks. Judicial review, as a constitutional instrument, gives the judiciary the ability to review actions taken by the legislature and the executive to ensure that they are consistent with the provisions of the constitution. Despite the two instruments, the aim is to ensure the supremacy of the constitution and the rule of law and not the rule of man. As their relationship has often been fraught with tension, especially in constitutional democracies where the judiciary is actively engaged in defending constitutional rights. In the Indian context, this tension is most apparent in the debate over judicial activism, judicial restraint, and judicial overreach. This paper will critically assess the relationship between the doctrine of separation of powers and judicial review, primarily in the Indian constitutional tradition, with comparative insights from other systems. It argues that judicial review, when exercised within constitutional limits and guided by institutional restraint, does not violate separation of powers but rather strengthens the constitutional balance envisioned by the framers. The study concludes that a functional and cooperative interpretation of separation of powers is essential for sustaining democratic governance, the rule of law, and constitutional supremacy.

Keywords: Separation of Powers, Judicial Review, Constitutional Balance, Judicial Restraint, Rule of Law

I. Introduction

Constitutional democracies are based on the idea that power cannot be allowed to concentrate in the hands of one authority. History shows that unconstrained power, regardless of the political system, always results in arbitrariness and the destruction of individual freedoms. To check this trend, the theory of constitutionalism has developed a system of dispersing and controlling state power. Among these systems, the doctrine of separation of powers plays a pivotal role. The doctrine aims to allocate law-making, administration, and

adjudication to separate organs of the State, thus providing for accountability, efficiency, and freedom.

Judicial review, on the other hand, is a constitutional mechanism that allows courts to review the constitutionality of legislative and administrative measures. It is an important tool for ensuring the supremacy of the Constitution and the enforcement of fundamental rights. Nevertheless, the concept of judicial review has been widely criticized for being necessarily in conflict with the doctrine of separation of powers. Critics hold that when the judiciary

strikes down statutes on the grounds of invalidity, makes policy-based decisions, and supervises the functioning of the executive, it oversteps the powers allocated to the legislature and the executive under the Constitution.

The Indian constitutional experience offers a rich area for exploration in this regard. The Indian Constitution provides for a written, supreme Constitution, protects justiciable fundamental rights, and confers vast judicial review powers on constitutional courts. At the same time, it provides for a democratic system based on the sovereignty of Parliament within constitutional parameters. The task, therefore, is to strike a balance between the role of the judiciary as the protector of the Constitution and the functional autonomy of the other two branches of government.

This paper aims to explore whether judicial review erodes the doctrine of separation of powers or whether it is possible to strike a balance between the two doctrines within a constitutional framework.

II. Conceptual Foundations of the Doctrine of Separation of Powers

The doctrine of separation of powers has a long history. Aristotle, in his book "Politics," has identified three aspects of governance: deliberative, magisterial, and judicial. Later, John Locke has distinguished between legislative and executive powers. He has also emphasized that liberty would be in danger if the same power were to wield the sword of law-making and law-execution.

The most influential articulation of the doctrine, however, is attributed to Montesquieu. In *The Spirit of Law*¹¹⁹¹, Montesquieu argued that liberty cannot exist where legislative, executive, and judicial powers are united in the same person or body. His formulation aimed to prevent tyranny by ensuring that no single authority wielded absolute power. This classical model envisaged

a strict separation of functions, personnel, and authority among the three branches.

Modern constitutional systems, however, have moved away from a rigid application of this doctrine. Absolute separation is neither practical nor desirable in contemporary governance, where interdependence among branches is necessary for effective administration. Consequently, the doctrine has evolved into a principle of checks and balances, allowing each branch to exercise limited control over the others while retaining its core functional autonomy.

In the Indian context, the Constitution does not explicitly codify the doctrine of separation of powers¹¹⁹² in a single provision. Nevertheless, it is implicit in the constitutional scheme. Legislative powers are vested in Parliament and State Legislatures, executive power is vested in the President and Governors acting through the Council of Ministers, and judicial power is vested in an independent judiciary. The Supreme Court has repeatedly recognized that separation of powers forms part of the basic structure of the Constitution, thereby affirming its foundational status.

III. Judicial Review: Nature, Scope, and Constitutional Basis

Judicial review is the "power of constitutional courts to review the constitutionality and legality of legislative and executive measures." It is a crucial aspect of constitutional supremacy, as it ensures that all State actions are consistent with the Constitution. In India, judicial review is explicitly and implicitly guaranteed by various provisions of the Indian Constitution.

Article 13 states that "laws inconsistent with fundamental rights shall, to the extent of such inconsistency, be void." Articles 32 and 226 confer a power on the Supreme Court and High Courts, respectively, to protect fundamental rights through appropriate writs. Articles 131, 136,

¹¹⁹¹ Baron de Montesquieu, Charles de Secondat. *The spirit of laws*. Vol. 1. F. Wingrave...[and 4 others], 1793.

¹¹⁹² Manning, John F. "Separation of powers as ordinary interpretation." *Harv. L. Rev.* 124 (2010): 1939.

and 142 further strengthen the judicial role in constitutional interpretation and enforcement.

The theoretical basis for judicial review is the supremacy of the Constitution over ordinary law. In a written Constitution, the Constitution embodies the will of the people in its highest form. Judicial review prevents “transient political majorities from eroding constitutional values and fundamental rights.” It also provides a safeguard for minorities in a majoritarian democracy.

However, judicial review is not an unfettered power. Courts have consistently emphasized that their role is not to substitute legislative or executive wisdom with judicial preferences. The scope of review varies depending on the nature of the action under scrutiny. While courts apply strict scrutiny in cases involving fundamental rights, they often exercise deference in matters of economic policy, administrative discretion, and legislative policy choices.

IV. Tension Between Judicial Review and Separation of Powers

The perceived tension between judicial review and the separation of powers arises when judicial review strikes down laws, when courts issue mandatory orders to the executive, or when courts supervise the functioning of the government over a long period of time.

In India, this tension became particularly pronounced during the constitutional struggles of the 1960s and 1970s. The judiciary’s assertion of its power to review constitutional amendments culminated in the landmark decision in *Kesavananda Bharati v. State of Kerala*, where the Supreme Court propounded the basic structure doctrine. While this doctrine strengthened constitutional supremacy¹¹⁹³, it also positioned the judiciary as the final arbiter of constitutional validity, thereby intensifying debates about institutional boundaries.

Post-Emergency judicial activism further expanded the scope of judicial intervention. The development of public interest litigation enabled courts to address issues of governance, environmental protection, social justice, and administrative accountability. While these interventions have produced significant positive outcomes, they have also blurred the distinction between adjudication and governance.

The core issue, therefore, is not the existence of judicial review but the manner of its exercise. At the same time, excessive restraint risks rendering constitutional guarantees illusory.

V. Indian Judicial Approach: Case Law Analysis

Indian constitutional jurisprudence offers valuable insights into how courts have attempted to balance judicial review with separation of powers. In *Kesavananda Bharati v. State of Kerala*, the Supreme Court held that while Parliament possesses wide powers to amend the Constitution, it cannot alter its basic structure. Judicial review was recognized as an essential feature of this structure, thereby cementing the judiciary’s role as the guardian of constitutional supremacy.

In *Indira Nehru Gandhi v. Raj Narain*, the Court struck down constitutional amendments that sought to exclude judicial review of election disputes involving the Prime Minister. The Court held that such exclusion violated the basic structure by undermining the rule of law and separation of powers.

Similarly, in *I.R. Coelho v. State of Tamil Nadu*, the Supreme Court reaffirmed that laws placed in the Ninth Schedule after the *Kesavananda* decision remain subject to judicial review if they violate fundamental rights forming part of the basic structure. This judgment underscored that constitutional immunity cannot be used to bypass judicial scrutiny.

At the same time, the Court has repeatedly emphasized the need for judicial restraint. In *Divisional Manager, Aravali Golf Club v. Chander Haas*, the Supreme Court cautioned

¹¹⁹³ Kumm, Mattias. "The jurisprudence of constitutional conflict: Constitutional supremacy in Europe before and after the constitutional treaty." *European Law Journal* 11.3 (2005): 262-307.

that judges must not encroach upon executive or legislative functions under the guise of judicial activism. The Court observed that governance is primarily the responsibility of elected representatives and administrators, not judges.

These decisions reflect a nuanced judicial approach that recognizes both the necessity and the limits of judicial review within a constitutional framework.

VI. Comparative Constitutional Perspectives

A comparative analysis of the constitutions shows that the conflict between judicial review and the separation of powers is a common phenomenon in constitutional regimes and is not specific to the Indian experience. Each country has developed its own unique approach to balance judicial oversight with democratic governance, depending on the specific constitutional design, history, and political culture of the country.

In the United States, judicial review was firmly established in the case of *Marbury vs. Madison*, where the Supreme Court claimed the power to interpret the Constitution and strike down laws repugnant to it. The U.S. Constitution is known for its rigid textual separation of powers and a strong system of checks and balances. Although the Supreme Court has had a major impact on public policy through its constructions of the constitutional provisions, especially in the areas of civil rights, federalism, and the executive branch, its power can be justified on the assumption that it upholds the "supreme law of the land." Judicial review in the United States is considered an essential part of the separation of powers, which prevents legislative and executive abuses without undermining democratic institutions.

In contrast, the United Kingdom traditionally adhered to the doctrine of parliamentary sovereignty, which limited the scope of judicial review over primary legislation. Courts historically refrained from questioning the validity of Acts of Parliament. However, the

enactment of the Human Rights Act, 1998, marked a significant constitutional shift by enabling courts to assess legislative compatibility with the European Convention on Human Rights. Although British courts lack the power to strike down legislation, declarations of incompatibility exert considerable persuasive influence on Parliament, thereby fostering constitutional dialogue rather than judicial supremacy.

These comparative models illustrate that judicial review, when institutionally embedded and normatively constrained, functions as a complementary mechanism within the separation of powers. Rather than undermining democratic governance, judicial review enhances constitutional accountability while respecting institutional boundaries.

VII. Judicial Restraint as a Constitutional Balancing Tool

Judicial restraint¹¹⁹⁴ operates as a vital constitutional principle that mediates the relationship between judicial review and the doctrine of separation of powers. It is premised on the understanding that while courts are entrusted with the duty of constitutional interpretation and enforcement, they must also respect the functional autonomy and democratic legitimacy of the legislative and executive branches. Judicial restraint, therefore, reflects institutional self-discipline, ensuring that the judiciary does not transgress constitutional boundaries under the guise of constitutional guardianship.

At its core, judicial restraint does not signify passivity or abdication of judicial responsibility. Rather, it embodies a calibrated approach to constitutional adjudication, wherein courts intervene decisively in cases involving violations of fundamental rights, constitutional morality, or the basic structure, while exercising caution in matters of policy formulation, administrative discretion, and legislative wisdom. This approach acknowledges the judiciary's

¹¹⁹⁴ King, Jeff A. "Institutional approaches to judicial restraint." *Oxford journal of legal studies* 28.3 (2008): 409-441.

institutional limitations, particularly its lack of direct democratic accountability and policy-making expertise.

In the Indian constitutional framework, judicial restraint has evolved as a counterbalance to the expanding scope of judicial review, especially in the post-Emergency era marked by judicial activism and public interest litigation. The Supreme Court has repeatedly emphasized that courts must avoid substituting their own views for those of elected representatives. In this context, doctrines such as proportionality, reasonableness, and judicial deference have emerged as doctrinal tools to maintain constitutional equilibrium. The doctrine of proportionality enables courts to assess whether State action disproportionately infringes fundamental rights, without invalidating policy choices merely on the basis of disagreement. Similarly, the test of reasonableness ensures that executive and legislative actions are not arbitrary, while still allowing sufficient latitude for governance.

Judicial deference, especially in relation to economic policy, national security, and administrative regulation, further cements the separation of powers by acknowledging the relative institutional advantage of the executive and legislative branches. In this manner, judicial restraint enables the judiciary to uphold the supremacy of the Constitution without encroaching upon judicial legislation or administrative governance.

In the end, judicial restraint enhances the legitimacy of judicial review by bringing it in line with the intent and principles of democracy. By adhering to a set of principled standards of review, the judiciary can serve as a constitutional sentinel that guards rights, safeguards the rule of law, and preserves the fragile balance of power as contemplated by the Constitution without compromising the structural integrity of the separation of powers.

VIII. Conclusion

The doctrine of separation of powers and judicial review must be grasped not as two competing constitutional tenets but as two complementary elements of a sound constitutional democracy. Separation of powers is the structural guarantee that prevents the concentration of power and maintains democratic accountability, while judicial review is the normative mechanism that ensures the supremacy of the Constitution and the safeguarding of basic rights. Together, these tenets ensure the rule of law and the rule of the Constitution.

The Indian constitutional experience illustrates that judicial review has been a crucial factor in ensuring that the Constitution is not violated by the legislature and the executive, especially in times of democratic distress. Through its landmark decisions, the judiciary has reiterated that the supremacy of the Constitution cannot be made subordinate to the will of fleeting political majorities. At the same time, judicial decisions that stress restraint indicate that the judiciary is conscious of the fact that constitutional adjudication must be mindful of institutional constraints. The legitimacy of judicial review, therefore, does not lie in its scope but in its principled and restrained exercise.

A functional and cooperative approach to separation of powers, and not a rigid or formalistic one, is necessary for the maintenance of constitutional balance in the complex modern state. This approach recognizes the interdependence of the constitutional organs and at the same time maintains their separate character. The judiciary must be ever vigilant against arbitrariness, unconstitutionality, and violations of rights, but must not assume the role of policy-makers or administrators.

The role of the judiciary as a constitutional sentinel in the evolving constitutional democracy must be informed by constitutional morality, judicial humility, and sensitivity to

democracy. The judiciary's review power must be a shield and not a sword. Only through this calibrated approach can the delicate equilibrium between judicial review and separation of powers be sustained in the long term.

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