
JUDICIAL REVIEW AND SEPARATION OF POWERS: RETHINKING JUDICIAL OVERREACH IN INDIA

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ABSTRACT

The judicial review is a characteristic of Indian constitutional structure and a very important mechanism of protection against the excess of legislative and executive power. However, in the past 10 years the expansion of interpretative and remedial powers of the courts has raised concerns of judicial overreach. This paper is a critical discussion of the developing relationship of judicial review and separation of powers in India. It disaggregates the principles of judicial review, determines hermeneutical lines between judicial activism and judicial encroachment, and evaluates a variety of more recent cases in the areas of economic policy, institutional appointment, fundamental rights, environmental regulation, and public interest litigation. Special emphasis is given to the emergence of structural remedies and ongoing mandamus to represent a means of judicial governance. The article relies on a comparative constitutional experience in the United States, the United Kingdom, and South Africa, and suggests a principled set of recommendations regarding the proportionality, institutional competence, and judicial minimalism as a means to re-equilibrate the boundaries of judicial intervention. This article concludes that despite the fact that judicial review should be vigorous to protect the constitutional rights, it should also be constrained by the constitutional humility to help in the democratic legitimacy of all state organs.

Keywords: Judicial Review, Separation of Powers, Judicial Overreach, Constitutional Governance, Public Interest Litigation, Proportionality, Basic Structure, Structural Remedies.

I. Introduction

The judicial review has been a primary and debatable part of the Indian constitutional structure. The judiciary was vested with the power to test the constitutionality and legality of the State action as far back as in 1950 when the Constitution was in effect, and it was that majoritarian excess and institutional arbitrariness that led the framers to grant them that power.¹ Gradually, however, judicial review has changed to be less limited to the purely legal-constitutional instrument and increasingly to be a more extended process by which the upper judiciary has come to interfere with the policy of legislature as well as administrative discretion and even in areas that are traditionally regarded to be solely executive. This development has spawned a growing literature on the subject of what is considered legitimate judicial scrutiny versus judicial overreach.² An absolute separation of powers is not preached by the Indian constitutional system. Rather, it assumes a pattern of functional segregation, according to which every organ, the legislature, the executive, and the judiciary, has to work within a system of mutual dependence, controlled by the checks and balances.³ In its context, the judicial review is not a mere principle of law but a constitutional guarantee that the action taken by the governmental authorities is not allowed to go beyond the stipulated boundaries and also that it is in line with constitutional morals. The Supreme Court has on numerous occasions indicated judicial review as being one of the fundamental components of the constitutional fabric, and as such, is resistant to legislative or executive watering down.⁴ Nevertheless, the institutional boundaries of the judiciary have also been tricky due to this expansion of the doctrines.

Judiciary review during the years after independence was mostly limited to the protection of basic rights and examining bills concerning their constitutionality.⁵ Since the 1980s, however, particularly with the emergence of Public Interest Litigation (PIL), there has been a much more active role of the courts.⁶ Originally, PIL was created to enlarge the coverage of access to justice by the poor, but over time it grew to serve as a channel in which the Supreme Court and High Courts started to make extensive structural instructions upon the governmental agencies.⁷ Academics contend that this has been a movement not only out of the traditional adjudication

¹ Constituent Assembly Debates, Vol. VII, 15 November 1948.

² Upendra Baxi, “*The Avatars of Indian Judicial Activism*,” Indian Journal of Public Administration, 1985.

³ M.P. Jain, Indian Constitutional Law, 8th edn., LexisNexis (2018), p. 163.

⁴ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

⁵ H.M. Seervai, Constitutional Law of India, 4th edn., Universal (2013), p. 475.

⁶ S.P. Sathe, Judicial Activism in India, Oxford University Press (2002).

⁷ S.P. Gupta v. Union of India, 1981 Supp SCC 87.

but also out of what can be described as judicial governance where courts oversee, control or even replace executive policy in matters as diverse as environmental protection to city planning.⁸ According to critics, this judicial activism, despite good intentions, may be a threat to democratic accountability by setting the policy-making decisions of elected institutions in an unelected judiciary.⁹ The judicial remedies like the continuing mandamus, where the judiciary keeps matters pending to check the conformity of the executive have been subject to examination especially.¹⁰ Its supporters, though, argue that in such a system where bureaucracy has become stagnant, where populism in politics has become a commonplace, and where the institutions have been occupied by capture, there is a need to have more judicial intervention in order to protect the constitutional rights and have an effective government.¹¹ This is the tension between judicial necessity and judicial excess, which is the centre of British constitutional debate of today in India. The past few years have seen an increase in controversy on judicial overreach especially in cases which seem to cross the line between adjudication and policy making.¹² This has raised the issue of constitutional competence of the judiciary to adjudicate cases relating to natural resource allocation, environmental standards regulation, institutional design of tribunals, and even issues relating to economic policy.¹³ Furthermore, the judiciary involvement in the formulation of institutional structures, including the ruling of the National Judicial Appointments Commission (NJAC), has brought a new question of the interpretive supremacy and its connection with other branches of government.¹⁴

One of the key sources of complexity is that there is no definite line between legitimate judicial review and judicial overreach based on the fact that there is no clear demarcation of what constitutes legitimate judicial review as opposed to judicial overreach. In contrast to the jurisdictions, which utilize the concept of political question doctrine (United States) or judicial deference to legislative judgment (United Kingdom), India does not have a systematic system, which would regulate the circumstance in which courts should follow and those in which they may interfere.¹⁵ Even though such standards as arbitrariness, proportionality, and manifest unreasonableness have been stated in case law, they have been applied inconsistently, and in

⁸ Anuj Bhuiwalia, *Courting the People: Public Interest Litigation in Post-Emergency India*, Cambridge University Press (2017).

⁹ T.R. Andhyarujina, *Judicial Activism and Constitutional Democracy in India*, Universal (2012).

¹⁰ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

¹¹ Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty," *Journal of Democracy*, 2007.

¹² Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis*, Hart Publishing (2017), p. 210.

¹³ *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1.

¹⁴ *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1.

¹⁵ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge (2012).

many cases, they have been dependent on the subjective judgment of individual judges.¹⁶ The Indian judicial system is strong, imaginative, but still, it works on the terrain of doctrinally fluidity that sometimes confuses the constitutional borders.

This paper attempts to relook critically and consider the extent of judicial review in the face of modern discussion on judicial overreach. It seeks to build a value-based system to create a boundary to the extent to which the judiciary can intervene without compromising on its duty of protecting the constitutional rights. The last decade offers a most enlightening backdrop, as there were a series of landmark cases that demonstrated the change in judicial attitudes towards the questions of institutional limit, the legitimacy of democracies, and the ability to govern.¹⁷ Through a case and doctrinal analysis of this changing jurisprudence, the article postulates that Indian courts should gravitate towards a more ordered, principled, and deferential model of judicial review, one that safeguards rights firmly on the one hand and does not overstep its constitutional division of powers as it seeks to on the other.

On a more constitutional plane, the current debate about judicial overreach is a kind of expression of the friction of the transformative constitutional vision of India. Limited governance is not the only idea that the Constitution envisages; social justice, economic development, and defense of individual dignity are also on the list.¹⁸ This dual mandate occasionally exerts pressure on the judiciary to exercise its interpretive powers to serve constitutional purposes particularly when other branches of government seem incapable or even uncooperative to meet their constitutional obligations.¹⁹ However, institutional integrity should not be sacrificed to constitutional change. A judiciary who claims the authority of policy, runs the threat to undermine the very principles of democracy itself in which they claim to be protecting.

The paper will therefore offer a reformed concept of judicial review - a concept that upholds both centrality and constitutional humility. With the application of criteria based on proportionality, institutional competence, and democratic legitimacy, courts need not wander into political governance and technocratic policy-making to remain in their constitutional position. It is not aimed at reducing the independence of judiciary but enhancing it with

¹⁶ Shayara Bano v. Union of India, (2017) 9 SCC 1.

¹⁷ Gautam Bhatia, "Judicial Review and Constitutional Boundaries," NUJS Law Review (2020).

¹⁸ B.R. Ambedkar, "The Grammar of Anarchy," *Constituent Assembly Debates*, 25 November 1949.

¹⁹ Justice D.Y. Chandrachud, "Transformative Constitutionalism," Lecture, NALSAR University, 2019.

principled restraint. Finally, judicial review should be a right protective mechanism and constitutionalism rather than a replacement of the democratic procedure.

II. History and Theory Foundations of Judiciary Review and Separation of Powers

The concept of judicial review in India is not legitimized by a single provision of the constitution but rather it is formed by what has been structurally designed in the constitution itself. The framers visioned a constitutional order where the power will be decentralized, controlled, and reprimanded by integrating institutional barriers and normative restraints.²⁰ This structure stems out of the notion that parliamentary sovereignty would not be the ultimate guarantee of liberty in a new independent country that was aware of colonial excessiveness, but constitutional supremacy would be. Judicial review therefore became the key tool under which the judiciary would facilitate the check on whether all organs were functioning within the constitutional limits.²¹

Even though the doctrine of separation of power is not directly stipulated in the Indian Constitution, its plan clearly shows a functional division of powers.²² The legislative power is arranged according to Part V and Part VI, executive powers are arranged according to Articles 53 and 154 and judicial powers are arranged according to Articles 124-147 and Articles 214-231. However, this distribution is not strict or closed, but a kind of flexible scheme that allows cooperation without preventing the accumulation of unlimited power.²³ Articles 32 and 226 further affirm the interpretative dominance of the judiciary, and thus making it possible to scrutinize cases of constitutional infractions with the help of a sound judicial review.²⁴

A. Article 13 and the Constitutional Supremacy Principle

Article 13 plays a central part in the philosophy of judicial review. It states that those laws that conflict with the basic rights are invalid giving the courts an unspoken authority to judge the constitutionality of legislative activity.²⁵ This is a conscious rejection of the British tradition of parliamentary supremacy, and makes India part of a tradition of constitutionalist thought where the Constitution is at the top of the legal order. The judiciary as the protector of this supremacy

²⁰ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press (1966), p. 67.

²¹ *Supra* 3 at p. 170.

²² *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

²³ *Supra* 6 at p. 45.

²⁴ *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

²⁵ Article 13, Constitution of India.

was the common understanding of the framers who argued and confirmed the need of the judiciary review to curb erosion of the rights and liberties.²⁶

Article 13 does not simply limit judicial review to ordinary legislation, but to any law, which has been construed broadly to ordinances, notifications, rules and executive orders.²⁷ This liberal approach to interpretation has enabled the widespread review of government action by the courts, which makes the judicial review an essential part of upholding the core rights. However, with time, the Supreme Court restated that Article 13 is not a textual one but a structural assurance of constitutional preeminence.²⁸

B. Articles 32 and 226: Judicial Power Entrenchment.

The judicial review in India is operationalized by the 32 and 226 articles. Article 32, which Dr. Ambedkar called the heart and soul of the Constitution, gives people a right to take their case to the Supreme Court in order to implement the basic rights.²⁹ Article 226 gives similar authority to the High Courts, and goes still further to the assertion of the legal right, and the judicial check of the administrative action.³⁰ Collectively, these provisions create the broad remedial jurisdiction such that judicial review is made available, flexible and broad in accordance to changing constitutional demands.

Articles 32 and 226 jurisprudence has slowly outgrown its formalist rights adjudication foundations and has come to accept a more purposive model incorporating socio-economic rights, procedural fairness and administrative accountability.³¹ The Supreme Court had in many cases decided that their authority under these provisions do not just extend to the granting of traditional prerogative writs, but the court has the ability to devise new remedies when trying to bring about justice.³² This has frequently been used to uphold the application of structural injunction and ongoing mandamus but this has also raised questions of judicial overreach.

C. Basic Structure Doctrine and the Judicial Entrenchment of Review

The inception of the Basic Structure theory in *Kesavananda Bharati* was a constitutional

²⁶ Constituent Assembly Debates, Vol. VII, 30 November 1948.

²⁷ *Keshavan Madhava Menon v. State of Bombay*, AIR 1951 SC 128.

²⁸ *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

²⁹ Constituent Assembly Debates, Vol. XI, 9 December 1948.

³⁰ *T.C. Basappa v. T. Nagappa*, AIR 1954 SC 440.

³¹ Upendra Baxi, "Taking Suffering Seriously," *Delhi Law Review* (1985).

³² *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

turning point.³³ In believing judicial review to be a component of the basic structure of the Constitution, the Supreme Court enshrined judicial authority, and made it unalterable by the legislature. This innovation in doctrine will see to it that Parliament and the executive cannot restrict or eliminate judicial review by the ordinary or constitutional amendment. The Basic Structure doctrine has in turn been used as the basis of a number of landmark decisions where the Court questioned constitutional amendments, institutional restructuring and judicial appointment changes.³⁴ Thus, the judiciary has placed itself as the ultimate determiner of constitutional values, which strengthens the design of constitutional supremacy. Opponents are of the view that this places undue powers in the judiciary and in response, those in favor are of the opinion that it is necessary to avoid undermining the fundamental principles of the constitution.³⁵

D. Separation of Powers: Functional and Balanced Model

Although the Constitution of India is not based on the strict tripartite division of powers, the design of the Indian Constitution shows a subtle constitutional philosophy. The framers realised that excessive focus on rigidity was likely to act as a hindrance when governing a developing country and total consolidation of powers could be a danger to liberty.³⁶ In this way, India has embraced a functional differentiation, each organ has its main duties, however, there are overlaps to provide interdependence and co-operation.

The role of judiciary in this structure is unique. The judiciary has an authority that is based on constitutional legitimacy, legal interpretation proficiency and institutional impartiality unlike the legislature and the executive whose authority is subject to periodic political accountability.³⁷ This requires a delicate balancing game because courts have to step in when constitutional breaches are committed, but should not take the role of tasks which are carried out by democratically elected branches. This tension is manifested in certain cases. In *Ram Jawaya Kapur v. State of Punjab*³⁸ the Supreme Court explained that separation of powers in India is not absolute but there must be a certain level of overlap which is not only possible but also necessary. Much later, in the case of *I.C. Golaknath* and *Indira Nehru Gandhi v. Raj*

³³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

³⁴ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

³⁵ *Supra* 9 at p. 93.

³⁶ *Supra* 5 at p. 451.

³⁷ Pratap Bhanu Mehta, "The Indian Judiciary: The Counter-Majoritarian Difficulty," Seminar (2007).

³⁸ *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

Narain, stated once again that the judiciary, as powerful as it is, is still constituted by the Constitution.³⁹ The in totality of these cases is the emphasis on the fact that judicial review is a limitation on the powers of government, and at the same time, must be limited.

E. The Administrative Action Review by Judicial Review

One of the important aspects of judicial review is the examination of administrative behavior. This has led to the devolution of tremendous regulatory authority to specialisation bodies and bureaucratic agencies with the emergence of the administrative state especially following the economic liberalisation of the 1990s.⁴⁰ Courts have often been requested to consider whether this type of authority is acted in a lawful, rational, and in a way that complies within the established procedures.

The change to the doctrine of proportionality that took the place of the traditional *Wednesbury* standard by the Supreme Court has widened the extent of scrutiny in cases that considered rights and constitutional interests.⁴¹ The concept of proportionality enables the court to discuss not only the legality of administrative action, but also its necessity, appropriateness, and reasonableness.⁴² Although this helps to suppress rights, it also elevates judicial discretion, which questions the issue of replacing their judgment by the one of administrative bodies.

F. Constitutional Morality and Developing Expanding Judicial Mandates

Over the last few years, courts have resorted to the aspect of constitutional morality more and more, which is a term coined out of the discourse of the Constituent Assembly and understood in a way that it reflects the implicit constitutional morals like liberty, equality, and dignity.⁴³ This judicial perception has increased the limits of judicial review allowing the courts to interfere in areas that would be under the control of legislative policy or social standards.⁴⁴ Even though these interventions have led to progressive results on the jurisprudence of rights, concerns have arisen as to the peripheral boundaries of judicial power in the democratic context.

³⁹ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643. & *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

⁴⁰ Arvind P. Datar, *Administrative Law*, 3rd edn., LexisNexis (2020), p. 212.

⁴¹ *Om Kumar v. Union of India*, (2001) 2 SCC 386.

⁴² *Supra* 15.

⁴³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁴⁴ *Indian Young Lawyers Association v. State of Kerala (Sabarimala Case)*, (2019) 11 SCC 1.

G. Synthesis: The Judicial Review as a Constitutional Compass.

By combining the above provisions of the constitution, judicial doctrines, and interpretive practices, it can be seen that judicial review is the constitutional guide to the Indian legal order. It governs the operations of the State institutions, prevents the tyranny of power, and makes the constitutional values to be preserved. But this compass should be running with precision. Over intervention runs the risk of excessive interference with the division of powers and over restraint will compromise the very rights that the Constitution aims to shield.

The issue then is not to undermine judicial review but to narrow it. Constitutional basis offers both the powers and the boundaries of judicial action and it is important to know this fine line to handle the modern arguments of judicial overreaching.

III. Judicial Review and Judicial Overreach: Conceptual Differentiations and Doctrinal Boundaries to Change

Judgment of judicial review and judicial overreach has been a source of jurisprudential discussion since time immemorial, and the Indian constitution however does not give any textual definition to define the line between the two. Judicial review is deeply rooted in the constitution and is meant to maintain legality, rationality, and constitutional faithfulness.⁴⁵ Judicial overreach, however, is not a legal term but is a normative term, an accusation that courts have overstepped the boundaries of adjudication and have crossed the boundary of governance.⁴⁶ Although the former is a constitutional requirement, the latter is a possible departure of the separation of powers. This subsection attempts to make the difference between the two conceptual and discuss the jurisprudential tensions that come around with this difference.

A. Judicial Review: Overview, Legitimacy and Objectives

The judicial review in India has three major dimensions which include review of the legislature, review of the administrative action, and review of the constitutional amendments.⁴⁷ It is legitimate because of its text, structure, and historical purpose in the constitution. The courts have always believed that judicial review does not encroach upon the legislative or executive

⁴⁵ Supra 3 at p. 172.

⁴⁶ Upendra Baxi, "The Avatars of Judicial Activism," Indian Journal of Public Administration (1985).

⁴⁷ H.M. Seervai, Constitutional Law of India, Vol. 1, 4th edn., Universal (2013), p. 503.

power but rather protects to ensure that all the State action is aligned to the constitutional standards.⁴⁸ The traditional purposes of such review include three main goals, namely:

- (i) maintenance of the basic rights;
- (ii) legality and procedural fairness; and
- (iii) constitutional balance among the organs of the State.⁴⁹

The classical form of judicial review is a legal exercise that is based on statutory interpretation, constitutional logic, and the traditional rules of administrative law.⁵⁰ In this model, courts are considered as neutral parties that evaluate the legality of a government decision but not to replace their own preferences in policy formulation. The legitimacy of judicial review is thus based on the faithfulness of the judiciary to the textual contents of the constitution, rationality, and observance of institutional limits.

B. Judicial Activism and Its Ambiguous Boundaries

Judicial activism, a term widely used in academic and public discourse, complicates the boundary between review and overreach. Activism typically refers to the readiness of the courts to be imaginative in their interpretation of the Constitution, the development of rights jurisprudence or the taking of action in areas where political institutions have not performed.⁵¹ The rising activism in India became prominent in the 1980s with the growth of the PIL that allowed the courts to respond to structural injustices and governmental passivity.⁵²

Although judicial activism played major roles in the realisation of the socio-economic rights, environmental protection, and governmental accountability, scholars warn that activism can easily transform into judicial activism when the court starts to dictate policy decisions or overseeing the executive roles.⁵³ The point of contention here is not the very existence of activism but rather the lack of doctrinal scales to determine when the judicial innovation stops being constitutional interpretation and when it is judicial legislation.

⁴⁸ Supra 34.

⁴⁹ Supra 6.

⁵⁰ Supra 9 at p. 51.

⁵¹ Rajeev Dhavan, "Judicial Activism and the Constitution," Supreme Court Cases Journal (1995).

⁵² S.P. Gupta v. Union of India, 1981 Supp SCC 87.

⁵³ Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty," Journal of Democracy (2007).

C. The Conceptual and Normative Limits of Defining Judicial Overreach

Judicial overreach, also known as judicial overstep, judicial encroachment or judicial adventurism is hard to define very specifically.⁵⁴ Typically, it can be defined as those cases when courts take on the duty to perform functions not delegated to them through the constitution or which require the expertise of an administrative agency to be properly executed, or which are otherwise encroaching on the legislative authority.⁵⁵ Overreach also destroys democratic accountability since judges are not accountable to the people as opposed to elected officials.⁵⁶

There are several ways of overreach:

- Replacement of Policy Judgment: Courts substitute the choices of the government with their preferences in those regions which require an expert view (e.g., economic regulation, environmental policy).
- Institutional Usurpation: The courts perform the role of administration, including patrolling of normal executive tasks, or project monitoring or even giving orders better performed by government agencies.
- Judicial Legislation: Courts also bridge the legislative gaps by establishing norms or guidelines which serve as de facto laws un-approved by the parliament.⁵⁷
- Continuing Mandamus Expansion: It is justified in some cases, but the possibility of prolonged judicial oversight turns the courts into permanent administrative agencies.⁵⁸

The lack of fixed principles in the application of doctrines to identify these situations fosters the lack of clarity and discrepancy between judicial rulings.

D. PIL Jurisprudence and Fuzzing Constitutional Lines

The most significant change in the boundary between review and overreach, perhaps, is the

⁵⁴ Arun Thiruvengadam, *The Constitution of India: A Contextual Analysis*, Hart Publishing (2017), p. 210.

⁵⁵ *Divisional Manager, Aravali Golf Club v. Chander Haas*, (2008) 1 SCC 683.

⁵⁶ Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism," *I•CON* (2004).

⁵⁷ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁵⁸ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

judicially designed tool of Public Interest Litigation. Firstly, formulated as a means of democratising access to justice, PIL over time became a system by which courts came to participate directly in the running of government.⁵⁹ PIL had a procedural flexibility that facilitated courts to handle social and environmental litigation which would otherwise have been overlooked, namely *suomotu* cognizance, relaxed standing rules, and epistolary jurisdiction.⁶⁰

Gradually however, PIL started to erode the constitutional boundaries of institutional competence. Examples of courts passing elaborate guidelines on environmental standards, local government, vehicle standards, and educational standards, have been passed by courts.⁶¹ In other issues, judicial injections have had great social good; on others, they have cast doubt over effectiveness, professionalism and supplanting the democratic procedures.⁶²

According to scholars, the era of PIL changed the judiciary into an active participant of governance as opposed to a reactive institution.⁶³ Although this kind of change was pioneered by constitutional ideals, its implications on institutional balance in the long term are controversial. The difficulty is in deciding how judicial creativity can be used to achieve constitutional goals and may instead be a threat to democratic government.

E. Doctrinal Tests: Arbitrariness, Proportionality and the Extremes of Reasonableness

One of the greatest bases of uncertainty in drawing the line between review and overreach is the doctrinal criteria used by the courts. An example is the arbitrariness test of Article 14, as first stated in *E.P. Royappa*⁶⁴ and subsequently developed in *Maneka Gandhi*, which gives courts the power to strike down State action which seems to be unreasonable, unfair or discriminatory. Although this will protect substantive rights, it will also increase judicial discretion, because the test has no objective parameters.

The proportionality test that is currently being used more in rights cases provides a more systematic approach because it asks the courts to look at suitability, necessity, and balancing

⁵⁹ Anuj Bhuwania, *Courting the People*, Cambridge University Press (2017).

⁶⁰ *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.

⁶¹ Lavanya Rajamani, “*Public Interest Litigation and Environment*,” *Indian Law Review* (2006).

⁶² Gautam Bhatia, “*Judicial Review and Constitutional Boundaries*,” *NUJS Law Review* (2020).

⁶³ Baxi, *supra* note 46.

⁶⁴ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

of measures.⁶⁵ Nonetheless, proportionality has not eliminated the need by the courts to consider policy options—a task that may inadvertently result in judicial policymaking.⁶⁶ Equally, the Shayara Bano doctrine of manifest arbitrariness is a doctrine that provides the courts with a broad discretion to strike against laws on substantive grounds other than procedural flaws.⁶⁷

Therefore, even the positive doctrinal innovations can increase the jurisdiction of the courts far beyond the traditional limitations. In the absence of any guardrails, the judicial review becomes indistinguishable with overreach.

F. Institutional competence: Why it counts

One of the key factors which determine the difference between review and overreach is the competence of institutions, or the ability of an institution to make effective, accountable, and informed decisions.⁶⁸ The legislatures have political legitimacy and deliberative power; the executives have technical skills and administrative engine; the courts have legal rationality and constitutional power.⁶⁹ Overreach is the exercise of an institutionally weak court that is acting outside its institutional strength.

An example is that courts are in a good position to pronounce rights and lawful but not so well positioned to make complex policy decisions which require an economic modelling, scientific analysis or long-term administrative planning.⁷⁰ The courts on the other hand are required to interfere in situations where failure of the executive is posing serious threats to basic rights or legislative inaction is compromising constitutional rights. Bringing this balance will be part and parcel of institutional integrity.

G. When Review slowly degenerates into Governance: The Slippery Slope

Judicial review can creep into government not in individual judgments but in a history of such judgments. Such gradual shift is observed in cases of continuous monitoring, repeated instructions or a judicial committee established to oversee projects. Although these measures come as a result of real fears in regard to bureaucratic inertia, it could lead to the emergence of

⁶⁵ *Modern Dental College v. State of Madhya Pradesh*, (2016) 7 SCC 353.

⁶⁶ Aharon Barak, *Proportionality*, Cambridge University Press (2012).

⁶⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁶⁸ Cass R. Sunstein, “*Judicial Competence*,” *Harvard Law Review* (2000).

⁶⁹ Mark Tushnet, *Weak Courts, Strong Rights*, Princeton University Press (2008).

⁷⁰ Richard H. Fallon, *The Dynamic Constitution*, Cambridge (2013), p. 97.

parallel systems of governance that functions outside the democratic check and balance.

It is especially acute in areas like environmental protection, the health of the population, and urban management where the executive capacity tends to be insufficient. Courts are responsive to grievances of the citizens but in that case, they unknowingly take the role of administration.⁷¹ This slippery slope highlights the importance of having a principled structure in order to preserve adjudicatory boundaries.

H. Separating Judicial Review and Overreach: A Conceptual Model Proposal

According to the emerging jurisprudence, the following conceptual framework can be used to refer to the difference between the judicial review and judicial overreach:

- **Legality vs. Policy** Courts are supposed to determine legality, constitutionality, and rights not policy wisdom or technical decisions.
- **Negative vs. Positive Directives** Negative directives (striking down an unconstitutional action) are squarely within the scope of judicial review; positive directives (requiring the policy be structured in a certain manner) are dangerous to overreach.
- **Rights- Based vis-a-vis Governance-Based Remedies:** Remedies are to be able to provide security of rights and not to regulate administrative procedures.
- **Deference to Democratic Choices:** The courts are required to honor the choices of legislatures and the executive, without questioning them as long as they do not go against the constitutional norms.
- **Institutional Competence Test:** Courts should act only within their expertise; where specialised knowledge is required, deference is appropriate. This conceptual clarity is essential because the legitimacy of judicial review depends on its disciplined and principled exercise.

IV. Conclusion

The rift between judicial review and separation of powers in India underscores the need for a

⁷¹ Shylashri Shankar, “India’s Judicial Governance,” Governance (2012).

nuanced recalibration to prevent judicial overreach while safeguarding constitutional supremacy. While the judiciary's expansive role through public interest litigation has fortified fundamental rights and checked executive excesses, instances of policy intrusion and normative overdetermination risk eroding legislative and executive autonomy, thereby destabilizing the constitutional equilibrium envisioned by the framers. Rethinking judicial overreach demands not curtailment of review powers but principled restraint - guided by doctrines of deference, proportionality, and democratic legitimacy - to ensure courts remain guardians of the Constitution rather than architects of governance. Ultimately, a mature separation of powers in India hinges on institutional dialogue, judicial self-discipline, and legislative resurgence, fostering a balanced democracy where each branch thrives within its delineated sphere.

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