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**JUDICIAL ACTIVISM AND THE SEPARATION OF POWERS: BASIC
STRUCTURE, JUDICIAL APPOINTMENTS, AND PUBLIC INTEREST
LITIGATION IN COMPARATIVE PERSPECTIVE**

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Abstract

Every constitutional democracy must decide how far its courts may go in reviewing, and on occasion displacing, the judgments of elected institutions. This article examines that boundary through four doctrinal sites where it has been most contested: the power of courts to invalidate constitutional amendments, the intervention of courts in policy through public interest litigation, the control of judicial appointments, and the recent confrontations between courts and governments in Israel, Poland, and the United Kingdom. Drawing principally on *Kesavananda Bharati*, *Minerva Mills*, the *NJAC* case, *Marbury*, *Miller (No 2)*, *Movement for Quality Government v. Knesset*, and the Colombian substitution doctrine, it argues that the familiar dichotomy between activism and restraint obscures the real question, which is whether a court's intervention protects the conditions of democratic self-government or substitutes for them. Basic structure review and public interest litigation can each be justified on the former ground, but each has been extended in ways that cannot. The article concludes that the legitimacy of judicial review in the twenty-first century will depend less on the abstract scope of the power than on the discipline with which courts explain when and why they decline to use it.

Keywords: judicial review; separation of powers; basic structure doctrine; public interest litigation; judicial appointments; unconstitutional constitutional amendments; judicial overreach

INTRODUCTION

The phrase "judicial activism" is almost always pejorative and almost never defined. It is used by governments to describe decisions they have lost, by academics to describe decisions they consider insufficiently reasoned, and by judges to describe what other judges do. Its opposite, "judicial restraint," is equally elastic. This article does not attempt a definition. It instead

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examines the concrete doctrines through which constitutional courts have expanded the reach of judicial review in the last half-century, and asks in each case whether the expansion can be reconciled with the separation of powers on which the courts' own authority depends.

The argument has four parts. Part II considers the most dramatic form of review, the power to invalidate a constitutional amendment, which originated in India and has spread to Colombia, Kenya, Bangladesh, and beyond. Part III examines public interest litigation, the procedural innovation through which Indian and South Asian courts became participants in governance. Part IV turns to judicial appointments, the site at which the struggle between courts and governments is most direct and least principled. Part V examines three recent confrontations in which a court's assertion of authority over the political branches provoked a constitutional crisis. Part VI draws the threads together.

REVIEWING THE CONSTITUENT POWER: THE BASIC STRUCTURE DOCTRINE

A. Origins in India

The proposition that a court may strike down a constitutional amendment for being unconstitutional is, on its face, a contradiction. The Supreme Court of India first rejected it in *Shankari Prasad* and *Sajjan Singh*, holding that Parliament's amending power under Article 368 extended to every provision of the Constitution including the fundamental rights.² It then reversed itself in *Golak Nath*, holding that fundamental rights were beyond the amending power altogether.³ *Golak Nath* was unworkable because it froze Part III, and the thirteen-judge bench in *Kesavananda Bharati* replaced it with something more subtle.⁴ Parliament could amend any provision, the majority held, but could not use the amending power to alter or destroy the basic structure of the Constitution. The judgment did not define that structure, though individual judges offered lists including the supremacy of the Constitution, the republican and democratic form of government, secularism, the separation of powers, and federalism.⁵

² *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

³ *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

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

⁵ *Id.* ¶ 316 (Sikri, C.J.); *id.* ¶ 582 (Shelat & Grover, JJ.); *id.* ¶ 1159 (Khanna, J.).

The doctrine's justification was worked out in *Indira Nehru Gandhi v. Raj Narain*, where the Court struck down a constitutional amendment that had retrospectively validated the Prime Minister's election and placed it beyond judicial review,⁶ and in *Minerva Mills*, where it invalidated the provisions of the Forty-second Amendment that had purported to remove all limits on the amending power and to give the directive principles priority over the fundamental rights.⁷ Chandrachud, C.J., in *Minerva Mills*, put the point in a sentence that has become the doctrine's motto: a limited amending power is itself a basic feature, and Parliament cannot, by exercising it, convert itself into an unlimited one.⁸ The doctrine has since been applied to invalidate the Ninth Schedule's blanket protection of statutes from review,⁹ and, most controversially, the Ninety-ninth Amendment establishing the National Judicial Appointments Commission, discussed in Part IV.

B. Migration

The doctrine has travelled, and the manner of its travel is instructive. In Bangladesh, the Appellate Division adopted it expressly in *Anwar Hossain Chowdhury*, striking down an amendment that decentralised the High Court Division.¹⁰ In Colombia, the Constitutional Court developed an analogous "substitution of the constitution" doctrine, holding that Congress, acting as a derived constituent power, may reform the constitution but may not replace it with a different one. The doctrine was applied in 2010 to prevent a referendum that would have allowed President Uribe a third term, the Court reasoning that a third term would substitute the constitution's system of checks and balances with a personalised presidency.¹¹ The Kenyan Court of Appeal and Supreme Court invoked the doctrine in the *BBI* litigation to hold that a popular initiative to amend the constitution could not be led by the President, though the Supreme Court declined to hold that the basic structure doctrine as such applied in Kenya.¹² Pakistan's Supreme Court accepted a version of the doctrine in the *Twenty-first Amendment* case while upholding the amendment in question.¹³

⁶ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

⁷ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

⁸ *Id.* ¶ 17.

⁹ *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

¹⁰ *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR (AD) 165 (1989) (Bangl.).

¹¹ Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10 (Colom.).

¹² *Attorney General v. Ndii* [2022] KESC 8 (KLR) (Kenya).

¹³ *District Bar Ass'n, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401 (Pak.).

The Israeli Supreme Court's decision of January 2024 in *Movement for Quality Government v. Knesset* is the most recent and most consequential application.¹⁴ The Knesset had amended Basic Law: The Judiciary to prohibit courts from reviewing government decisions on the ground of unreasonableness. Twelve of fifteen justices held that the Court had authority to review Basic Laws, and a bare majority of eight held that the amendment, by removing all judicial review of reasonableness, inflicted severe and unprecedented harm on the core characteristics of Israel as a democratic state and was therefore void.¹⁵ Israel has no formal constitution, only Basic Laws that the Knesset can amend by ordinary majority, and the decision therefore rests on a thinner textual foundation than *Kesavananda*. It was nevertheless a direct application of the idea that a legislature exercising constituent authority is constrained by the identity of the constitutional order it is amending.

C. Justification and Limits

The strongest argument for basic structure review is that it protects the conditions of democratic self-government against a temporary majority that would use the amending power to entrench itself. *Indira Gandhi*, the Colombian third-term case, and the Israeli reasonableness case are all instances of this. In each, the amendment under review would have weakened the mechanisms by which the governing party could be removed or held accountable. Review in these circumstances is not counter-majoritarian in any troubling sense; it is a defence of the majority's future ability to decide.

It is worth noting that the same result can be reached by text rather than by implication. Article 79(3) of the German Basic Law prohibits any amendment affecting the division of the federation into states, the principle of human dignity, or the basic principles of democracy and the rule of law, and the Federal Constitutional Court has treated the clause as a justiciable limit while applying it with conspicuous restraint.¹⁶ The Turkish and Czech constitutions contain comparable eternity clauses. Where the drafters have themselves identified what cannot be amended, the court's role is interpretive rather than creative, and the objection that unelected judges are inventing limits on the constituent power falls away. The Indian doctrine lacks that

¹⁴ HCJ 5658/23 *Movement for Quality Gov't in Israel v. Knesset* (Jan. 1, 2024) (Isr.).

¹⁵ *Id.* (opinion of Hayut, P.).

¹⁶ Grundgesetz [GG] [Basic Law] art. 79(3) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 (Lisbon Treaty), ¶¶ 216–19 (Ger.).

anchor, and its legitimacy has therefore always depended on the persuasiveness of the particular application.

The doctrine is weakest when it is used to protect a court's own preferences about how the constitution should be interpreted. The Indian Court's invalidation of the NJAC, considered below, is the clearest example. There, the basic feature said to be violated was the independence of the judiciary, and the content given to that feature was the primacy of the judiciary in its own appointments, a proposition that the Court had itself invented in 1993. An unelected body that uses an unwritten doctrine to invalidate an amendment passed by an overwhelming parliamentary majority and ratified by more than half the states, on the ground that the amendment interferes with a power the body had assigned to itself, is difficult to reconcile with any theory of separation of powers.

PUBLIC INTEREST LITIGATION AND THE GOVERNANCE ROLE OF COURTS

A. The Indian Innovation

Public interest litigation began in India as a relaxation of standing. In *S.P. Gupta*, Bhagwati, J., held that where a person or class suffering a legal wrong could not approach the court because of poverty or disability, any member of the public acting in good faith could do so on their behalf.¹⁷ The Court accepted letters as petitions, appointed commissioners to investigate facts, and fashioned continuing remedies through which it supervised compliance over years. The early cases concerned undertrial prisoners,¹⁸ bonded labour,¹⁹ and the conditions of the destitute, and there is little doubt that in these cases the Court filled a vacuum left by the failure of the executive to enforce the law.

The difficulty arose when the same technique was applied to matters of policy. The *Vishaka* guidelines on sexual harassment, issued in 1997 and treated as law until Parliament legislated in 2013, were the Court's response to a legislative gap, and few now question their substance.²⁰ But the Court also, through PIL, ordered the conversion of Delhi's bus fleet to compressed natural gas, regulated the height of a dam, prohibited the sale of alcohol within a fixed distance

¹⁷ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87, ¶ 17.

¹⁸ *Hussainara Khatoon v. Home Sec'y, State of Bihar*, (1980) 1 SCC 81.

¹⁹ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

²⁰ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

of highways, and imposed a ban on the sale of firecrackers.²¹ Whatever the merits of these measures, they are regulatory choices of the kind that legislatures and administrative agencies exist to make, and the Court has no comparative advantage in making them.

The Court has itself acknowledged the problem. In *Divisional Manager, Aravali Golf Club v. Chander Hass*, Katju, J., delivered an unusually direct warning that judges must know their limits and must not "run the government," and that the Court's adventurism in matters of policy risked a backlash that would harm the institution.²² In *State of Uttaranchal v. Balwant Singh Chaufal*, the Court issued guidelines to curb frivolous and politically motivated petitions.²³ Neither warning has had a lasting effect, because the incentives that drive PIL, a public that trusts the Court more than the executive and a Court that is willing to be trusted, remain in place.

Pakistan carried the Indian technique further than India itself. Article 184(3) of the Pakistani Constitution confers original jurisdiction on the Supreme Court in matters of public importance involving fundamental rights, and successive Chief Justices used it to take suo motu cognisance of matters ranging from the price of sugar to the appointment of senior civil servants.²⁴ The absence of any procedural rule governing when and by whom the jurisdiction could be invoked made the Chief Justice, in practice, the arbiter of which policy questions the Court would decide. Parliament's attempt to regulate the exercise of the power through the Supreme Court (Practice and Procedure) Act 2023, which vested the decision to take suo motu notice in a three-member committee rather than the Chief Justice alone, was initially suspended by the Court and then upheld by a full bench, an outcome that illustrates how contested the boundaries of such a jurisdiction become once a court has grown accustomed to setting them itself.²⁵

B. The Comparative Contrast

American constitutional law offers the sharpest contrast. The requirement of standing under Article III, that a plaintiff show concrete injury fairly traceable to the defendant and redressable

²¹ *M.C. Mehta v. Union of India*, (2002) 4 SCC 356; *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664; *State of Tamil Nadu v. K. Balu*, (2017) 2 SCC 281; *Arjun Gopal v. Union of India*, (2017) 1 SCC 412.

²² *Divisional Manager, Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683, ¶¶ 20–33.

²³ *State of Uttaranchal v. Balwant Singh Chaufal*, (2010) 3 SCC 402, ¶ 181.

²⁴ Pak. Const. art. 184(3); see, e.g., *Suo Motu Case No. 10 of 2009* (Sugar Prices), PLD 2010 SC 759 (Pak.).

²⁵ *Raja Amer Khan v. Federation of Pakistan*, PLD 2024 SC 1 (Pak.) (upholding the Supreme Court (Practice and Procedure) Act 2023).

by the court, is treated by the Supreme Court as an essential element of the separation of powers, because it confines courts to the resolution of disputes and prevents them from acting as roving commissions on the legality of government.²⁶ The political question doctrine performs a complementary function, placing certain matters beyond review altogether.²⁷ The result is a system in which the reach of judicial review is broad in the cases that reach the courts but the class of such cases is narrow.

South Africa occupies an intermediate position that is arguably the most defensible. Section 38 of its Constitution confers generous standing, including on anyone acting in the public interest, and the Constitutional Court has used that standing to decide cases of considerable policy significance.²⁸ But the Court has coupled this with a deliberate choice of remedy. In *Grootboom* and *Treatment Action Campaign* it reviewed the reasonableness of the government's housing and HIV programmes and found them wanting, but it declined to prescribe the content of the programme, leaving that to the executive under a declaration and, in the latter case, a mandatory order to remove specified obstacles.²⁹ The distinction between reviewing a policy for reasonableness and rewriting it is the distinction that Indian PIL has most often failed to observe.

JUDICIAL APPOINTMENTS

A. The Indian Collegium and the NJAC

No question tests the separation of powers more directly than who appoints the judges. Article 124 of the Indian Constitution provides that Supreme Court judges are appointed by the President after consultation with the Chief Justice and such other judges as the President thinks necessary. In the *First Judges' Case* the Court held that "consultation" did not mean concurrence and that the executive had the final say.³⁰ In the *Second Judges' Case* it reversed itself, holding that the Chief Justice's opinion, formed in consultation with senior colleagues, had primacy,³¹ and in the *Third Judges' Case* it elaborated the collegium of the Chief Justice

²⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62 (1992); *Allen v. Wright*, 468 U.S. 737, 750–52 (1984).

²⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding partisan gerrymandering claims non-justiciable).

²⁸ S. Afr. Const., 1996, § 38.

²⁹ *Government of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) ¶¶ 41–44, 99; *Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) ¶¶ 96–114, 135.

³⁰ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.

³¹ *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (1993) 4 SCC 441.

and the four senior-most judges that now controls appointments.³² The result is a system, unique among major democracies, in which judges appoint judges through a process with no statutory basis, no published criteria, and until recently no published reasons.

Parliament's attempt to replace the collegium with a six-member National Judicial Appointments Commission, comprising the Chief Justice, two senior judges, the Law Minister, and two eminent persons, was enacted by the Ninety-ninth Amendment with near-unanimous support and ratified by sixteen states. The Supreme Court struck it down.³³ The majority held that the presence of the Law Minister and the veto that any two members could exercise compromised the independence of the judiciary, which was a basic feature, and that the primacy of the judiciary in appointments was an element of that independence. Chelameswar, J., dissented, observing that the collegium's own record did not support the assumption that judicial primacy guaranteed independence, and that the majority had elevated a judicially created procedure into an unamendable constitutional principle.³⁴ The dissent has the better of the argument. Judicial independence requires that judges be protected from the executive once appointed; it does not require that the executive have no role in appointing them, as the practice of nearly every other democracy demonstrates.

B. Comparative Models

The United Kingdom removed the Lord Chancellor's effective control of appointments in 2005 and vested selection in an independent Judicial Appointments Commission with a lay chair, the Lord Chancellor retaining a limited power to reject a recommendation with reasons.³⁵ South Africa's Judicial Service Commission, composed of judges, practitioners, academics, and politicians from government and opposition, interviews candidates in public and submits a list from which the President must choose.³⁶ The United States retains an overtly political process, with presidential nomination and Senate confirmation, and accepts the resulting politicisation as the price of democratic accountability. Each model has weaknesses. The point for present purposes is that each involves more than one branch, and none has produced a judiciary less independent than India's.

³² *In re Special Reference No. 1 of 1998*, (1998) 7 SCC 739.

³³ *Supreme Court Advocates-on-Record Ass'n v. Union of India* (NJAC), (2016) 5 SCC 1.

³⁴ *Id.* ¶¶ 1105–1183 (Chelameswar, J., dissenting).

³⁵ Constitutional Reform Act 2005, c. 4, §§ 61–70, 94A–94C (UK).

³⁶ S. Afr. Const., 1996, § 178.

CONFRONTATION: WHEN COURTS CHECK THE EXECUTIVE

Three recent episodes illustrate how courts have responded when the executive has sought to escape constitutional constraint. In *R (Miller) v. Prime Minister*, the United Kingdom Supreme Court held unanimously that the Prime Minister's advice to the Queen to prorogue Parliament for five weeks in the run-up to the Brexit deadline was unlawful, because it had the effect of frustrating Parliament's constitutional functions without reasonable justification.³⁷ The decision was criticised as an intrusion into high politics, but its reasoning was narrowly institutional: the Court did not assess the merits of Brexit or of prorogation but asked whether the executive could use a prerogative power to prevent the legislature from sitting. That is a question of the separation of powers in its purest form, and it is difficult to see who could answer it if not a court.

The United States Supreme Court's recent record shows a court applying very different levels of scrutiny to executive action depending on the subject matter. In *Trump v. Hawaii* it upheld a proclamation restricting entry from several predominantly Muslim countries, applying rational basis review and declining to look behind the stated national security rationale despite the President's public statements.³⁸ A year later, in *Department of Commerce v. New York*, the same Court blocked the addition of a citizenship question to the census because the Secretary's stated reason was, on the administrative record, "contrived."³⁹ The two decisions are reconcilable on the ground that the first concerned foreign affairs and the second domestic administration, but the contrast illustrates that the intensity of review is a choice, and that a court which declines to explain the choice invites the suspicion that it is being made on other grounds.

Poland presents the opposite trajectory. Beginning in 2015, the governing party packed the Constitutional Tribunal with its nominees, refused to publish judgments it disliked, reconstituted the National Council of the Judiciary under political control, and established a disciplinary chamber to discipline judges who questioned these measures. The Court of Justice of the European Union held that the disciplinary chamber did not satisfy the requirement of independence under Article 19 of the Treaty on European Union,⁴⁰ and the European Court of

³⁷ *R (Miller) v. Prime Minister* [2019] UKSC 41, [2020] AC 373, ¶¶ 50–61.

³⁸ *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–23 (2018).

³⁹ *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

⁴⁰ Case C-791/19, *Commission v. Poland* (Disciplinary Regime for Judges), ECLI:EU:C:2021:596.

Human Rights held that the Tribunal, as reconstituted, was not a "tribunal established by law."⁴¹ The Polish experience is the strongest argument for some form of basic structure review: a court that cannot resist its own capture cannot protect anything else.

Israel's reasonableness case, discussed above, sits between the two. The Court prevailed, but at the cost of a bare majority, a bitterly divided bench, and a judgment that rested on the Court's own prior expansion of the reasonableness doctrine. It remains to be seen whether the institution can sustain the legitimacy the decision requires.

CONCLUSION

The separation of powers is not a rule about which branch does what. It is a principle about how power is to be prevented from concentrating. Judicial review is defensible on that principle to the extent that it prevents concentration, and it is indefensible to the extent that it produces concentration in the courts themselves. The basic structure doctrine, applied to amendments that would entrench a governing majority or dismantle the mechanisms of accountability, prevents concentration. Applied to preserve a court's monopoly over its own composition, it produces it. Public interest litigation, used to enforce existing law on behalf of those who cannot enforce it themselves, corrects a failure of the executive. Used to substitute the court's regulatory preferences for those of the legislature, it repeats the failure in a different institution.

The lesson of the comparative material is that the legitimacy of a court's intervention depends on the discipline with which it distinguishes these cases, and on its willingness to explain, in each instance, why the political process cannot be trusted to reach the result on its own. The South African Constitutional Court's practice of reviewing for reasonableness while leaving the content of policy to the elected branches, and the United Kingdom Supreme Court's confinement of *Miller* to the institutional question of whether Parliament could be prevented from sitting, are models of that discipline. The Indian Supreme Court, which developed the most powerful tools of review in the democratic world, has been least willing to articulate the limits of their use. That is not because its judges are more activist than others; it is because the doctrine has never required them to say when they will stop. A court that cannot describe the boundary of its own power has, in an important sense, already crossed it.

⁴¹ *Xero Flor w Polsce sp. z o.o. v. Poland*, App. No. 4907/18 (Eur. Ct. H.R. May 7, 2021).