

TESTING THE SEPARATION OF POWERS: STRUCTURAL VULNERABILITIES, TRIBUNALISATION, AND JUDICIAL ACTIVISM IN INDIA

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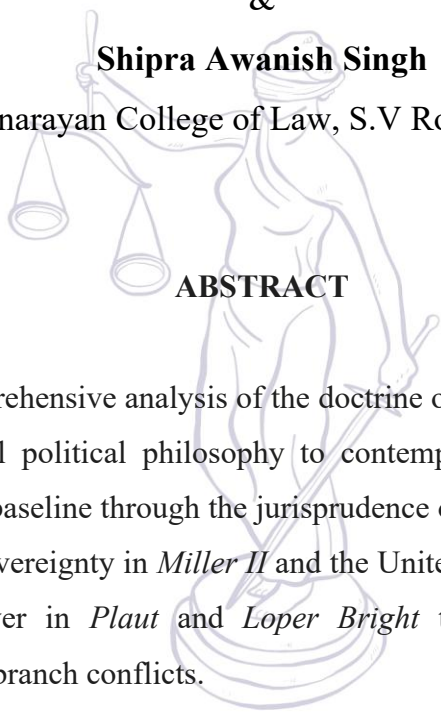
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ABSTRACT

This paper provides a comprehensive analysis of the doctrine of the separation of powers, tracing its evolution from classical political philosophy to contemporary constitutional practice. By establishing a comparative baseline through the jurisprudence of the United Kingdom such as the defense of parliamentary sovereignty in *Miller II* and the United States highlighting the formalist protection of judicial power in *Plaut* and *Loper Bright* the study examines how mature democracies navigate inter-branch conflicts.

The primary focus is directed toward the Republic of India, where a Westminster parliamentary model of executive-legislative integration intersects with robust judicial review. Despite the Constituent Assembly's design of a "seamless web" of governance, the research demonstrates that the Indian constitutional framework faces deep structural vulnerabilities. The analysis details how this balance is continuously threatened by executive overreach including "pocket vetoes" on judicial appointments, "Ordinance Raj," and "sealed cover" jurisprudence alongside aggressive legislative overrides and the systematic tribunalisation of justice, which subordinates adjudicatory bodies to executive ministries.

While the Indian higher judiciary has actively countered these encroachments through the Basic Structure doctrine and expansive judicial activism, the paper argues that relying solely on judicial intervention is insufficient and carries the risk of democratic overreach. Ultimately, the study synthesizes comparative institutional mechanisms and proposes targeted structural reforms such as regulating post-retirement judicial appointments, restricting retrospective legislative overrides, and unifying tribunals under independent judicial control to fortify judicial autonomy and restore lasting constitutional equilibrium.

Introduction

The doctrine of the separation of powers remains one of the most enduring and fiercely contested principles in modern constitutional law. Conceived as a structural bulwark against tyranny, the concept dictates that the legislative, executive, and judicial functions of a state must be divided among distinct institutions to prevent the concentration of arbitrary power. However, the theoretical purity of this doctrine rarely survives contact with the practical realities of governance. Across the democratic world, constitutional architectures oscillate between strict compartmentalization and pragmatic functional overlap, reflecting continuous institutional struggles for supremacy.

This comprehensive analysis provides an exhaustive examination of the separation of powers, tracing its theoretical evolution from classical political philosophy to contemporary jurisprudential debates. By analyzing the constitutional frameworks of the United Kingdom and the United States, the analysis establishes a comparative baseline for understanding how mature democracies navigate inter-branch conflicts. The report subsequently directs a granular focus toward the Republic of India, where the Westminster parliamentary model intersects with a robust tradition of judicial review. Through a detailed investigation of constituent history, executive overreach, legislative overrides, the tribunalisation of justice, and the phenomenon of judicial activism, this analysis identifies the structural vulnerabilities within the Indian constitutional system. Finally, it synthesizes comparative institutional mechanisms that can be leveraged to fortify judicial independence and restore constitutional balance.

Theoretical Foundations of the Separation of Powers

The Evolution from Pure Doctrine to Balanced Constitutionalism

The intellectual lineage of the separation of powers is most prominently traced to the political philosophy of John Locke and Charles-Louis de Secondat, Baron de Montesquieu. In John Locke, *Two Treatises of Government* (1690), Locke advocated for the division of state power, specifically separating the legislative function from the executive, to prevent arbitrary rule and the monopolization of authority. However, Locke's tripartite division was idiosyncratic by modern standards, classifying the judiciary within the executive sphere and designating a separate "federative power" to handle foreign relations and international security.¹

The doctrine achieved its classical, recognizable form in Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans., Hafner Press 1949) (1748). Montesquieu argued that liberty is fundamentally incompatible with the unification of legislative and executive powers in a single magistrate or body, warning that a unified power would enact tyrannical laws and execute them in a tyrannical manner². Crucially, Montesquieu established that the judicial power must be equally separated from the legislative and executive branches. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control because the judge would simultaneously be the legislator. If joined to the executive power, the judge might behave with violence and oppression.

While Montesquieu's maxim heavily influenced the architectural design of the United States Constitution of 1787, modern constitutional theory recognizes that a rigid, absolute separation of powers is both a historical fiction and a practical impossibility. In M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2d ed. 1998), Vile conducts a comprehensive historical critique of the doctrine, distinguishing between the "pure doctrine" of separated agencies and the more pragmatic "theory of the balanced constitution".³ Vile demonstrates that the pure doctrine which demands that each branch be confined exclusively to its own function without any

¹ John Locke, *Two Treatises of Government* (1690),

² Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans., Hafner Press 1949) (1748).

³ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2d ed. 1998)

encroachment has routinely proved untenable in practice. Instead, constitutionalism relies on a system of checks and balances where major societal interests jointly participate in government functions, preventing any single interest from imposing its will unchecked. Vile asserts that the separation of powers is an essential constituent of the rule of law, requiring internal checks through the creation of autonomous centers of power that develop institutional interests to counter arbitrary governance.

Constrained Parliamentarism and the Formalist-Functionalist Divide

Contemporary political scientists and legal theorists have expanded upon classical frameworks to address the complexities of the modern administrative state. Bruce Ackerman, in his seminal article *The New Separation of Powers*, 113 Harv. L. Rev. 633 (2000), critiques the global export of the American presidential model of separated powers. Ackerman argues that the American system frequently leads to institutional gridlock and democratic fragility because its rigid separation invites paralyzing standoffs between the executive and the legislature. Instead, he advocates for "constrained parliamentarism," a model that embraces the executive-legislative fusion typical of Westminster systems but heavily constrains it through independent judicial review, fundamental rights protections, and autonomous regulatory agencies⁴. Ackerman's framework highlights that the modern separation of powers must move beyond the classical tripartite division to accommodate new, independent power centers while maintaining democratic legitimacy and preventing the executive from dominating the legislative process.

Within the adjudication of separation of powers disputes, a persistent methodological divide exists between "formalist" and "functionalist" approaches to constitutional interpretation. Formalism insists upon a rigid, text-based categorization of powers, viewing the constitutional text as establishing definitive boundaries that cannot be transgressed, regardless of practical convenience. Formalists argue that the Constitution's Vesting Clauses demand strict adherence to demarcated roles to prevent the slow, incremental accretion of tyrannical power by any one branch. Conversely, functionalism prioritizes a pragmatic, flexible approach, focusing on the core functional competencies of each branch. Functionalists tolerate institutional overlap and structural innovation, such as the creation of independent administrative agencies, provided that no single

⁴ *The New Separation of Powers*, 113 Harv. L. Rev. 633 (2000)

branch aggrandizes its power to the point of threatening the overarching balance of the constitutional system.

Anglo-American Jurisprudence: Testing the Boundaries of Power

The United Kingdom: Parliamentary Sovereignty vs. Executive Prerogative

The British constitutional tradition operates without a single, codified document, relying instead on a continuous historical evolution of statutes, common law, and binding political conventions. The foundational theorist of this system, A.V. Dicey, identified two fundamental pillars of the British Constitution in A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959) (1885): the Rule of Law and Parliamentary Sovereignty. Dicey posited that Parliament possesses the absolute right to make or unmake any law whatever, and no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament. Simultaneously, the Rule of Law demands that no person is above the law and that the government cannot exercise arbitrary or discretionary power without legal authorization.⁵

This theoretical framework faced a historic stress test in the context of the United Kingdom's withdrawal from the European Union. In *R (Miller) v. Prime Minister*⁶, the UK Supreme Court was forced to adjudicate a direct clash between executive prerogative and parliamentary sovereignty. Prime Minister Boris Johnson advised the Queen to prorogue (suspend) Parliament for five weeks during a critical phase of the Brexit negotiations, a duration exceptionally longer than the standard few days required for a new parliamentary session. The executive argued that the exercise of the royal prerogative to prorogue Parliament involved high policy and political judgment, rendering it a non-justiciable issue beyond the competence of the courts. The English Divisional Court initially agreed, ruling that the matter could not be measured against legal standards. Conversely, the Scottish Inner House of the Court of Session ruled the prorogation unlawful, necessitating intervention by the Supreme Court.

In a unanimous, landmark ruling, an eleven-justice panel of the Supreme Court rejected the executive's formalist defense, asserting that the limits of prerogative power are a matter of law to

⁵ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959) (1885)

⁶ *R (Miller) v. Prime Minister*, [2019] UKSC 41,

be determined by the courts. Elevating governmental accountability to a fundamental constitutional principle, the Court established that a decision to prorogue Parliament is unlawful if it has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for executive supervision. The Court noted that allowing the executive an untrammelled power to suspend the legislature would render the concept of parliamentary sovereignty a dead letter. By declaring the Prime Minister's advice unlawful and the resulting prorogation null and of no effect, the Court utilized judicial review to defend parliamentary sovereignty against an executive attempt to neutralize legislative scrutiny, thereby reinforcing a functional separation of powers within an uncodified constitution.

The United States: Judicial Finality and the Administrative State

The United States Constitution explicitly operationalizes Montesquieu's theories through a rigid system of checks and balances. Two modern Supreme Court decisions highlight the Court's formalist defense of its own Article III judicial powers against encroachment by both the legislature and the executive.

In *Plaut v. Spendthrift Farm*⁷, the Supreme Court addressed legislative interference in judicial finality. Congress had passed a statute requiring federal courts to reopen certain securities fraud cases that had already been dismissed as time-barred under existing law. The Court struck down the statute, ruling that Congress violates the fundamental principle of the separation of powers when it commands federal courts to reopen final judgments. Grounding its decision in the strict separation of Article III judicial power, the Court held that while the legislature can alter laws prospectively to govern future conduct, it cannot retroactively overturn or mandate the reopening of final decisions already rendered by the independent judiciary. This doctrine of judicial finality ensures that the adjudicatory process remains insulated from shifting legislative majorities.

More recently, in *Loper Bright Enters. v. Raimondo*⁸, the Supreme Court fundamentally altered the balance of power between the judiciary and the modern administrative state. The Court

⁷ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)

⁸ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024)

overruled the decades-old *Chevron* deference doctrine, which had previously required courts to defer to reasonable agency interpretations of ambiguous statutes. The majority reasoned that *Chevron* deference violated the separation of powers by forcing courts to abdicate their core Article III duty to say what the law is, effectively transferring judicial interpretative power to executive branch bureaucrats. This ruling represents a sweeping formalist reclamation of judicial interpretive authority, curtailing the functional flexibility previously afforded to the administrative state and reasserting the judiciary's exclusive role in statutory interpretation.

The Indian Constitutional Architecture

Constituent Assembly Debates: Designing a Seamless Web

The framers of the Indian Constitution faced the monumental task of designing a governance structure for a newly independent, highly diverse nation emerging from colonial rule. The Constituent Assembly debates reveal a deliberate rejection of the strict American separation of powers in favor of the Westminster model of executive-legislative integration, coupled with a fiercely independent judiciary.

During the debates on Article 50 (which mandates the separation of the judiciary from the executive in the public services of the State), members like K.T. Shah advocated for a strict, explicit separation of powers akin to the United States. Shah proposed amendments demanding complete separation between the principal organs of the State the legislative, the executive, and the judicial arguing that such rigid demarcations were necessary to prevent corruption, totalitarianism, and tyranny. He also advocated for direct presidential elections to ensure the executive was independent of the legislature.

Dr. B.R. Ambedkar, the principal architect of the Constitution, firmly rejected this proposition. Ambedkar argued that the Indian model was predicated on a parliamentary system where the executive is drawn from and directly accountable to the legislature, creating a "harmonious governmental structure" rather than a "conflicting trinity". Consequently, the Indian Constitution does not feature a strict, codified separation of powers. Instead, as constitutional historian Granville Austin noted, the framers designed a "seamless web" of governance. This framework

establishes functional overlaps to ensure cooperative federalism and socio-economic reform, but it relies on institutional boundaries to prevent the concentration of unchecked power⁹.

The Supreme Court of India has consistently affirmed this nuanced position. In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*¹⁰, the Court held that the executive power is co-extensive with legislative power and does not always require a specific legislative act to undertake trade or business, affirming that the Indian Constitution does not mandate a rigid separation of powers. However, the Court has simultaneously maintained that the underlying doctrine forms an entrenched part of the Constitution's "Basic Structure." In cases such as *Indira Nehru Gandhi v. Raj Narain*,¹¹ the Court clarified that no organ can usurp the essential functions of another, meaning the legislature cannot act as a judge, nor can the executive assume legislative powers beyond its constitutional mandate.

The Erosion of Judicial Independence and Executive Overreach

Despite the framers' intentions, the history of the Indian Republic features multiple instances where the executive has actively undermined the judiciary to consolidate power. Because the executive in India inherently commands a legislative majority, the traditional separation between those two branches is blurred, leaving the judiciary as the primary structural check on state power.

The most catastrophic capitulation of judicial authority occurred during the National Emergency (1975–1977). In *ADM Jabalpur v. Shivkant Shukla*¹², the Supreme Court ruled 4-1 that citizens could not move High Courts for writs of habeas corpus to challenge illegal detentions, effectively surrendering the fundamental right to life and liberty (Article 21) to executive emergency decrees. During this period, the executive actively undermined judicial independence through punitive measures. The government bypassed established seniority conventions to appoint "committed" Chief Justices¹³ who were sympathetic to the executive's agenda. Furthermore, sixteen High Court

⁹ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (1999)

¹⁰ *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, and *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1

¹² *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521

¹³ Justice A.N. Ray in 1973 following the landmark judgment in *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, and Justice M.H. Beg in 1977

judges who had ruled against the government or granted relief to political prisoners were subjected to punitive transfers to instill fear and conformity within the ranks of the judiciary.

While the blatant coercion of the Emergency era has passed, the contemporary executive employs more subtle administrative mechanisms to bypass judicial authority. Foremost among these is the "pocket veto" over judicial appointments. Although the Supreme Court instituted the Collegium system to insulate judicial appointments from executive interference, the government frequently exerts control through deliberate inaction. By indefinitely delaying the appointment or transfer of judges recommended by the Collegium, the executive wields a de facto veto, crippling the judiciary's ability to maintain its own institutional strength and fill vacancies in a timely manner.

The executive has also weaponized legislative procedure to bypass constitutional scrutiny. In the passage of the Aadhaar Act (2016), the executive classified the sweeping mass-surveillance legislation as a "Money Bill," thereby circumventing the Upper House (Rajya Sabha), where the government lacked a majority. The Supreme Court majority's refusal to strike down the Speaker's certification left the judiciary powerless against procedural subversion, allowing the executive to ram through critical architecture without bicameral consensus. Similarly, the executive routinely utilizes "Ordinance Raj" the practice of repeatedly re-promulgating temporary emergency ordinances under Article 123 to create substantive law without parliamentary debate. Despite the Supreme Court declaring this practice a "fraud on the Constitution" in cases like *D.C. Wadhwa v. State of Bihar*¹⁴, and *Krishna Kumar Singh v. State of Bihar*¹⁵, the judiciary has often found itself incapable of undoing the structural changes, appointments, and actions executed while these ordinances operated as law.

Furthermore, the rising use of "sealed cover" jurisprudence has structurally marginalized the judiciary's role as a neutral arbiter. By submitting crucial evidence and national security claims in sealed envelopes as seen in the Rafale deal probe and the National Register of Citizens the executive deprives the opposing party of the right to adversarial cross-examination. This practice

¹⁴ *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378

¹⁵ *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1

forces the court to rely exclusively on unverified executive narratives, compromising the principles of open justice and effectively neutralizing independent judicial oversight.

Legislative Overrides and Statutory Shackling

When the Indian judiciary issues judgments that disrupt executive policy or political agendas, the legislature routinely deploys its majoritarian power to enact statutory or constitutional overrides, nullifying judicial mandates. While legislative bodies possess the legitimate authority to amend laws to cure defects identified by courts, the Indian experience frequently demonstrates a legislative determination to simply bypass unfavorable rulings, violating the doctrine of separation of powers by encroaching upon the judicial function of final adjudication.

Constitutional Nullifications

The practice of legislative overriding began almost immediately after the Constitution's adoption. Following early Supreme Court rulings that struck down state land reform laws for violating the fundamental right to property, the provisional Parliament enacted the First Amendment in 1951. This created the Ninth Schedule, a constitutional vault designed to place specific laws entirely beyond the scope of judicial review, shielding them from fundamental rights challenges.

In the 1970s, after the Supreme Court struck down the nationalization of banks in *Rustom Cavasjee Cooper v. Union of India*¹⁶, and the abolition of royal privy purses in *Madhav Rao Jivaji Rao Scindia v. Union of India*¹⁷, Parliament retaliated with the 24th, 25th, and 26th Constitutional Amendments. These amendments explicitly asserted absolute parliamentary supremacy over fundamental rights and the unfettered power to amend any part of the Constitution. This aggressive legislative posture culminated in the 42nd Amendment (1976), enacted during the Emergency, which comprehensively barred the Supreme Court from reviewing constitutional amendments and drastically curtailed the writ jurisdiction of High Courts. Similarly, the 39th Amendment (1975) was passed explicitly to place the election disputes of the Prime Minister beyond judicial scrutiny

¹⁶ *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248

¹⁷ *Madhav Rao Jivaji Rao Scindia v. Union of India*, (1971) 1 SCC 85

after the Allahabad High Court invalidated Prime Minister Indira Gandhi's election for electoral malpractices.

The legislature has also utilized constitutional amendments to override judicial interpretations of affirmative action. In the landmark case *Indra Sawhney v. Union of India*¹⁸, the Supreme Court ruled that reservations in government employment could apply to initial appointments but not to promotions. To bypass this restriction, Parliament passed the 77th Amendment (1995) to legally permit reservations in promotions, and later the 85th Amendment (2001) to grant retrospective "consequential seniority" to promoted reserved-category candidates, explicitly overriding the court's administrative boundaries.

Statutory and Retrospective Overrides

Statutory overrides are heavily utilized to reverse specific judicial outcomes without amending the Constitution itself. In 1985, the Supreme Court ruled that a divorced Muslim woman was entitled to maintenance under Section 125 of the Criminal Procedure Code. Facing intense political pressure, the legislature passed the Muslim Women (Protection of Rights on Divorce) Act, 1986, heavily diluting the judgment and restricting the maintenance period, effectively overriding the judicial mandate.

In the realm of taxation, after the Supreme Court ruled in 2012 that telecom giant Vodafone was not liable for a \$2.2 billion capital gains tax under existing law, Parliament passed the Finance Act of 2012. This Act amended the Income Tax Act with retrospective effect back to 1961, explicitly overruling the Supreme Court and legally reviving the tax demand. Similar legislative defiance was observed in 2018 when the Supreme Court introduced procedural safeguards including preliminary inquiries against immediate arrests under the SC/ST (Prevention of Atrocities) Act in *Subhash Kashinath Mahajan v. State of Maharashtra*,¹⁹ Facing massive political backlash, Parliament rapidly passed an amendment bill nullifying the judicial guidelines, stating explicitly that no preliminary inquiry was required.

¹⁸ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217

¹⁹ *Subhash Kashinath Mahajan v. State of Maharashtra*, (2018) 6 SCC 454.

State legislatures have also defied judicial edicts. In the Mullaperiyar Dam dispute, after the Supreme Court ruled in 2006 that the dam was structurally sound and permitted raising the water level to 142 feet, the Kerala State Legislature immediately passed an amendment fixing the maximum water level at 136 feet. Although the Supreme Court eventually struck this law down eight years later, the legislative override effectively stalled the execution of the court's binding order for nearly a decade. In environmental law, the Forest (Conservation) Amendment Act of 2023 effectively rolled back the Supreme Court's decades-old jurisprudence from the *T.N. Godavarman Thirumulpad v. Union of India*²⁰, judgment, which had broadly protected unclassified forests, by restricting statutory protection primarily to legally notified forests.

More recently, the legislature has preemptively shackled the judiciary through stringent statutory drafting. Special laws, such as the Unlawful Activities (Prevention) Act (UAPA) and the Prevention of Money Laundering Act (PMLA), contain bail conditions so restrictive that the judiciary is statutorily barred from granting relief unless a judge is satisfied that the accused is *prima facie* innocent. This legislative design effectively ties the judiciary's hands, allowing the executive to ensure prolonged incarceration without trial and subverting the traditional judicial function of assessing bail on conventional legal metrics. Executive shielding is further seen under the Armed Forces (Special Powers) Act (AFSPA), where civilian courts cannot prosecute military personnel for extrajudicial killings without prior sanction from the central government, which is routinely denied.

The Tribunalisation of Justice

Over the past four decades, the Indian legislature has systematically shifted vast areas of critical litigation ranging from company law and environmental protection to taxation and armed forces matters away from independent High Courts and into specialized tribunals. Formally introduced into the constitutional architecture via the 42nd Amendment (which added Articles 323A and 323B), the stated objective of tribunalisation was to reduce the massive burden on the traditional court system, which currently groans under the weight of approximately 4.5 crore (45 million) pending cases.

²⁰ *T.N. Godavarman Thirumulpad v. Union of India*, (1997) 2 SCC 267,

Administrative vs. Quasi-Judicial Roles

Tribunals are intended to offer specialized expertise and procedural flexibility, unbound by the strictures of the Civil Procedure Code, yet obligated to adhere to the principles of natural justice. However, it is vital to distinguish true tribunals from purely administrative grievance bodies. In *Swati Shivaji Lawhare v. State of Maharashtra*²¹, the Bombay High Court examined the nature of "Shikshan Sevak" grievance committees. The Court held that these committees are purely administrative or executive filters. They do not possess the trappings of a quasi-judicial forum or tribunal, and their recommendations are advisory, lacking the power to issue binding orders of reinstatement. Such entities do not violate the separation of powers because they exercise only administrative functions.

However, true tribunals (like the Central Administrative Tribunal or National Green Tribunal) exercise judicial power and adjudicate disputes that historically belonged to the courts. In *L. Chandra Kumar v. Union of India*²², a seven-judge Constitution Bench ruled that tribunals cannot act as complete substitutes for High Courts. The Court struck down provisions that excluded the judicial review jurisdiction of High Courts (under Article 226) and the Supreme Court (under Article 32), establishing that all tribunal decisions are subject to judicial review by the High Courts to protect the basic structure of the Constitution. The Bombay High Court has further clarified that tribunals like the NGT are creatures of statute and do not possess the power to rule upon the constitutional validity (*vires*) of their parent enactments, a power reserved exclusively for constitutional courts exercising judicial review.

The Backlog Crisis and Executive Control

Rather than resolving the judicial backlog, the tribunals themselves have become paralyzed. The overall traditional judiciary has approximately 4.5 crore (45 million) pending cases due to procedural delays, vast vacancies, and endless appeals. Meanwhile, the top 5 central tribunals hold a backlog of over 3.5 lakh (350,000) cases, caused by severe understaffing, infrastructural deficits, and a lack of permanent benches. Specifically, the Central Administrative Tribunal (CAT) has

²¹ *Swati Shivaji Lawhare v. State of Maharashtra*, 2021 SCC OnLine Bom 674

²² *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261

more than 65,000 cases pending due to delayed executive appointments of judicial and technical members. The Debt Recovery Tribunal (DRT) carries over 1.5 lakh (150,000) pending cases, suffering from overlapping jurisdictions, procedural complexities, and a high appellate rate.

This paralysis is largely engineered by executive neglect. The Supreme Court noted in 2021 that crippling vacancies existed across various tribunals, with hundreds of judicial and technical member positions left unfilled by the government, effectively starving these bodies of adjudicatory capacity.

Beyond inefficiency, tribunalisation represents a structural threat to the separation of powers. Tribunals are frequently placed under the administrative, budgetary, and logistical control of the specific executive ministries whose decisions they are tasked with adjudicating. For instance, the Finance Ministry exerts administrative control over the Income Tax Appellate Tribunal (ITAT), creating a severe conflict of interest that heavily dilutes the reach and power of the independent judiciary.

The executive aggressively asserts this control through legislative action. In *Madras Bar Ass'n v. Union of India*²³, the Supreme Court struck down specific conditions in the Tribunals Reforms Ordinance such as fixing a minimum age of 50 years and a short four-year tenure for members as blatant threats to judicial independence that would deter competent practitioners from joining. In an overt display of legislative overriding, Parliament passed the Tribunals Reforms Act, 2021 just days later, re-enacting the exact provisions that the Supreme Court had struck down verbatim, without removing the constitutional defect the Court had identified. This dynamic underscores a continuous institutional war wherein the executive uses the legislative apparatus to reclaim adjudicatory power and subordinate tribunal members to executive whim.

Judicial Activism, Fundamental Rights, and the Basic Structure

In response to legislative overrides, executive delays, and perceived governance failures, the Indian higher judiciary has frequently resorted to judicial activism. By relaxing *locus standi* rules and entertaining Public Interest Litigations (PILs), the Supreme Court has transformed itself into

²³ *Madras Bar Ass'n v. Union of India*, 2021 SCC OnLine SC 463

a proactive auditor of public policy, expanding fundamental rights and issuing structural injunctions to compel executive action.

The foundations of this expanded judicial role were laid during the battles over property rights and constitutional amendments. In *I.C. Golaknath v. State of Punjab*²⁴, the Supreme Court held that Parliament could not amend the Constitution to abridge fundamental rights, a ruling Parliament attempted to override with the 24th Amendment. This culminated in the monumental *Kesavananda Bharati v. State of Kerala*²⁵, decision, where a 13-judge bench established the "Basic Structure Doctrine". The Court ruled that while Parliament possesses broad amendatory powers, it cannot alter the fundamental architecture of the Constitution, which includes the separation of powers, judicial review, and the rule of law.

Through judicial activism, the Court has continually expanded the scope of Article 21 (Right to Life and Personal Liberty). In *Justice K.S. Puttaswamy (Retd.) v. Union of India*²⁶, a nine-judge bench unanimously recognized the right to privacy as a constitutionally protected fundamental right. Overruling earlier restrictive interpretations in *M.P. Sharma v. Satish Chandra*²⁷, and *Kharak Singh v. State of U.P.*²⁸ (which had held that the Indian Constitution lacked Fourth Amendment-style protections against search and seizure), the Court established that privacy is intrinsic to human dignity. This ruling imposed a structured standard of judicial review, requiring that any state interference with privacy must be backed by law, serve a legitimate state aim, and satisfy the test of proportionality. The Supreme Court has utilized this structured review in cases like *State of Maharashtra v. Bharat Shanti Lal Shah*²⁹, ensuring that state power such as police powers of search and seizure under special acts remains strictly regulated and does not infringe upon constitutional liberties.

The Academic Debate: Activism vs. Sovereignty

²⁴ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643

²⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225,

²⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1

²⁷ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300

²⁸ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295

²⁹ *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5,

Legal scholars remain deeply divided on the constitutional legitimacy of this expansive judicial role. Scholar Upendra Baxi defends judicial activism as an essential process for the implementation of the rule of law in a developing democracy. See generally Upendra Baxi, *The Indian Supreme Court and Politics* (1980). Baxi views activism not as an overreach, but as a necessary remedy for a "carcinogenic body politic," stepping in where the executive or legislature is inactive, corrupt, or unwilling to protect marginalized citizens. Through PILs, the judiciary provides a mechanism of accountability that the fractured political branches fail to offer.³⁰

Conversely, Pratap Bhanu Mehta warns that unbounded activism undermines democratic accountability, leading to the rise of "judicial sovereignty." Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. Democracy 70 (2007). Mehta argues that when unelected judges systematically replace the notion of the separation of powers with judicial supremacy, they encroach upon the domain of representative institutions, substituting legal judgments for political consensus³¹. The expansion of judicial power, while often producing beneficial outcomes in the short term, risks turning the judiciary into a politically contested arena. Furthermore, when courts fail to act against majoritarian state excesses such as their reluctance to intervene promptly against anonymous electoral bonds or their deference to the executive in Kashmir their claims to being the ultimate protectors of fundamental rights are compromised.

Comparative Structural Reforms: Plugging Institutional Loopholes

To establish a genuine separation of powers and arrest the cycle of executive encroachment and judicial overreach, India requires structural reforms. Comparative analysis of mature constitutional democracies provides a blueprint for targeted institutional interventions.

- **Post-Retirement Judicial Bias:** To remove incentives for pro-executive verdicts near retirement, India should institute strict statutory cooling-off periods (2–3 years) before retiring judges can accept government sinecures. In contrast, the United States offers lifetime tenure under Article III to ensure financial and career security, Germany enforces single, non-renewable 12-year terms for Constitutional Court judges to prevent them from

³⁰ Upendra Baxi, *The Indian Supreme Court and Politics* (1980).

³¹ Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. Democracy 70 (2007).

seeking reappointment, and the United Kingdom uses strict conventions and statutory bars against returning to political or commercial roles.

- **Executive "Pocket Veto" on Appointments:** India could mandate a constitutional timeframe (e.g., 30 days) within which the executive must notify Collegium reiterations, failing which appointments are deemed legally approved. By comparison, the United Kingdom's Judicial Appointments Commission (JAC) limits the executive to rejecting a nominee only once and requires written statutory reasons, while in South Africa, the President is constitutionally bound to appoint candidates selected by the independent Judicial Service Commission.
- **Legislative Rubber-Stamping (Whips):** Reforming the Anti-Defection Law (Tenth Schedule) so it applies strictly to Money Bills and No-Confidence Motions would allow MPs free conscience votes on standard legislation without fear of disqualification. Internationally, Germany's Article 38(1) mandates that lawmakers vote according to their conscience and cannot be stripped of their seats for defying a party whip, while the UK and US permit cross-voting and backbench rebellions without the loss of legislative seats.
- **Executive Primary Lawmaking ("Ordinance Raj"):** India must constitutionally restrict Article 123 ordinances to genuine physical emergencies when Parliament cannot convene, and explicitly outlaw the re-promulgation loophole. Both the United States and the United Kingdom maintain an absolute ban on executive statutory lawmaking, meaning executive orders cannot create new primary statutes or levy taxes without prior, explicit legislative authorization.
- **Executive-Controlled Tribunals:** India should bring all tribunals under a unified, independent judicial hierarchy (such as a National Judicial Infrastructure Corporation), severing administrative and financial ties to executive line ministries. This aligns with the United Kingdom, where the Tribunals, Courts and Enforcement Act 2007 unified tribunals under His Majesty's Courts and Tribunals Service (HMCTS), fully insulating them from the influence of line departments.
- **Retrospective Legislative Overrides:** India should enforce the "Curing the Defect" doctrine, requiring the legislature to fundamentally alter the legal basis of a statute rather than simply passing "notwithstanding" clauses, and establish constitutional barriers against retrospective civil and tax laws. In the United States, *Plaut v. Spendthrift Farm*,

*Inc*³² established that final judicial judgments cannot be retroactively overturned by Congress, and Germany holds a constitutional bar on "true retroactive legislation" (*Vertrauensschutz*), protecting citizens' legitimate expectations.

- **"Sealed Cover" Evidence Submissions:** India needs to formalize rules banning sealed covers except in strict military or victim-identity cases, and subject national security claims to adversarial testing. In the United Kingdom and Canada, Closed Material Procedures (CMPs) employ security-cleared independent "Special Advocates" to cross-examine secret intelligence files on behalf of excluded parties, ensuring state claims are rigorously tested.

Conclusion

The separation of powers is not merely an abstract concept of institutional design, but the operational prerequisite for the rule of law and the preservation of civil liberty. As demonstrated by the constitutional jurisprudence of the United Kingdom and the United States, mature democracies rely on an independent judiciary to vigorously defend institutional boundaries whether by striking down unlawful executive prorogations of parliament in *R (Miller) v. Prime Minister*, [2019] UKSC 41, overturning agency overreach in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), or denying the legislature the power to reopen final judgments in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

In India, the constitutional framework established by the Constituent Assembly intentionally blended executive and legislative functions to foster cooperative governance, while carving out an independent judiciary to serve as the ultimate constitutional sentinel. However, the subsequent decades have witnessed a relentless executive effort to centralize power and bypass accountability. Through mechanisms ranging from punitive judicial transfers and mass legislative overrides to the strategic use of tribunals and the delay of judicial appointments via pocket vetoes, the executive has continuously sought to neutralize judicial checks. While the Indian judiciary has responded with expansive activism to protect fundamental rights and maintain the basic structure of the Constitution, this approach alone cannot resolve deep-seated structural imbalances and carries the inherent risk of crossing into judicial overreach.

³² United States, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)

Securing the separation of powers in the modern era requires looking beyond domestic jurisprudence toward comparative structural reforms. By insulating judicial appointments from executive delay, breaking the administrative control of tribunals, restricting the use of secret evidence, and granting legislators the freedom to hold the executive accountable without fear of defection penalties, the constitutional balance can be restored. Ultimately, the health of a constitutional democracy is measured not by the sheer magnitude of power granted to its executive, but by the resilience of the institutional boundaries designed to contain it.



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