

Is India witnessing judicial despotism?

A series of judgments in recent times has had several parties questioning the powers and motives of the Supreme Court; while such criticism of the judiciary is not new, the top court has not yet crossed the Lakshman Rekha

Published - April 24, 2025 08:30 am IST



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The term 'judicial review' has not been used in our constitution but it can easily be inferred from Article 13, which says any law in contravention of the constitution shall be void. In fact, even this provision was inserted out of abundant caution, as even in its absence, such a power could have been exercised by the constitutional courts. High Courts under Article 226 and the Supreme Court under Article 32 look at the violation of rights.

Judicial review being an essential component of rule of law is part of our constitution's basic structure. Though 'judicial activism' and 'judicial review' are considered distinct, basically both are two sides of the same coin. Indeed, the judicial whistle should ideally be blown in extreme situations for a limited purpose, as the judiciary has no business taking over the governance of the country in its hands.

To overcome the crises of legitimacy for its pro-government decisions during the Emergency, the Supreme Court revolutionised the doctrine of *locus standi* and initiated the Public Interest Litigation. However, has the Supreme Court really become a nuclear missile, with its judges having no accountability? Are we in the midst of civil or religious war and Justice Sanjiv Khanna, in his short tenure as Chief Justice of India (CJI), is to be blamed for this? Is judicial review anti-democratic?

Has the court misused its powers under Article 142 (which provides for "complete justice")? It no more asks petitioners what right of theirs has been violated but rather whose right has been violated. In the process, it has helped the prisoners who were

blinded by needles being pierced in their eyes; paying compensation for the custodial deaths and upholding rights of workers etc.

The case for complete justice

In the constitutional law debates, there have always been lovers and haters of judicial review. At times, they do change their stand depending upon whether they are in government or Opposition. Thus, Congress leaders when in power were against the judicial review but are its strongest votary today. However, to term Article 142 as nuclear missile is too strong a statement and is basically criticism of the constitution and should have been avoided by the Vice-President of India, who himself being a senior advocate is familiar with the seminal contribution of the Supreme Court in saving our democracy. This provision was used in the Babri judgment, in issuing guidelines on mob lynching and in granting divorces in failed marriages on the ground of 'irretrievable breakdown'. True, the court should not use this power too often.

The Supreme Court has neither used judicial activism nor its constitutional power under Article 142 as an unguided missile. As a repository of people's trust in it, it has, barring few exceptions, lived up to their expectations and not betrayed their trust. Had the court ordered restoration of the Babri mosque, probably there would have been a situation of religious war but looking at the sentiments of the millions of people, the court preferred peace over justice.

Similarly, a judgment against the abrogation of Article 370 may have created a law and order situation in Kashmir. CJI Sanjiv Khanna's interpretation of the proviso of Article 370 has been severely criticised and the court's refusal to determine the constitutionality of a State being downgraded to a Union Territory was not liked by the constitutional law experts.

The democracy debate

True, Opposition is well within its right to criticise the Vice-President but it must remember its tallest leader, Pandit Jawaharlal Nehru, too had spoken in almost identical language in the Constituent Assembly on September 10, 1949: "Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament. If we go wrong here and there, it can point it out, but in the ultimate analysis where, the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately, the whole constitution is a creature of Parliament."

He went on to observe on the possibility of picking up pro-government judges: "If courts proved obstructive, one method of overcoming hurdle is... the executive which is the appointing authority of judges begin to appoint judges of its own liking for getting decisions in its own favor." His daughter, as a strong Prime Minister, gave full effect to this policy by twice indulging in the supersession of judges. It is a different story that even the collegium routinely indulges in supersession in the name of diversity and merit.

The greatest criticism against the judicial review is in the name of democracy, as unelected judges ideally should not have power to quash laws passed by democratically elected governments. Of course, the government would be formed based on the majority in popular House, yet the constitution does not permit it to become majoritarian. Similarly, the Governor or the President cannot exercise their discretionary powers arbitrarily in assenting Bills because they too should respect the will of the democratically elected State Assemblies.

In fact, most scholars reject this democratic objection in cases of judicial review on questions pertaining to federal provisions, legislative procedure or fundamental rights, as democracy can be the best means of resolving political disputes except in issues of fundamental rights and preservation of constitutional supremacy. Unlike the United Kingdom, we do not have the supremacy of the Parliament but the supremacy of the constitution. Our parliamentarians must keep it in mind. The Vice-President too should not assert supremacy of the Parliament.

Judiciary vs the government

Generally, the Supreme Court upholds the decisions of the government and the laws enacted by the Legislature. The quashing of laws or striking down of governmental decisions happens once in a blue moon. The Supreme Court has a duty to speak against the misgovernment; if it fails to do so, it would be failing in its constitutional duty of protecting the constitution and upholding people's rights.

To say that Parliament be shut down as the court itself is making laws too is an unfair criticism. As a matter of fact, lately, the liberals have been saying that our judiciary has become more executive-minded than the executive itself. In most cases during the Modi government, the Supreme Court has gone with the government. It upheld demonetisation; it refused to recognise same sex marriages; it approved the Rafale deal; saved the BJP-Shiv Sena(S) government in Maharashtra; insisted on the National Register of Citizens for Assam; did almost nothing in the Pegasus surveillance matter; declared 'triple talak' as void; freely used sealed covers; did not agree even for a CBI probe in Judge

Loya's death; made bail conditions more stringent under Unlawful Activities (Prevention) Act and for over five years, did not grant bail even to student leaders; did not hear petitions against Electronic Voting Machines (EVM) and the Citizenship (Amendment) Act, 2019.

The only big setbacks for the government were in cases against the electoral bond scheme, National Judicial Appointments Commission (NJAC), and President's rule in Arunachal Pradesh. In the recent verdict on Tamil Nadu Government's petition against its Governor, the court has merely interpreted the expression 'as soon as possible' in Article 200. The only problematic part that may qualify as judicial activism is the suggestion to President to seek the court's advisory opinion if a State law looks patently unconstitutional; the court has said "it would be prudent" (Paragraph 434). This too was to save the President from the allegations of bias, arbitrariness and *mala fide*.

Need for fair criticism

Let us be fair to our judges. Fair criticism is welcome but attributing motives to judges or blaming them either for the violation of separation of powers or civil war is not acceptable. Our judges do deserve respect as they have too much of work due to poor judge-population ratio. The current CJI has not given any significant judgment. Aware of religious sensitivities, he merely tried to maintain peace through his observations on the Places of Worship Act. There is no stay as of now even on the The Waqf (Amendment) Act, 2025. Cannot he even ask questions anymore?

All three organs of the government must remain within their allotted spheres. Holders of these organs do take an oath to bear true faith and allegiance to the constitution. A Governor who refuses to sign Bills validly passed by the Assembly for years together basically was in violation of his own oath.

In Supreme Court Bar Association (1998), the Supreme Court had observed that the powers under Article 142 being curative do not authorise the court to supplant substantive law. It cannot build a new edifice where none existed earlier. It cannot make any order which is inconsistent with the constitution or statutory law. The judgment in the Tamil Nadu Government's suit has strengthened, not weakened, democracy and federalism. Justice J.B. Pardiwala has not gone against any provision of the constitution. He has indeed saved the constitution from the despotism of unelected Governors and prevented Governors from becoming "super constitutional figure" (Paragraph 317).

Justice Krishna Iyer in *Maru Ram v. Union of India* (1981) has held that “no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course”. He also observed that no constitutional power can be vulgarised by the personal vanity of the men in authority.

The constitutional fiction of political questions beyond judicial remit cannot tie the hands of judges in exceptional situations like the one in Tamil Nadu. Its Governor's action being found *mala fide* warranted such timelines. The timelines suggested by the court do not amount to amendment of the constitution at all. No court in future is going to initiate contempt proceedings against the President or even the Governors for not strictly complying with these timelines. If there is undue delay without any reason, timelines can be used to evaluate arbitrary or non-arbitrary nature of the Governor's action/inaction.

In *Qaiser e Hind* (2001), Justice Dorairajan had observed that “the assent of the President envisaged under Article 254(2) is neither an idle or empty formality nor an automatic event” (Paragraph 73). It is an exercise of constitutional power. The Indian President too is under the constitution and not above it. Her actions too are amenable to judicial review. Even the Supreme Court is not supreme despite its nomenclature; it too must work under and within the constitutional limits.

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Published – April 24, 2025 08:30 am IST