

Role Of Legislative Function Of Judiciary: A Critical Study

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ABSTRACT:

The judiciary defends the Constitution and citizens' rights from the unconstitutional acts of the legislature and the executive. In a case where a particular law has become obsolete or is inadequate to meet the needs of the moment, the judiciary gives a sense to the current provision of a statute to address the issue. There are three government wings with specified powers and tasks for executive, legal, and judiciary authorities. Still, there are instances in which the judiciary must fill the void created by the failure of the other two wings. It is the use of legal authority to define and implement what is advantageous to society and individuals in general. Judicial activism in India affected almost every dimension of life, and it has been more than legal or written in black and white in the process. There are objections that the judgment violates the separation of powers principle. This research paper critically analyses the diverse aspects of the issue, including separation of power in India, the judicial function, the power of judicial review, judicial activism, and judicial overreach.

KEYWORDS: Judicial Activism, Judicial Review, Judicial Overreach, Separation of powers, Judiciary Function.

I. INTRODUCTION

In the Democratic Government structure, the three different bodies – the Legislature, the Executive, and the Judiciary – carry out various roles of government.¹ The legislature is making new rules. The executive also known as the government enforces legislation and maintains law and order. The judiciary is used to settle conflicts in accordance with the Constitution and to interpret the law. The doctrine of the division of powers was established to avoid the accumulation of power in one government body, which would result in a lack of legitimacy and would be correlated with a rise in arbitrary power.² This doctrine includes the principle that, while one government body should not perform the duties of another body, the government should not interfere with the authority of another body.

A judicially non-partisan and autonomous judiciary, which is accountable within the limits of the constitutional provisions, shall exercise its judicial duties within the confines of the Constitution and based on the principles of the rule of law to uphold the norms laid down in the Constitution. The Supreme Court, which has the person of a sentinel, has argued that it is the sentinel who watches and lives and serves as a watchdog against fundamental and constitutional rights violations. In the context of the democratic form of governance, the doctrine of power-sharing has a profound impact on how government institutions interact with public organizations and society's values. There is a great deal of debate in Britain that judicial independence is relevant. It was created with the Magna Carta in 1215 A.D., which placed the control of the King in the hands of the independent judiciary, which is still in use thousands of years later today.³ The notion of a welfare state and a democratic system as functionaries who are well paid for their services is in the formative years of India. However, others are now in favor of positions traditionally covered by the government. The drawbacks of the obvious gaps in the executive branch prompted the Serious Commissions to step into the executive branch. This was not a scenario forever, initially involving areas of heinous human conduct, such as Hussainara Khatoon,⁴ Olga Tellis,⁵ etc. It would be much later, even in the rarest of rare cases, if Supreme Court were to take the drastic step of framing regulations – as in the case of Vishaka v. Rajasthan. Article 32 of the Constitution of India, 1950 ('Constitution') confers on the Supreme Court the power to protect the right of an individual to bring a constitutional right of enforcement before the Court of Justice. Furthermore, Article 141 of the Constitution expressly treats such judicial decisions as "rules of the law" and thus codifies that the decisions are binding precedents.⁶ Compared to prior rulings, the Supreme Court continued to adopt many different jurisprudences and novel options in its judgments on public interest litigations ('P.I.L.s'). The advent of personal injury lawyers in India was one of India's critical catalysts behind the rise of judicial activism.

However, the Supreme Court is bound by the Constitution to defend the law as it is written by the legislative or executive branches of government. On many occasions, the courts have extended the foundations of law to something more tangible, more optimistic, right-based, constructive, and liberal. At such times as judges, courts

can use objective interpretation, fill gaps in the law and provide meaning-based interpretation to protect human rights and combat impunity.

II. THE DOCTRINE OF SEPARATION OF POWERS IN THE INDIAN CONTEXT

"Separation of Powers" is the subject of debate in the minds of many philosophers. Over the centuries, old thinkers, political philosophers, and political theorists, constituent framers, judges, and academic writers all considered doctrines. This implies, first and foremost, the division of powers between the various bodies of the State, administrative, legislative, and judicial. The theory of the separation of powers applies specifically to three formulations of government powers;

- i. More than one of the three national bodies should not be the same body.
- ii. No other state organ should be hindered by a single organ.
- iii. No other organ can perform the assigned roles.

CONSTITUTIONAL CLAUSE

Our Constitution makes no explicit mention of the principle of delegation of authority. However, the Constitution defines such guiding rules, as Part IV and V of our Constitution separate the judiciary from the executive, as 'the government shall take measures in public services through the executive.' There can be no formal, dogmatic separation of powers except in India, where substantive and personal overlap occurs.⁷

IN THE COURTROOM:

According to Article 142 and Article 145 of our Constitution, in violation of any clause of the Constitution or legislation enacted by Parliament in the event of executive actions, S.C. has the power to declare null the laws passed by the legislature. The Court can also scrutinize Parliament's authority to amend the Constitution.⁸ If the Constitution's basic framework is disrupted, the Court has the power to declare any amendment unconstitutional. In some circumstances, the courts have provided orders to the Parliament to make legislation.

Executive:

The President of India, who is regarded as India's Supreme Executive Body, has the authority to consult the Supreme Court in compliance with Article 143 and the authority to pardon in accordance with Article 103(1) and Article 217. (3). The executive also has an impact on the Court's functioning by the appointment of the Indian Chief Justice and other judges.⁹

Legislative

The Council of Ministers shall be elected from the Parliament, and the legislature shall be responsible for this Council. In the absence of its immunity, the legislature shall exercise judicial power in the absence of Article 61 of the Constitution and remove the judges. Article 105 of the Legislative Body shall be subject to sanctions. In Gledhill's words, "India's constitution did not ceremoniously marry the doctrine of the separation of powers, but followed the doctrine of the separation of powers wherever possible."

The answer of the judiciary:

There are many cases in which S.C. has judged on the facts of the case, but the position of the doctrine in India can be understood through several points of reference given by the Supreme Court in the following cases;

Ram Jawaya v. Punjab¹⁰ Say, and keep, C.J. Mukherjee:

"The Indian Constitution did not recognize the doctrine of separation by its complete rigidity, but properly divided the roles of the various parts or branches of government, and it could therefore be very well argued that our Constitution does not allow for the assumption of one or more of its functions, which are essential of another kind."¹¹

Maneka Gandhi vs. Raj Narain, C.J. Ray held the following:"The Constitution of India only allows for a general separation of powers. There is no question of strict separation of powers, as in the case of India under the American Constitution or the Australian Constitution."

J. Beg has added:"Power separation is part of the basic constitutional structure. Neither one of the three autonomous entities of the Republic would take over the roles of the other. Even if Article-368 of the Constitution is restored, this structure cannot be changed."

III. THE JUDICIAL REVIEW IN INDIAN CONTEXT

The concept of judicial review was established by the Supreme Court of the United States of America. According to the United States Constitution, the Supreme Court of America has the authority to amend statutes

to determine their legality. Article 13 of the Constitution of India reserves the power of the Indian government to revise state laws. Any previously enacted law cannot be extended to the extent that it contradicts the Constitution. Legislation that is inconsistent with any of the fundamental rights that are enshrined in Part III of the Constitution will be declared unconstitutional by the Supreme Court.

Shankari Prasad vs. Union of India, First Amendment interests have been threatened because they have violated civil rights. Former Chief Justice of India questioned the lawfulness of the 17th Amendment Act. The High Court upheld the current condition in Shankari Prasad v Union of India¹² by refusing judicial review. Golaknath¹³ opposed the amendment once more, claiming that fundamental rights have been elevated to a transcendental status in our Constitution and are thus excluded from Parliament's authority. The last straw was the High Court's decision to disqualify Mrs. Gandhi from running for President. The Supreme Court stated unequivocally that democracy is the most prevalent form of governance. This is because every large part of India's democratic administrative structure would be weakened or destroyed by a constitutional act such as 329A.

On the other hand, the Supreme Court ruled in Aditya Birla Group v Thane Municipal Corporation (1985) 3 SCC 302. Opposition leaders and members of the press were detained in the aftermath of a state of emergency. Human rights have been revoked. The Supreme Court decided by its decision to defend the person from state intervention, even though this action conflicted with the Constitution, during an emergency, which resulted in total deprivation of life and freedom. The Court held that the Court was unable to protect the public from Government policies.

In *Minerva Mills, Ltd v Union of India*, A.I.R. 1980 SC 1789,¹⁴ the Apex Court invalidated Sections 4 and 5 of Article 12 of the 42nd amendment for undermining the constitutional system's fundamental principles. The fundamental framework of the Constitution is the restriction of the power of amendment, which excludes all amendment limits and confers the unrestricted power to change.

L. Chandra Kumar v Union of India and *S.P. Sampat Kumar v Union of India*.¹⁵ The Supreme Court of India has ruled that judicial oversight of legislative activity conferred on the High Court and Supreme Court through Article 226 and Article 32 of the Constitution is an important and fundamental function of the Constitution.

The National Judicial Appointments Commission (NJAC) Act was challenged because it undermines judicial independence by establishing a structure in which the Chief Justice loses primacy over judicial appointments and the judiciary loses majority power over judicial appointments.¹⁶ Both the Act and the amendment were ruled invalid by the Supreme Court. A new system for naming judges is being implemented. The problem at hand, however, is forwarded for the review of the new review scheme.

In the *Shayara Bano* case,¹⁷ the Supreme Court's Justice Nariman introduced the Manifesto Arbitration Doctrine and found that triple talaq was illegal. Section 497 of the Indian Penal Code has been declared unconstitutional by the Supreme Court in *Joseph Shine v Union of India* A.I.R. 2018 S.C.I. S.C. Anuradha Bhasin SC 2020 Education. The Supreme Court has instructed the Union Territory of Jammu and Kashmir to revisit all orders suspending internet services and refrain from issuing new ones that contradict the Constitution.

In 2010, the Supreme Court ruled that according to Article 19(1)(a) and Article 19(1)(b), freedom of speech and expression and right to do business online are protected by the Constitution by Article 19(1)(g).¹⁸ Judicial review is a vital part of the Constitution of India, but it is not very useful in political matters. However, because there are political reasons for the program, it is justified. The Supreme Court of India held in *Kerala Bar Hotels Association vs. State of Kerala* A.I.R. 2016 SC 163 that the courts must be cautious and hesitant in deciding the state policy at any given time.

IV. JUDICIAL ACTIVISM IN INDIA

During the changing world, judicial activism has a diverse method of legal evaluation. Arthur Schlesinger Jr. published an essay in the *Fortune Magazine* titled "The Supreme Court: 1947". The Court has progressed to have a better understanding of legal issues. To answer concerning legal questions, the conservative judicial authorities continue to enforce their will on the Constitution. The judges should be more courageous and willing to take risks with their rulings.

EVOLUTION OF JUDICIAL ACTIVISM

The Supreme Court of India started as a technocratic court in the 1950s but eventually acquired more influence through constitutional interpretation. Their transition has been subtle and incremental, only noticeable over time. Indeed, the root cause of judicial activism can be found in the initial court declaration. Indian judicial activism can be both realistic and unduly pessimistic. A court devoted to working to improve the status of minorities is labeled as being pro-activist.

NEED FOR JUDICIAL ACTIVISM

Despite the rigid division of powers between the branches of government, our constitutions meticulously set forth the duties of the various state agencies. The country is still a welfare state, and it is difficult, like most developing nations, to identify the position of the judiciary. It is impossible for the legislature to predict every possible situation and to pass any piece of legislation. It is the responsibility of the Courts to observe and remove legal loopholes. When the government fails to accomplish its duties, it is the duty of the judiciary to

recommend that it perform various arguments against the liberalism of the judiciary. There are already two misconceptions about judicial activism.¹⁹

1. PRINCIPLE OF VACUUM FILLING:²⁰ The vacuum of authority is the product of a lack of action and laziness in the country. Such a vacuum would be contrary to the country's needs and maybe destructive to the elected government of the territory. There is a vacuum within the legislative and executive branches due to rampant inaction, stupidity, lawlessness, indifference, corruption, utter indiscipline, and lack of character within government legislative and executive branches.

2. THE SOCIAL WANT THEORY:²¹ The recent law has not provided a solution to the problems. So the judiciary has stated that it is the judiciary's responsibility to solve the marginalized issues and come up with a solution. The only alternative left to them was to introduce more laws than those currently in the books to achieve this objective. Consequently, the judicial advocacy of the judiciary has increased. Proponents of the theory of constitutional judicial activism argue that judicial activism leads to the transformation of society.

THE NECESSITY OF JUDICIAL ACTIVISM IN THE PRESENT SITUATION

Our Constitution is sovereign, impartial, and fearless, and our founding fathers firmly believed that the judiciary should be separated from outside control. The institution of the judicial branch is to set down the rules and adjudicate lawsuits within the scope of laws enacted by the legislature. It is a fundamental responsibility of the judiciary to uphold the rule of law and defend the Constitution. It is the responsibility of the judges to reveal the delinquencies of the ruling elite. Failure to act by broadening their prudence and bravery in an environment where they were previously afraid to move forward could contribute to the death of democracy.

THE COURSE OF JUDICIAL ACTIVISM

In the first decade of democracy, judicial activism was almost negligible, compared to the executive's political stalwarts and their zeal for the Parliament, the judiciary, and the executive. In certain respects, the Supreme Court was entirely a legal and administrative entity until the 1970s. In the case of Keshavananda Bharati, the Supreme Court ruled that the executive should not have authority over the Constitution and that the Constitution's basic features cannot be altered. However, the emergency imposed by Mrs. Gandhi could not be halted, which led to people involved in all three branches of government. The Bihar case was the first important case where radical activists inappropriately manipulated judges. In 1980, several law professors at Agra Protective Home revealed the harsh conditions of detention camps in reaction to Article 21, sparking a legal case against Delhi Women's Home, instituted by a Delhi University Law School student and a social worker.

ARTICLE 21 AND JUDICIAL ACTIVISM

In India, judicial activism has an unrecognized right to privacy under Article 21 of the Constitution.²² That is a right to psychological control or a right violation, not a right to physical restraint. The Supreme Court has also used the right to privacy to expand women's detention for harassment, phone tapping, the disclosure of horrible illnesses, and personal matters, such as the prohibition of what one eats. That isn't unconditional but, in some cases, such as doping checks for athletes and cricketers, the right to secrecy does not outweigh state protection and public health.

LANDMARK CASES

Hussainara Khatoon vs. the State of Bihar is a case about inmates being treated inhumanely and barbarically. The Court exercised its expository authority in Sunil Batra vs. Delhi Administration²³ to consider the prisoner's letter as an appeal. In Maneka Gandhi vs. Union of India²⁴, the Supreme Court restored public confidence in the justice system. The three major decisions marked a dramatic shift in the judiciary's thought process and paved the way for the emergence of judicial populism. Articles 14, 19, and 21 of the Constitution, which make up the 'golden triangle,' and state invalid rules or illegitimate intervention, are among the most often invoked human rights. The Supreme Court has defied popular belief and maintained that the legal system protects fundamental liberties.

V. JUDICIAL OVERREACH IN INDIA

CHARACTERISTICS OF THE JUDICIAL SYSTEM OVERREACH

The line between judicial activism and judicial overreach is pretty minimal.²⁵ When judicial activism appears to be doing whatever it wants, it is appropriately called judicial overreach. As the Court goes outside its bounds, it will obstruct the legislature's and executive's ability to work properly.

THE PHENOMENON OF JUDICIAL ACTIVISM

The Court stated that NJAC enforcement would not help the public. The NJAC, a proposal by the body which would have given the NJAC the authority to elect judges.²⁶ The law was passed in both houses and finally struck down by the honourable Supreme Court.

THE BENEFITS AND DISADVANTAGES OF JUDICIAL ACTIVISM

The judiciary serves as a check against the other branches of government and is active, progressive and pro-people.²⁷ It helps preserve the essence of the Constitution by offering a broader interpretation of some of the

Constitution's fundamental clauses, such as Article 14, Article 19, Article 21, and Article 32. The judiciary supports more openness and accountability with the judicial system.

DISADVANTAGE:

Critics claim gross judicial over-reach harms the equilibrium between the three branches of government. It is a threat to the new regime. Judicial activism was once seen as crucial in addressing legislative issues and fixing executive misconduct. However, the balance of powers is being questioned in the absence of a strong executive, which can exclude elected legislators. Judicial activism has led to the expansion of the courts. The Supreme Court has been expressing by overreach.

The judiciary may have a negative effect on the confidence of the executive by seeking a large part of the policy-making process.²⁸ The over-reach of the courts has compromised the arrangement of the policies and strategies between the executive and the legislature, at the intersection between advocacy and over-reach. Judicial activism is seen as supplementing the legislative branch, but involvement in the workings of the federal system is seen as being intrusive. Judicial supremacy is a fundamental structure of the Constitution, and participation of the legislature in decision-making is not justified.

VI. CONCLUSIONS

It must be recalled that the judiciary has breached its borders. The Supreme Court has long recognized that it is the executive's duty to make decisions free of constitutional or legislative intervention. The Court just intervened because the legislature and the executive couldn't set the rules, and it did so before the legislature passed the legislation. The Court was apprehensive about taking on legislative or administrative responsibilities. According to the Court, judges do not attempt to conduct administrative or legislative roles if they are not necessary. The judiciary cannot perform the functions of another body. Unconstitutional is a judicial act aimed exclusively at interests other than those enshrined throughout the Constitution. The Supreme Court has always followed the Constitution. A functional democracy needs judicial advocacy. To ensure that more powerful voices cannot silence unheard-of speech, judicial activism is necessary. The legislature's prominence in policy-making must be preserved in the same way as the judiciary's independence must be protected. Interference by courts in their jurisdiction is a breach of the Constitution's fundamental framework, which is thus unjustifiable. As in all spheres of democracy; the judiciary is transparent and required to understand its boundaries. The crucial need of the hour is to increase the judicial system's efficiency and pace, enhance the judicial infrastructure and the strength of judges, and establish judicial competence.

ENDNOTES:

¹Tyagi, K. (2008). THE DOCTRINE OF SEPARATION OF POWERS AND ITS RELEVANCE IN TIME OF COALITION POLITICS. *The Indian Journal of Political Science*, 69(3), 619-625.

²Rao, P. (2005). SEPARATION OF POWERS IN A DEMOCRACY: THE INDIAN EXPERIENCE. *Peace Research*, 37(1), 113-122.

³Brewster, R. W. (1963). *Government in Modern Society: With Emphasis on American Institutions*. United States: Houghton Mifflin 347-348.

⁴1979 AIR 1360, 1979 S.C.R. (3) 169

⁵1986 AIR 180, 1985 S.C.R. Supl. (2) 51

⁶Kumar, K. Sivananda, Article 141: Law Declared by Supreme Court to Be Binding on All Courts.

⁷Bhatia, R. (2003). EVOLUTION OF JUDICIAL ACTIVISM IN INDIA. *Journal of the Indian Law Institute*, 45(2), 262-274.

⁸Sathe, S. (1971). Supreme Court, Parliament, and Constitution-I. *Economic and Political Weekly*, 6(34), 1821-1828.

⁹Dewan, N. (2005). REVISITING THE APPOINTMENT OF JUDGES: WILL THE EXECUTIVE INITIATE A CHANGE? *Journal of the Indian Law Institute*, 47(2), 199-223.

¹⁰A.I.R. 1955 SC 549, 1955 2 SCR 225

¹¹Gupta, Aishvarya, An Analysis of the Limitations of the Doctrine of Separation of Powers: Re-Visiting the Judgment Delivered in *Ram JawayaKapur v. State of Punjab* (A.I.R. 1955 SC 549).

¹²1951 AIR 458, 1952 S.C.R. 89

¹³1967 AIR 1643, 1967 S.C.R. (2) 762

¹⁴1980 AIR 1789, 1981 S.C.R. (1) 206

¹⁵1995 AIR 1151, 1995 SCC (1) 400

¹⁶KUMAR, C., & GAUTAM, K. (2015). Questions of Constitutionality: The National Judicial Appointments Commission. *Economic and Political Weekly*, 50(26/27), 42-46. doi:10.2307/24482556

¹⁷Herklotz, T. (2017). ShayaraBano versus Union of India and Others. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice. ¹⁸Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America, 50(3), 300-311.

¹⁹Sen, S. (2014). RIGHT TO FREE SPEECH AND CENSORSHIP: A JURISPRUDENTIAL ANALYSIS. Journal of the Indian Law Institute, 56(2), 175-201.

²⁰Roach, Kent, The Myths of Judicial Activism. Supreme Court Law Review (2nd) Vol. 14, pp. 297-330, 2001.

²¹ Semwal, M., & Khosla, S. (2008). JUDICIAL ACTIVISM. The Indian Journal of Political Science, 69(1), 113-126.

²²Dias, A. (1994). JUDICIAL ACTIVISM IN THE DEVELOPMENT AND ENFORCEMENT OF ENVIRONMENTAL LAW: SOME COMPARATIVE INSIGHTS FROM THE INDIAN EXPERIENCE. Journal of Environmental Law, 6(2), 243-262.

²³Bhatia, R. (2003). EVOLUTION OF JUDICIAL ACTIVISM IN INDIA. Journal of the Indian Law Institute, 45(2), 262-274.

²⁴1978 AIR 1675, 1979 S.C.R. (1) 392

²⁵1978 AIR 597, 1978 S.C.R. (2) 621

²⁶Bhatkoti, R. (2011). HUMAN RIGHTS AND JUDICIAL ACTIVISM IN INDIA. The Indian Journal of Political Science, 72(2), 437-443.

²⁷JAISING, I. (2014). National Judicial Appointments Commission: A Critique. Economic and Political Weekly, 49(35), 16-19.

²⁸Sorabjee, S. (2011). Role of the Judiciary: Boon or Bane? India International Centre Quarterly, 38(3/4), 126-143.

²⁹Kavanagh, A. (2010). Judicial Restraint in the Pursuit of Justice. The University of Toronto Law Journal, 60(1), 23-40.