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# Judiciary Legislative Function: Quo Vadis?

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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. It is three government wings have specified powers and tasks for executive, legal and judiciary authorities, but 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 in general and individuals in general. The 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 which includes 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 different roles of government. 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. 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

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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 violations of fundamental and constitutional rights. In the context of democratic form of governance, the doctrine of power-sharing has a profound impact on how government institutions interact with public organisations and the values of society. 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. 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 favour 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, Olga Telis, 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. In comparison to prior rulings, the Supreme Court continued to adopt many different jurisprudences and novel options in its judgments on public interest litigations ('PILs'). The advent of personal injury lawyers in India was one of the key catalysts behind the rise of Judicial activism in India.

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 the issue of law to something more tangible, which is more positive, 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 to combat impunity.

## **II. THE DOCTRINE OF SEPARATION OF POWERS IN 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**

There are no specific provisions in our Constitution on the doctrine of the separation of powers. However, there are some guiding principles set out in the Constitution, as part IV and part V of our Constitution separate the judiciary from the executive, as 'the government shall take action in public services from the executive,' and there can be no formal, dogmatic separation of powers except that, not only are there functional overlaps in India, but there is also personal overlap.

### **In the courtroom:**

Pursuant to Article 142 and Article 145 of our Constitution, violation of any clause of the Constitution or legislation enacted by Parliament in the event of executive actions, SC has the power to declare null the laws passed by the legislature. The power of Parliament to amend the Constitution is also subject to the Court's scrutiny. If the fundamental structure of the constitution is modified, the Court can decide that any reform is invalid. In some circumstances, the courts have provided orders to the Parliament to make legislation.

### **Executive:**

The President of India, who is the Supreme Executive Authority in India, has the authority to consult the SC in India, in accordance with Article 143, and the authority to forgive, also in accordance with Article 103(1) and Article 217(3). The executive also influences the functioning of the court by nominating the Indian Chief Justice and other judges.

### **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 the judicial power in the absence of Article 61 of the Constitution and the removal of 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."

**Answer of the judiciary:**

There are many cases in which SC has judged on the facts of the case, but the position of the doctrine in India can be understood by means of a number of points of reference given by the Supreme Court in the following cases;

Ram Jawaya v. Punjab

Say, and keep, C.J. Mukherjee:

"The Indian Constitution did not recognise 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 essentially of another kind."

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 DOCTRINE OF JUDICIAL REVIEW IN INDIAN CONTEXT**

The principle of judicial review comes from the Supreme Court of America. In accordance with the Constitution of the United States, the Supreme Court of America is empowered to modify laws in order to decide if they are lawful. Article 13 of the Indian Constitution guarantees the right of the Government of India to revise the laws of the State. Any legislation that has been in effect cannot be applied to the degree that it violates the Constitution. The Supreme Court will invalidate a law which is inconsistent with one of the constitutional rights set out in Part III of the Constitution.

Shankari Prasad vs. Gandhi, First Amendment interests have been threatened because they have violated civil rights. Former Chief Justice of India, Sajhan Singh, questioned the lawfulness of the 17th Amendment Act. The High Court upheld the current condition in Shankari Prasad v Union of India by refusing judicial review. The amendment was again challenged by Golaknath, who saw that fundamental rights have been given a transcendental status under our constitution and are left out of the jurisdiction of Parliament. The final straw was the decision of the High Court to bar Mrs. Gandhi's candidacy. The Supreme Court affirmed that democracy

is the most common form of government. 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. Through decision of the Governments of the State, the Supreme Court ruled that, during the emergency, a court was powerless to protect a citizen from state action, notwithstanding the fact that such action was contrary to the law and resulted in a complete deprivation of life and liberty.

*Minerva Mills, Ltd v Union of India AIR 1980 SC 1789, the Supreme Court invalidated Section 4 and 5 of Article 12 of the 42nd amendment, due to them destroying the fundamental aspects of the constitutional system. The fundamental framework of the constitution is the restriction of the power of amendment which excludes all limits to amendment and confers the unrestricted power to change.*

*L. Chandra Kumar v Union of India and S.P. Sampat Kumar v Union of India. 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 on the basis that it violates judicial independence by creating a system under which the Chief Justice will no longer have the primacy over judicial appointments, and in which the judiciary will no longer have majority control over judicial appointments. 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, The Supreme Court's Justice Nariman introduced the Manifesto Arbitration Doctrine and found that the triple talaq was an illegal practice. Section 497 of the Indian Criminal Code is invalid by the Court's decision in *Joseph Shine v Union of India AIR 2018 S.C.I. Anuradha Bhasin, SC. Education 2020 SC. The Supreme Court has ordered the Union Territory of Jammu and Kashmir to review all orders halting internet services and not to issue a new similar order that doesn't conform with 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 as well as the right to do business online are protected by the constitution by Article (1)(g). Judicial review is an essential part of India's constitution, but it is not very useful in political matters. However, because there are political reasons for*

*the programme, it is justified. The Supreme Court of India held in Kerala Bar Hotels Association vs. State of Kerala AIR 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 concerned 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 labelled 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.

**1. Principle of Vacuum Filling.** 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 needs of the country and may be 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 the legislative and executive branches of government.

**2. The Social Want Theory:** The recent law has not provided a solution to the problems, and

so the judiciary has stated that it is the responsibility of the judiciary to solve the marginalized problems and come up with a solution. In order to achieve this objective, the only alternative left to them was to introduce more laws than those currently in the books. 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.

### **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 to 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.

### **Course of Judicial Activism**

The judicial activism in the first decade of democracy 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 judges were inappropriately manipulated by radical activists. 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. 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 the detention of women 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 v. State of Bihar is a case about the inhumane and barbaric treatment of prisoners. In Sunil Batra v. Delhi Administration, the court used its epistolary power to treat the prisoner's letter as an appeal. The Supreme Court restored people's confidence in the justice system in Maneka Gandhi v. Union of India. 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 fundamental liberties are protected by the legal system.

## **V. JUDICIAL OVERREACH IN INDIA**

### **Characteristics of the judicial system Overreach:**

There is a thin line between judicial activism and judicial overreach. When judicial activism appears to be doing whatever it wants, it is properly called judicial overreach. As the court goes outside its bounds, it will obstruct the legislature's and executive's ability to work properly.

### **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. The law was passed in both houses and ultimately struck down by the 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. It helps to 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 be used to 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. The arrangement of the policies and strategies between the executive and the legislature have been compromised by the over-reach of the courts. 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 involvement 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 recognised 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. judges do not attempt to conduct administrative or legislative roles if they are not necessary, according to the Court. 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 needed.

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## VII. REFERENCES

1. G. B. Reddy, *Judicial activism in India* (2013).
2. Salman Khurshid, *Judicial review. Process, powers, and problems (Essays in honour of Upendra Baxi)* (2020).
3. Marc Galanter & Rajeev Dhavan, *Law and society in modern India* (1989).
4. Mamta Kachwaha, *The Judiciary in India: determinants of its independence and impartiality* (1998).
5. S S Hasani, *JUDICIAL ACTIVISM – AN ASSET TO JUDICIARY BY INDIAN CONSTITUTION, TOWARDS EXCELLENCE* 31–36 (2018).
6. *In Search of an Effective Judiciary: A Doctrinal Reconciliation of Judicial Independence and Accountability, INDEPENDENCE AND ACCOUNTABILITY OF THE HIGHER INDIAN JUDICIARY* 168–204 (2019).
7. R. Hari Krishnan & Anurag Bhaskar, *Article 142 of the Indian Constitution: On the Thin Line between Judicial Activism and Restraint, JUDICIAL REVIEW* 341–364 (2021).
8. Stefanie A. Lindquist & Frank B. Cross, *Identifying Judicial Activism, MEASURING JUDICIAL ACTIVISM* 29–46 (2009).
9. G. Manohar Rao, G. B. Reddy & V. Geeta Rao, *Judiciary in India: constitutional perspectives* (2009).
10. Rashmi Pradhan, *Doctrine of judicial review in India: relevancy of defining contours* (2019).
11. Durga Das Basu & Ishwara P. Bhat, *Limited government and judicial review* (2016).
12. Madhurendra Nath Jha, *India: a three-tier judicial review system, DOMESTIC JUDICIAL REVIEW OF TRADE REMEDIES* 287–312.
13. P. Puneeth, *Judicial Review of Legislations by Tribunals in India: Law, Problems, and Perspectives, JUDICIAL REVIEW* 293–314 (2021).
14. Adv Urvashi, *Judicial Review: Comparative Study in India and USA, SSRN ELECTRONIC JOURNAL* (2021).
15. James Manor, *The Interplay of Law and Politics in India, JUDICIAL REVIEW* 27–45 (2021).
16. Nilanjana Jain, *Judicial activism in India: with special reference to the quest for social justice* (2013).

17. R. Shunmugasundaram, *Judicial activism and overreach in India*, 2007 AMICUS CURIAE (2011).
18. Nilanjana Jain, *Judicial Power: From Judicial Review to Judicial Overreach*, 56 INDIAN JOURNAL OF PUBLIC ADMINISTRATION 331–342 (2010).
19. Sreyan Chatterjee, *An Analysis of the Scope of Judicial Overreach in the Context of Legislative Intent*, 3 CHRIST UNIVERSITY LAW JOURNAL 31–41 (2014).
20. Opinion of the Supreme court of India on Special reference, no. 1 of 1964: reference by the President of India under Article 143 (1) of the Constitution of India regarding the powers and jurisdiction of the High Court and its judges in relation to the State legislature and its officers and regarding the powers, privileges and immunities of the said Legislature and its members in relation to the High Court and its judges in the discharge of their duties., (1964).
21. Pal Ruma, *Part IV Separation of Powers, Ch.15 Separation of Powers*, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016).
22. Arghya Sengupta, *in Independence and accountability of the Indian higher judiciary* (2019).
23. Epilogue: The Moment the Judiciary Came Out, INDEPENDENCE AND ACCOUNTABILITY OF THE HIGHER INDIAN JUDICIARY 264–270 (2019)

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