JUDICIAL ACTIVISM AND ITS ETHICAL VALIDITY

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# Abstract

The scope of judicial creativity expands when a constitution contains bill of rights. It is one thing to consider whether a legislature has acyed within its power and another to consider whether its acts, although within its plenary powers, are violative of any of the basic rights of the people. Judicial activism has become a question of debate in India. According to the Mr. Justice A.H. Ahmadi, the former Chief Justice of Indi, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern.[[1]](#footnote-2) The judiciary is free to interpret the constitution in terms of what the framers would have intended under the circumstances that exist at the time of such interpretation.

The Supreme Court of India has emerged as the most powerful organ of State and amongst the foremost constitutional courts in the world through the instrument of Public Interest Litigation (PIL), the exercise of writ jurisdiction. The concept of judicial activism is exclusive to common law countries as it is a common law which mandate of judge made law. It is a detailed judicial interest about the matters. However, Judicial Activism does not mean supremacy by the judiciary. In this paper, it has dealt with the separation of power and how it brings the concept of the judicial activism. The paper illustrates through the judgment of the Supreme court, how activism is developed in the Judiciary.

Keywords: *Judicial activism, Supreme court, PIL, Separation of powers*

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# Introduction

The edifice of the democratic country rests on the three pillars – the executive, the legislative, the judiciary and they constitute the three organs of the government machinery[[2]](#footnote-3). These three organs have their own powers and functions which are different from each other and thus, are defined in the constitution which is the supreme law of the country. The function of the legislative is to make the law, where the executive’s function is to execute that law and the judiciary, enforces that law. These threefold division of governmental function is hold by the theory of separation of power[[3]](#footnote-4). Separation of powers of the three organs is vital for the proficiency of the governmentand the freedom of the people. Government can work systematically and efficiently only when each of its organs exercises its own powers and functions and similarly the liberty of the people can be secured only when there is no concentration of the three governmental powers in the hands of one or two organs.

*Montesquieu’s view*

In the book of ‘The Spirit of Laws’, he explained his theory of Separation of Powers as:[[4]](#footnote-5)

* If the legislative and the executive get combined as oneorgan, the liberty of the people get hampered because it leads to tyrannical exercise of these two organ.
* If the judiciary and legislative powers get combined, then the interpretation of law becomes meaningless as the lawmaker acts as the law interpreter and never accepts the errors of his law.
* If the judiciary combines with the executive, then the administration of justice would become faulty because then the executive becomes the judge.
* And if all three organs combined and the power are given to one organ, then the there will be no liberty.

As such, the three powers should not be pooled and neither of a single organ nor to two organs should be given powers. These divisional three powers should be used by three distinct organs of the[[5]](#footnote-6) government. Where it is essential for safeguarding the liberty of the people, but there is no democratic system exists with an absolute separation of powers. The powers and the responsibilities of the government intentionally overlap, they are too complex and interrelated.

## Judicial system- india

The nature of the democracy and development depends much on how the legal system conducts itself to sustain the overall socio-economic and political environment. [[6]](#footnote-7)The legal system originates its authority from the Constitution and is deeply surrounded in the political system; the presence of judiciary authenticates the theory of separation of power wherein the other two organs, viz. legislature and executive stand relatively apart from it. It is the judiciary which remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the constitution[[7]](#footnote-8). It acts a check on the arbitrariness and unconstitutionality of the legislature and the executive.

The Indian Judicial system is one of the oldest legal system in the world. It is received from the British after more than 200 years ago after their colonial rule and the same is the reason of Indian Legal system sharing similarities with the English Legal System[[8]](#footnote-9). The basis of legal system is laid down by the Constitution and the judiciary derives its power from it. The Indian Constitution is the supreme law of the country and of course the fountain law of the nation. It has been adopted in 26 January, 1950 and it has the unique feature of being the longest written constitution of the world. It not only laid down the frame work of the judiciary but also defined the powers, functions, position, procedure and structure of various government branches at the State and Union level. It also prescribed the fundamental rights and duties for the citizens of the country.

The constitution has provided for the setting up of the single integrated system of courts to administer both Union and state laws.[[9]](#footnote-10) The apex court of the country is the Supreme Court followed by the high courts which serve to one or more state, and then the subordinate courts consist of District Court at the district level. One of the main features of the Indian Judicial system is that it is a Common Law System. Common law system is based on the doctrine of Judicial precedent and where the lower courts must follow the decisions of the higher court and not on the statutory law. It has no basis, and thus it established and developed through the written opinions of the judges. Also our Judicial system consist of another feature is that it has been designed on the pattern of the adversarial system[[10]](#footnote-11), which means conducting proceedings by having two sides and each side present its argument to a non-partial Judge who then give an order or judgment based upon the merits of the case.

The status of the judiciary in a democratic society can hardly be overstated. Judiciary is a part of the self-governing practice. Judiciary not only controls justice[[11]](#footnote-12), it safeguards the rights of the nations and it acts as the linguist and protector of the Constitution. In many states, the judges enjoys the power of judicial review by asset of which the bench decides the statutory validity of the laws ratified or of the declaration issued. It can quash such laws and verdicts which are not lawful.

## Role of judiciary

*Prevention of violation of law:*

The judge perceives both sides and chooses whether there has been a disruption of the law. In the case of destruction of law, the judiciary institutes justice by providing compensation and grueling the offender.[[12]](#footnote-13)

*Making of the new law*

The adjudicators, by way of construing the existing laws, create new laws. The bench can follow standards established in preceding decisions; it can also override such precedents, and in so doing, makes new law.

*Decides on constitutional questions:*

The uppermost centralized Court, namely the Supreme Court, chooses legitimate questions. If there is any lawful conflict or quarrel between the Union and the States or between different States, the clash is brought to the central Court who decides and performances as the protector of the central Constitution.[[13]](#footnote-14)

*Interprets the Constitution and Laws*:

In addition to decision, the accountability of maintaining and construing the constitution and law respites on the judiciary[[14]](#footnote-15). We are in a constitution but the constitution is what the adjudicators say it is. But the Indian Court of law does not relish the enormous power in this area.

*Administrative functions:*

The adjudicators perform firm decision-making functions. Appointments of officers and servants, conservation of records, management of staff etc. are accomplished by the judiciary. Superintendence over inferior courts is added task of the judiciary.

*Advisory function:*

The uppermost court of the nation sometimes gives guidance to the policymaking and the parliament on statutory points, if sought for. Thus, the Judiciary has advice-giving functions too. If it seems that a question of law or fact has ascended, it may be stated to the Courts for its guidance.

## Judicial activisim

Under the Indian Constitution, the State is under the prime responsibility to ensure justice, liberty, equality and fraternity in the country.[[15]](#footnote-16) State is also under an obligation to protect the individual’s fundamental rights and also to implement the directive principles. Indian constitution has conferred inherent powers, of reviewing the state’s action on the courts, in order to restrain the state from escaping their responsibilities. Considering this context, the Indian judiciary is the guardian and the protector of the Indian constitution. Whenever its about the Constitutional duty, the Indian Judiciary has played active role in protecting the individual’s right against the State’s unjust, unreasonable and unfair actions.[[16]](#footnote-17)The judicial activism in simpler way means,when the Judiciary steps into the shoes of the Executive or the Legislature and venture onto the work of law-making rather than construing laws, it can be believed to be judicial activism.

Black’s Law Dictionary defines judicial activism as:

*“a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent”.*

Judicial activism occurs when the judges have power to evaluation the State action. Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution. The power of judicial review is a basic structure of the Indian Constitution.[[17]](#footnote-18)Judicial activism implies going beyond the normal constraints applied to jurists and the Constitution, which gives jurists the right to strike down any legislation or rule against the precedent if it goes against the Constitution.[[18]](#footnote-19)

## Origin of judicial activism

The term first originated in USA.[[19]](#footnote-20)For a very protracted time, the Indian judiciary had taken an orthodox attitude to the very concept of judicial activism. But after a certain period of time, it emerged, although Some are scattered and some are random incidents of judicial activism which happened from time to time.

The history of judicial activism can be traced back to 1893 when Justice Mehmood of the Allahabad High Court delivered a dissenting decision which sowed the seed of activism in India. It was a case of an under-trial who could not have wherewithal for engaging a lawyer. So the question was whether the court could decide his case by barely looking at his papers. Justice Mehmood held that the prerequisite of the case being heard (as opposed to merely being read) would be fulfilled only when somebody speaks. So he has the broadest possible interpretation of the relevant law and laid the foundation stone of judicial activism in India.The Supreme Court of India started off as a technocratic Court in the 1950’s but slowly started gaining more power through constitutional interpretation.

Justice P.N Bhagwati said that, in India there is no completion of discussion of public Interest Litigation without some reflection on the nature of Judicial Activism.[[20]](#footnote-21)In *A.K Gopalan v. State of Madras,*[[21]](#footnote-22) the court declined an inviatation made on behalf of the petitioner, Mr. Gopalan, a communist leader who had been detained under a law of preventive detention, to read the provisions of the constitution liberally so as to give effects to the essence of the constitution rather than outstanding in the limits of its text. The court gave a thin building to words such as “personal liberty” & “procedure established by law” controlled in Article 21 of the constitution.

The first act where the judicial activism got widespread recognition was the case of *Kesvananda Bharti v. State of Kerala*[[22]](#footnote-23), where it has dealt with the concept of basic structure. And thus the bench of 13 judges by majority of 7:6 held that the parliament can amend the law and had wide powers to amend but that power cannot be used in an unlimited way to abridge, abrogate or destroy the basic structure of the constitution.

Similarly, in *Maneka Gandhi*[[23]](#footnote-24) case, two ground breaking changes i.e., the right to travel is a fundamental right and cannot be deprived except by procedure established by law. It then intrepretate the law and extend the scope of life and liberty by including travel right and holds that the principle of natural justice must apply in all cases.

In the Bhagalpur Blinding case(Khatri (II) v State of Bihar)[[24]](#footnote-25),  it was held that Article 21 comprised the right to free legal aid to the deprived and the poor and the right to be denoted by a lawyer. It was also held that the right to be presented before a magistrate within 24 hours of arrest must be carefully monitored.

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## POST EMERGENCY ACTIVISM

Post emergency judicial activism grew out of the realization that narrow construction of constitutional provision like Article 21 in *A.K Gopalan v. State of Madras*[[25]](#footnote-26) was contradicting the court’s liberal stance in the basic structure cases. If the court had planned a more positive role for the aforementioned in Indian democracy through the basic structure doctrine, it could no last longer to accept a positivistic role while interpretating other provisions of the constitution. The legal positivism of the court helped the political dissenters and the property owners over the economic reformers. The small man could not manage to pay for the luxury of the court’s legal review.

The Court used judicial activism in an attempt to reinstate the image of the Court and to increase its political power vis-a-vis other organs of government. A court gains strength only by carving a niche for itself in the minds of the people. A court must give the impression to the people as their guardian.[[26]](#footnote-27) It must not only be, but also must look to be independent, ethical, and capable of attaining results.

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## Need for judicial activism

Basically, this means when the judges intertwine their own personal feelings into a sentence or conviction, instead of abiding by the existing laws. The need for Judicial Activism arises because sometimes it provides a system of checks and balances to other government branches. The symbol of a great nation is its establishments. The stouter the aptitude of these institutions to support and reservation fundamental values, the better the country would be.[[27]](#footnote-28)

When comes to the sensitive issues which need a care so that it can be handle properly, it provides judges opinion when law fails there. By providing judges this opportunity, it provides them their personal voice to be raised against the unjust and thus, making judicial active. When this happens, then a phase come where the justice is provided to every individual and thus creating a trust on the judiciary and thus the duty of the judges will be accomplished.

The courts cannot endure silent spectators when laws are not imposed and accordingly, fundamentally rights are dishonored. If the Judiciary does not intervene, it would be an inactive Judiciary. This would be called asit judicial refraining and not judicial restraint.In an atmosphere of unease caused by jibes at judicial activism by the executive and legislature, a sitting Supreme Court [judge](https://www.thehindu.com/tag/625-623-600/judge/?utm=bodytag)asserted that it is a solemn duty performed by judges to curb “legislative adventurism and executive excesses.” An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process.[[28]](#footnote-29)

Too good of something may also result harmful. Sometimes when a judge can literally override any law simply because they feel like it, and he can even set aside a jury’s verdict under certain circumstances.Judicial activism becomes a more reflective focus for those who help on the Supreme Court, as their decisions generally stand. With the control to have the last around on substances, their judicial views would also developed principles for governing on other cases.[[29]](#footnote-30) When the activism is exercised it is often done for personal affairs, like one might getting compensation for delivering a particular verdict. And this results in appointing the judges and not electing them.

Having negative aspect also, our country cannot afford to let the Judiciary to fail as it is the only ray of hope and provides the protection to the citizen against arbitrary actions of the other two organs.[[30]](#footnote-31) It has also played a ‘activist role’ by giving the Fourth Estate a role, which the framers of our Constitution would have never imagined.

## Judicial restraint

[Judicial restraint](https://legaldictionary.net/judicial-restraint/) is commonly measured to be the contradictory of judicial activism. Judicial restraint holds the belief that adjudicators should hardly interpret prevailing law and constitutional analyses, obeying to prior analyses or congressional acts in making decisions. [[31]](#footnote-32)When exercising judicial restraint, adjudicators desist from working out their controls to make rulings based on their own individual or radical views. The aim of judicial restraint is mainly to preserve a balance within the administrative divisions.

In view of allegation and to prevent ‘judicial activism’ being converted into Judicial overreach, the supreme court issued the following directions:

* The court must inspire genuine and bonafide PIL and successfully depress and control the PIL filed for unnecessary contemplations.
* The court should prima facie confirm the permits of the petitioner before engaging a PIL.
* The court should be fully gratified that significant public attention is intricate before engaging the petition. [[32]](#footnote-33)

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## Judicial activism and the constitution

Article13: Power of “Judicial Review”[[33]](#footnote-34)and its effect thereof. The justifiability of fundamental rights and the source of “Judicial Review” can be found under Art. 13 which are regarded as a key provision as it gives teeth to the fundamental rights cannot be infringed by the state either by enacting a law to that effect or through an administrative action.

Article 32: Writ Jurisdiction of Supreme Court.[[34]](#footnote-35) It constitutes one of the major constitutional safeguards against the state tyranny and can be said to confer ample scope for judicial activism on Supreme Court.

Article 226: Writ Jurisdiction of High Court[[35]](#footnote-36). This provision signifies an essential aspect of Indian Constitution since it confers writ jurisdiction on high courts as well, with a much wider scope as compared to what is enjoyed by the Supreme Court under Articles 32.

Article 131:Power to decide Inter-governmental disputes. The Supreme Court has exclusive original jurisdiction in any dispute between the center and the state, or the center and state on one side and a state on the other side, or between two or more States.[[36]](#footnote-37)

Article 132: Constitutional Appellate Jurisdiction. Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final order, whether civil, criminal or other proceeding, of a high court of it verifies that the case includes a considerable question of law as to the clarification of the Constitution.[[37]](#footnote-38)

Article 133 and 134: Civil Appellate Jurisdiction and Criminal Appellate Jurisdiction.[[38]](#footnote-39)

Article 142: Power to do complete justice.The Supreme Court, in exercise of the power conferred under this provision, is entitled to pass any decree, or make any orders, as is necessary for doing complete justice in any cause or matter pending before it.[[39]](#footnote-40)

## Judicial activism and public interest litigation

The idea of PIL came from “actiopopularis” of the Roman jurisprudence which permitted court access to every citizen in the matters of public wrong.[[40]](#footnote-41) Development of PIL has provided significant aid in making the judicial activism meaningful. On account of this type of litigation the court has found chance to give directions in public interest and enforce the public duties. The attempt has been made to show how in taking up such cases, the Supreme Court is coming into view as the guardian of the rights and liberties of the victims of repression, cruelty and torture. Hence the Supreme Court of India in its activist role Vis-a`- Vis PIL has taken a goal-oriented approach in the interest of justice by clarifying highest technical and anachronistic procedures.

The essential aspect of a genuine PIL is that the person who moves the court has no personal interest in the outcome of the proceedings apart from a general standing as a citizen before the court. It is a powerful instrument to preserve the rule of law and to ensure the accountability of and transparency within structures of governance. But PIL had now become a façade for people hungry for publicity or those who wanted to settle personal, business or political scores. The true face of the litigant behind the façade was seldom unraveled.

Justice Bhagwati addressed the issue of pre-trial detention in *Hussainara Khatoon v. Bihar*[[41]](#footnote-42)The Hussainara Court held that the right to a speedy trial was covered under the procedure established by Article 21 of the Constitution and gave directions to courts and the governments regarding how to expedite trials

Justice Lokur said that PIL is one of the most important contributions of India which is being adopted by other countries also.[[42]](#footnote-43) It has been said that, during the last several decades, PILs have compelled this court to consider issues relating to the environment, social justice, violation of human rights and disrespect for Article 21 of the Constitution; either for the reason that of an absence of authority due to the failure of the government to authentically and honestly appliance laws enacted by Parliament or due to mis- governance by the state, that is, the central government, the state government and union territory Administrators leading to rampant illegalities.

## Recent legislations enacted through judicial activism

Declaring instant triple talaq invalid In *ShayaraBano v. Union of India* (22nd august 2017) the Supreme Court has declared the practice of “triple talaq” (talaq-e-biddat) as unconstitutional by 3:2 majority.[[43]](#footnote-44)

Right to marriage – Fundamental Right in *Shakti Vahini v. Union of India[[44]](#footnote-45)* and others (27th march 2018) the Supreme Court held that the consent of the family or community is not necessary once the two adult individuals agree to enter into a wedlock. It is their fundamental right to marry of their own choice.

# Conclusion

Addressing the criticism that judicial activism disturbed the “delicate balance of separation of powers,” Justice Joseph said:

“Adoption of separation of powers is partial and not total. Legislature and judiciary are independent, yet judiciary can interpret, review and implement laws made by the legislature.”

An lively judiciary is one that receipts its task of shielding the fundamental rights of the individuals and their liberties against the offensive of the state, solemnly. As far as judges are concerned, it is a matter of mindset. One judge might say that strategy design is the job of the Administrative and Bench does not need to interfere while other could believe that even in strategy preparation, the Bench would need to step in to watch fundamental rights. Judges should, however, be careful about one thing. Judicial activism should not become judicial adventurism. They must not get into zones in which they do not have any skill.

The judiciary is the weakest body of the state. It turn out to be solid only when people rest faith in it. Such confidence establishes the validity of the Court and of judicial activism. Courts must continuously strive to sustain their legitimacy. The courts are bound to follow previous precedents; they are bound to follow the decisions of the higher courts; and they are bound to follow certain rules of interpretation. Through such restrictions, the courts sustain their legitimacy.

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