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## Expansion of Judiciary's role through Judicial Activism and its nexus with the principle of Separation of Powers

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*When the legislature and executive fail to fill a void left by their inaction, those who are most vulnerable become victims of injustices for which they are not to blame. This is why India now needs Judicial Activism. It was for this reason that the notion of Judicial Activism emerged in India with the Supreme Court serving as its pioneer and interpreting laws and statutes from the positivist period to their golden age. As a result of judicial activism in India, the courts have taken it upon themselves to provide justice, and this research examines how the courts have done so while overlooking practicalities. It also examines the relationship between judicial activism and the separation of powers and discusses possible solutions to this problem.*

**Keywords:** *judicial, activism, separation, powers, judiciary.*

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### INTRODUCTION

Since its inception, the Indian judiciary has gone through many stages of evolution. From the positivist era to the great era of judicial activism, case law and its interpretation can show how the courts' views of the government changed over time. First and foremost, the concept of judicial activism should be understood in order to understand its evolution and expansion of the Judiciary's power. Judicial Activism refers to the ultimate power of the judiciary to freely

interpret laws and legislations by using their great acumen and unbiased beliefs to provide fair and equitable justice to the disadvantaged citizen standing in the court of law.

When the legislature fails to enact suitable legislation to address evolving needs, and when government agencies shamefully fail to carry out their administrative responsibilities with integrity, voters' faith in constitutional values and democracy erodes. In this case, the court moves into areas that are usually reserved for the legislative and executive branches. This results in judicial legislation or judicial activism. It is important to note that the Indian system is a system of checks and balances, in which only the Supreme Court of India has the right to declare any law or legislation null and void if it is in violation of the Indian constitution, in order to reduce the sense of power and avoid institutional dominance. This research paper will trace the origins of the notion of judicial activism, as well as how the role of the Indian judiciary has grown as a result of judicial activism in both the positivist and golden eras, as well as which case laws were helpful in the process. Last but not least, I will attempt to determine if judicial activism and separation of powers are mutually exclusive, and, if they are not, what measures might be designed to alleviate the damage that can be caused.

## **ORIGIN OF JUDICIAL ACTIVISM IN INDIA**

Judicial Activism started in 1893 in the Allahabad High Court, not by the concept but by action, when Justice Mahmood issued a dissenting judgment in a case involving a defendant who could not afford counsel. The court ruled that "the precondition for hearing a case would only be fulfilled when someone speaks" in this instance. The credit for the evolution of judicial activism in India can be given to failures of legislature and executive - the void created by their inactivity on certain laws and legislations; and also, to the increasing faith of citizens in the judiciary as the last resort to their problems. Some of the early pioneers of judicial activism in India include Justice VR Krishna Iyer, Justice PN Bhagwati, and Justice Hidayatullah, who stoutly advocated for the rights of underprivileged people, who were the victim of constitutional or legal flaws (void) created by the other two organs of the government. In India, judicial activism became more compassionate because of the ease with which people could get justice and the way public interest litigation (PIL) was used to help vulnerable

populations. A postal letter or even a postcard sent to the court is sufficient to initiate constitutional writs, with judges overlooking procedural technicalities. Citizens may raise public issues to the Supreme Court of India, which has liberalized the traditional definition of locus. As a consequence, since 1977, the number of PIL actions has increased steadily. Between 1975 and 1977, while the nation was under emergency control, the emergence of PIL may be attributed mostly to these events.

### EXPANSION IN THE ROLE OF INDIAN JUDICIARY VIA JUDICIAL ACTIVISM

The Supreme Court's early years were marked by a textualist orientation. It concentrated on the literal interpretation of the terms in the Constitution, as stated in the document. Judiciary functioned solely as a complement to legislative and executive powers from post-independence until halfway through the 1960s. Before 1967, these two government organizations had unrivaled authority.<sup>1</sup> However, a slew of landmark judgments issued in the years that followed served as beacons of judicial activism and enlarged the judiciary's position. With the landmark judgments flowing one by one by the apex court, it automatically expanded its role to safeguard the public and serve the larger interest of the nation. In *A.K. Gopalan v the State of Madras*<sup>2</sup>, the Supreme Court applied a restrictive interpretation to language in Article 21 of the Constitution such as “personal liberty” and “procedure established by law”. It rejected to go beyond the scope of the legislation on preventative detention as long as the action infringing on personal liberty followed the process provided in law validly adopted by Parliament. Even though the case was lost, it sparked a new legal norm that would be seen in the years to come. This case was an apt example of restrictive interpretation or judicial restraint exercised by the judiciary after its inception.

The Judiciary further expanded its role in the case of *Sakal Paper Private Ltd. v Union of India*<sup>3</sup>, as per the Newspaper Act and the Daily Newspaper Order, the government sought to

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<sup>1</sup> Vinod Surana, 'Judicial Adventurism: Time to Introspect' (*The Hindu Business Line*, 3 May 2021 <<https://www.thehindubusinessline.com/business-laws/judicial-adventurism-time-to-introspect/article34465686.ece>> accessed 31 December 2021

<sup>2</sup> *A.K. Gopalan v State of Madras* [1950] SCR 88, SC 27

<sup>3</sup> *Sakal Paper Pvt. Ltd. v Union of India* AIR [1962], SC 305

control the page count concerning the price of the paper. The Supreme Court broadened the extent of Article 19(1)(a) of the Constitution's<sup>4</sup> right to freedom of expression, holding that newspapers could not be controlled like other businesses since they were a medium for ideas and information. During the pre-Emergency period (1967-1976), the Indian Supreme Court's judges acted on and established their own institutional principles when they upheld the fundamental structure doctrine in the *Golak Nath*, *Kesavananda*, and *Indira Gandhi* (1976) rulings. In *I.C. Golaknath and Ors. v the State of Punjab*<sup>5</sup>, the circumstances surrounding this issue addressed Parliament's authority under Article 368 of Constitution<sup>6</sup>, which empowers Parliament to amend the Constitution and its processes. Although Article 368 does not explicitly restrict the fundamental rights established in Part III of the Constitution, the Supreme Court ruled that Parliament cannot amend the Constitution in order to limit those rights.

In *Kesavananda Bharati v State of Kerala*<sup>7</sup>, one of the most famous landmark cases ever recorded in the judiciary comprised of the largest constitutional bench of 13 judges. In this case, the doctrine of "basic structure of the constitution" was evolved, which was not mentioned anywhere in the Constitution. The Supreme Court while expanding its role held that the Parliament cannot amend the "**basic structure of the constitution**". For the first time, the Supreme Court's rulings showed a growing agreement that constraints on Parliament's component power of amendment are necessary to maintain and defend constitutional rights, notably property rights and economic liberty from eroding. With regard to Article 14 and Article 21<sup>8</sup>, the Judicial Activism of the post-emergency era demonstrated an open and progressive approach to interpretation, which expanded the power of the judiciary to an unprecedented degree in a positive way.

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<sup>4</sup> Constitution of India, 1950, art 19(1)(A)

<sup>5</sup> *I.C. Golaknath and ors. v State of Punjab* AIR [1967], SC 1643

<sup>6</sup> Constitution of India, 1950, art 368

<sup>7</sup> *Kesavananda Bharati v State of Kerala* [1973] 4 SCC 225

<sup>8</sup> Constitution of India, 1950, art 14, 21

In *K.S. Puttaswamy v Union of India*<sup>9</sup>, whether the Aadhar biometrics scheme, which was launched by the incumbent government and allegedly violated the right to privacy, was constitutionally valid was called into question. Although the Supreme Court had not fully incorporated the right to privacy into its decisions, it had decided that it did so in several previous decisions. Despite the fact that the right to privacy was not directly stated in the Indian Constitution, the Supreme Court ruled that it should be recognized under Article 21 – life and liberty – of the Constitution. This is one of the recent judgments in which the judiciary exercised its power of judicial activism.

These judgments paved the way for the judiciary to expand its role and duties on a case-to-case basis. Through these judgments and several other judgments in which the judiciary exercised judicial activism, it made sure the role was to provide fair and equitable justice to the people, interpret and apply laws according to the facts of the case and not let the common man be the victim of the gap created by the legislature and executive, protect the fundamental rights of people (for instance – in *Maneka Gandhi*<sup>10</sup> Case), act as the sentinel on qui vivo of the constitution, prove to be helpful in law-making by the way of precedents and lastly to provide a sense of equality and fairness amongst the citizens. To cut short a long story, as the dynamic requirements of modern society have changed, the judiciary has developed from a conservative perspective toward a more liberal perspective in handling legal issues and interpreting statutory and constitutional language. However, as judicial activism has grown, some have accused the judiciary of overstepping its bounds and intruding on the authority of the legislative and executive.

### **WHAT IS SEPARATION OF POWERS & HOW IT IS APPLIED IN INDIA?**

According to Montesquieu, combining judicial and legislative powers would jeopardize individuals' lives and liberties, since the judge would act as a legislator. Even if the judicial and executive branches are combined, the judge will operate as a tyrant, resulting in arbitrary

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<sup>9</sup> *K.S. Puttaswamy v Union of India* [2017] SCC OnLine SC 996

<sup>10</sup> *Maneka Gandhi v Union of India* AIR 1978, SC 597

acts. As a result, he believes that the idea of “**separation of powers**” is intrinsic in the current democratic form of administration.

The Doctrine of Separation of Powers emphasizes the interconnectedness of the three organs of government: the legislature, the executive, and the judiciary. Even if the constitutional concept of separation of powers does not exist in its strict sense, the responsibilities of several government agencies have been appropriately delineated such that no agency may assume the job of another. The Constitution expressly states in several clauses that both the Legislature and the Judiciary shall preserve their independence in carrying out their separate functions. Since it is so rigorous in its real meaning, a great many countries across the world do not adhere to the principle of separation of powers. It is the fundamental purpose of separation of powers to establish a system of government that is founded on the rule of law rather than the whims of a single individual. In *I.C. Golak Nath v the State of Punjab*<sup>11</sup>, Justice Subha Rao opined that “The constitution brings into existence different constitutional entities, namely the union, the state, and the union territories. It creates three major instruments of power, namely the Legislature, the Executive, and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.”

## **HOW DOES THE SEPARATION OF POWERS OBSTRUCT THE PATH OF JUDICIAL ACTIVISM?**

Judicial activism may indeed violate the idea of separation of powers, but the minute it does so, the whole assumption on which the notion of judicial activism has been founded is challenged. The court must thus adhere to the notion of judicial activism while respecting the principle of separation of power. Any time a court crosses an established constitutional line for judicial activism, we may say that this court has started to undermine the concept of separation of powers established in the Constitution. The legislature must fill up any legal voids, and the executive must carry out the law's provisions in a timely and effective manner. Consequently, all that is left to the judge is an interpretation of the laws. Only via this system

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<sup>11</sup> *I.C. Golak Nath v the State of Punjab* [1967], AIR 1643, SCR 762

of checks and balances can constitutional values be kept intact. It is known that one of the cons of judicial activism is that there are higher chances of separation of powers being diluted via a judgment. It is indeed correct that judicial activism has a negative impact on the separation of powers but providing justice to the citizen is also equally important. According to my opinion, the main issue should be whether the case for which the judiciary is transgressing its power provides justice to the citizen or not. Also, before pronouncing a judgment, it is important for the judiciary to bring into notice the problem to the legislature and executive.

When government officials are not assisting in the resolution of a problem rather than attempting to worsen the situation in order to get votes, it becomes essential and critical for the judiciary to intervene in the operation of government. For instance, after the three farm laws were enacted, there were continuous protests for the repeal of these laws, multiple meetings, and negotiations held which produced an insignificant result.<sup>12</sup> The matter was heard in Supreme Court and the court decided to stay on the implementation of laws by transgressing its powers & not exercising judicial review. This judgment is an apt example of the separation of powers being violated by judicial activism. This example can be viewed from two points, the proponents' views and opponents' views. The proponents' view is that when the legislature and executive cannot pitch into a solution for these issues then it becomes imperative for the judges to adjudge the matter for the larger public interest keeping aside the doctrine of separation of powers.

The opponents' view is that the court has failed to carry out its primary constitutional responsibility of impartial judicial review. When there are several challenges to the legality of the agricultural laws based on claims of violations of federalism, the legislative process, and other grounds, it is an unusual option for the court to sidestep this duty and instead operate as a mediating body. The courts, notably the Supreme Court and the High Courts, are the most qualified to determine whether or not laws are constitutional. Taking up a new duty that is essentially the responsibility of the legislative as a result of a perceived policy failure does not

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<sup>12</sup> Shruti Rajagopalan, 'The Judiciary Mustn't Violate The Separation of Powers' (*Live Mint*, 18 January 2021) <<https://www.livemint.com/opinion/columns/the-judiciary-mustn-t-violate-the-separation-of-powers-11610985519267.html>> accessed 02 January 2022

imply that the courts will be able to successfully complete the assignment. No special committee no matter how prominent or unbiased can collect opinions in the same manner that an elected legislature can. *Indira Nehru Gandhi v Raj Narain*<sup>13</sup> was a landmark case that clarified the position of this concept in the Indian setting. On this point, it was noted by the Honourable Chandrachud J.: "In the Indian Constitution, there is only the separation of powers in a broad sense. In India, there is no such rigorous division of powers as exists under the American Constitution or the Australian Constitution."

### MEASURES THAT NEEDS TO BE TAKEN TO PRESERVE A JUDICIAL BALANCE

The concept of judicial activism should be modified to include only those cases whose scope is limited to that which is permissible only in the national interest<sup>14</sup>; from this point forward, judicial activism should be referred to as though it violates the concept of separation of powers and transgresses into the realms of other branches of the government only to the extent required to uphold the fundamental precepts of the Indian Constitution, rather than based on judicial wants and desires. Furthermore, it may well be challenging to draw a clear line delineating the boundaries between the two. However, it may be important for each pillar of the state to have a robust convention that maintains the realm of the others in order for the state to function well. Recently at a public event, CJI N.V. Ramana also opined on this issue. In his words, "*The concept of separation of powers cannot be utilised to restrict the scope of judicial review. This concept only protects bona fide legitimate actions. It is required that the legislative and executive wings recognise their limits under the Constitution to ensure the smooth working of the democracy.*"<sup>15</sup>

Judicial activism may certainly cause problems for the other two branches of the government because of the greater public interest. The separation of powers, on the other hand, is sure to

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<sup>13</sup> *Indira Nehru Gandhi v Raj Narain* [1976] 3 SCC 321

<sup>14</sup> Gautam Bhatia, 'Why Separation of Powers in India is Like Love' (*Live Law*, 20 September 2019) <<https://www.livelaw.in/columns/why-separation-of-powers-in-india-is-like-love-148265?infinitescroll=1>> accessed 01 January 2022

<sup>15</sup> Live Law News Network, 'Judges Themselves Appointing Judges' A Widely Propagated Myth; Judiciary Merely One Of The Players In Appointment Process: CJI Ramana' (*Live Law*, 26 December 2021) <<https://www.livelaw.in/top-stories/judges-themselves-appointing-judges-a-widely-propagated-myth-judiciary-merely-one-of-the-players-in-process-cji-ramana-188405>> accessed 02 January 2022

be overrun as a result of judicial activism since any judgment departing from the usual method of rigorously reading laws would be required to reach the area of authority of another organ in order to give effect to the weightage of its judgment. However, the method should be collaborative in nature, so that judicial activism does not devolve into judicial adventurism, which would dilute the noble notion of judicial activism in the process.

## CONCLUSION

Thus, the idea of separation of powers in its rigid sense is unachievable and impractical, and as a result, it has not been completely adopted in any nation until now. However, this does not rule out the doctrine's applicability in today's world, as discussed above. The rationale that underpins this doctrine continues to hold true. The rationale of the doctrine is based on polarity rather than precise classification, which means that the centre of authority must be distributed in order to prevent the emergence of absolute power. *“Power corrupts, and absolute power has a tendency to corrupt totally,”* as Lord Acton has observed, and this is true. Absolutism results from the concentration of power in a single body. As a result, even while it is critical that power not be centralized inside one hand, a system of checks and balances should be kept in order for the government to work properly. Finally, I'd like to point out that while judicial activism can be beneficial for safeguarding fundamental rights and improving the functioning of the judiciary in an ever-changing world, it can also lead to an overreach of judicial authority, which could undermine the country's democratic values by granting judges unchallenged authority. Therefore, in order to avoid a scenario like this, the court must practise judicial activism within the confines of the theory of separation of powers.