
Balancing The Scales: Rethinking Judicial Review and Activism in the Indian Democracy

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Abstract

This article examines the delicate balance between judicial review and judicial activism as it operates within the Indian democratic context and emphasizes the need for either of the two to give way to the other in respect to a balance between fidelity to the constitution and the extension of the role of judges. Judicial review, as enshrined under Articles 32, 226, 227, 141 and 142 of the Constitution, is an important check whereby the court is able to keep state action in a constitutional space. While judicial activism occurs when there it is determined that in the absence of legislative and/or executive action, rights are not being protected thus enabling the court to promote social justice. In landmark cases like *Maneka Gandhi v. Union of India*, *Vishaka v. State of Rajasthan*, and *Common Cause v. Union of India*, the courts have significantly expanded the rights captured under Article 21 covering a right to dignity, livelihood, privacy, health and a clean and healthy environment, ultimately making the Constitution a live organism. But this idea of judicial activism comes at a cost, namely; the threat of judicial overreach, the lack of mechanisms of accountability, and the restricting of public expressions and explanations by way of contempt for the courts already adverse impact on the idea of democratic openness. It is our claim that a healthy democracy requires cooperation, not competition, between the judiciary and legislature with the accountability of acting as an important safeguard and useful agent at every milieu of power. The evolving concepts of law in respect of all of the constitutional tools that judges have to work with in a constitutional democracy need to remain mindful of the limits imposed on them by the Constitution itself, so that individual rights are secured while at the same time respecting the independent institutional role of the judiciary and any other institution in respect of the relationship of legitimacy.

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Introduction:

The Supreme Court of India accepts judicial review as a significant check on reality, even by way of a projection. Judicial activism is also useful for the judiciary to mitigate the deficiencies of the law and secure rights, specifically in situations where there is inaction in the gospel of justice either in the legislature or by social justice. Both forms are to protect the rights of citizens and the constitution. However, addressing how to deal with judicial review as opposed to judicial activism is a primary concern of contemporary jurisprudence. On one hand, judicial review is fundamental in protecting the constitutional order, and determining whether artifacts of the government align with the things that made the commitments of just and equal; judicial activism characterizes as jurisdictions that, while advancing the attainment of social progress, as judicial overreach when judgement is taking liberties which imply intruding on the legislature's function to make policy. This article outlines the frames of judicial review and judicial activism in India, a brief anecdotal examination of noteworthy judicial rulings and the finding the balance between them both and where the balance between them leads in its law and politics.

Source of Power:

Articles 32, 226, 227,141, and 142 of Constitution of 'India, inter alia, have desired judicial intervention whenever fundamental rights of the citizen are at stake. The judiciary also struck down the exclusion of judicial review provision in Article 7 of the Tenth Schedule of the Constitution as void.

What is the very purpose of existence of the Supreme Court?

Indian supreme court certainly has not enacted that the primary legislation, that is always done by Parliament. As a researcher I have certain question,

“When the very purpose of law is to continue their ruling in the country?”

The 39th Constitutional Amendment is the one such elite example. The authority or body created by the Parliament have to election issues especially pertaining to the President, Vice President, Prime Minister, and Speaker of the Lok Sabha. The authority's judgment will be final and cannot be contested in any court of law. The very purpose of making this amendment to validate the Elections of the Former Prime Minister Indira Gandhi, since the Allahabad High³ Court ruled that the election of Prime Minister Mrs. Indira Gandhi was unlawful. Subsequently, the question will arise democratic essence (the will of the people) of the country, supported the change. The representative in the parliament does not represent a very broad national consensus. As per the data released by the Election Commission, the overall turnout in the 2024 Lok Sabha elections stood at 65.79% — 1.61 percentage points lower than the turnout in 2019. These votes are divided among several political parties.

“What if they were first person to abuse the Law?”

- a) From addressing the “process established by Law” in par with “due process of law” in *Maneka Gandhi v. Union of India*.⁴
- b) What if somebody had not written letter from jail – *Sunil Batra v. Delhi Administration*.
- c) *Arnesh Kumar v. UOI*: A Guidelines to arrest “liberty and freedom of the citizens needs to be exercised with great care and caution”

“How the Law will work when certain things were unaddressed by Parliamentarians?”

There is possibility of delegation on Part of the Parliament to Executive.

“How the society will work when there is vacuum in terms of certain issues? Sometimes, legislative action is incomplete, ambiguous, or outdated, leaving citizens without legal recourse. In such cases, the judiciary has taken it upon itself to fill the vacuum and ensure that the legal framework remains effective and just.

³ *Indira Gandhi vs Raj Narain* (1975) 2 SCC 159

⁴ 1978 AIR 597

- a) The Supreme Court dealt with the issue of child adoption, highlighting the absence of specific laws and procedures governing inter-country adoptions. In the absence of a proper framework, the Court formulated guidelines for child adoption, which were later incorporated into the *Inter-Country Adoption Guidelines* by the government.⁵
- b) The Bhopal gas leak tragedy of 1984 resulted in the deaths of thousands of people, and the survivors suffered from severe health issues. Despite the magnitude of the disaster, there was no adequate legal framework to address compensation, accountability, and the long-term rehabilitation of the victims. The Supreme Court intervened and directed compensation for the victims, issuing several orders to ensure justice for the survivors.
- c) A Guidelines relating to Women at workplace was given in – *Vishaka v. State of Rajasthan* (1997)⁶. The guidelines were instrumental in later influencing the enactment of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013*.
- d) The entire forest issue being taken by the Supreme Court through its empowerment committee in *T.N. Godavarman Thirumulpad v. Union of India*.⁷
- e) The guidelines for passive euthanasia and the Living Will was laid down in *Common Cause v. Union of India*⁸
- f) The Guidelines regarding compensation in terms of acid attack victims was laid down in *Laxmi v. UOI*.⁹
- g) Unmarried woman to have right to abortion as par with the Married Women¹⁰

⁵ *Laxmi Kant Pandey v. Union of India* (1984)

⁶ (1997) 6 SCC 241

⁷ AIR 2000 SC 1636

⁸ (2017) 10 SCC 1

⁹ 2014 SCC 2 427

¹⁰ *X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another*: 2022 SCC OnLine SC 1321

How the aspirations and legitimate expectation really get transformed into reality? How the constitution becomes alive?

It's being alive because of the Supreme Court. One can answer to this statement by analyzing "The Supreme Court's decisions regarding Article 21." Some of few examples of expansion of Article 21: (i) Right to live with human dignity¹¹, (ii) Right to livelihood¹², (iv) Right to die with dignity¹³, (v) Right to Sleep¹⁴, (vi) Right to Health and Medical Assistance¹⁵, (vii) Right to Education¹⁶, (vii) Right to Clean Environment¹⁷, (viii) Payment of minimum wages¹⁸, (ix) Compensation for violation of Fundamental Right¹⁹, (x) Reproductive choices (decision to produce child or not)²⁰, (xi) Right to self-determination²¹, (xii) Right to free legal aid²², (xiii) Right to speedy trial²³, (xiv) Right against handcuffing, handcuffing should only be resorted to in case there is clear and present danger of escape²⁴, (xv) Right against illegal Detention²⁵, (xvi) Using Third degree violative of article 21²⁶ and (Xvii) Right to Privacy etc.²⁷

Major Problem with Judicial Activism:

(a) Contempt a Barrier to Transparency:

In any functioning democracy, accountability is one of the pillars of a fair and just system. On the other hand, the system concerning accountability in the judiciary is particularly deficient.

¹¹ Occupational Health and Safety Association v. Union of India (2014): Navtej Singh Johar v. Union of India (2019)

¹² Olga Tellis v. Bombay Municipal Corporation (1986)

¹³ Common Cause (A Reg. Society) v. Union of India (2015)

¹⁴ Ramlila Maidan v. Home Secretary, Union of India (2012)

¹⁵ Parmanand Katara v. Union of India (1989)

¹⁶ Mohini Jain v. State of Karnataka (1992): Unni Krishnan v. State of A.P (1993)

¹⁷ Rural Litigation and Entitlement Kendra v. State of U.P. (1985): M.C. Mehta v. Union of India (Shriram Food Fertilizer case) (1986): Indian Council for Enviro-Legal Action v. Union of India (1996): Vellore Citizen's Welfare Forum v. Union of India (1996)

¹⁸ PUDR v. Union of India (1982)

¹⁹ Khatri v State of Bihar (Bhagalpur blinding case) (1981): Rudul Shah v. State of Bihar (1983)

²⁰ Suchita Srivastava v. Chandigarh Administration (2010)

²¹ National Legal Service Authority v. Union of India (2014).

²² M.H. Hoskot v. State of Maharashtra (1978)

²³ Hussainara Khatoon v. State of Bihar (1979)

²⁴ Prem Shankar v. Delhi Administration (1980)

²⁵ D.K. Basu v. State of West Bengal (1996)

²⁶ Kishore Singh v. State of Rajasthan (1981)

²⁷ Justice K.S. Puttaswamy (Rtd.) and Anr. V. Union of India (Aadhar Judgement) (2019)

Judges have the ability to influence certain legal outcomes and to dictate the course of justice without any meaningful form of accountability. The result is that citizens have no clear avenue for recourse if they are unhappy with a decision or a judge's behavior.

The bottom line is that there is no real means of holding judges accountable for their decisions or actions. Unlike any other public officials, judges are not subjected to public questioning, scrutiny, investigation, or impeachment by the public, if the self-regulating handling of performance issues is disregarded. The level of protection afforded to the judiciary can sometimes border on secrecy, and this is particularly important within the confines of the rule of law. In a system with little to no transparency, judges are not generally obliged to provide an explanation or justification, and individuals who feel they were wronged in the system have little, if any, recourse.

In addition to the accounts above, the contempt of court laws presents a chilling effect. Contempt of court legislation was enacted to protect the will and dignity of the court as a reasonable law unto itself. However, this only demonstrates that it has evolved into a means of deterring criticism and opposition to the judiciary and the laws that govern its actions. Even the consideration of being found in contempt of court can create a significant barrier to vocal dissatisfaction.

(b) Rethinking Power Dynamics in a Democracy: Challenging the Status Quo

In any democracy, the relationship between citizens and people in power should be based on a foundation of accountability, transparency, and respect. Looking deeper into how power works in our country, will reveal an unpleasant reality. Even though we like to think of ourselves as a democracy, it often seems that power is still defined by a feudal construct. By a feudal construct, I mean to imply that those in power, consider themselves to have power over the common person and questioning that authority is often seen as a brave act.

The Prime Minister, as the head of government, is always the most obvious and visible target of criticism. When you think about any government leader, it's almost a forgone conclusion that they will be criticized and there will be opposition. But if we keep going, who else in

positions of power, are we willingly to challenge? Would the average citizen really consider making the same assertion to a simple bureaucrat or a civil servant? The answer is most likely, not.

The reluctance to call out the people in charge, especially when their indiscretions have caused great harm or may have rendered the democratic system impotent, indicates a larger problem within our democratic system. Not only do we claim that we are a democracy, but a significant amount of people still holds the belief that power should not be challenged. The real challenge, however, is why does it seem to be so difficult to even question, let alone challenge, a person holding power?

This struggle requires a change in mentality. A true democracy requires the individual courage and ability to ask awkward questions regardless of the rank or title of the person at the top. The challenge is not to just criticize government officials, but rather take personal responsibility for demanding accountability at all power levels, bureaucrat, civil servant, or ordinary local government.

It is not sufficient to just say we are living in a democracy, but engage with the systems that are in place. The citizen should not hesitate to hold the power holders accountable and not just ask questions but demand that they provide answers with accountable solutions to the issues that impact us as citizens. This would relieve some of the impact on the already beleaguered judicial system. Thus, for a democracy to function properly, the mindset of those in power must evolve. There must be an acceptance that authority is not absolute, and it can—and should—be challenged. This shift in attitude is crucial not only for the health of our democratic system but also for ensuring that power remains balanced and that our government serves the people, not the other way around.

Conclusion:

A critical question is: who holds more power – the courts, with no elected responsibilities but with the ability to challenge the actions of elected officials, or the legislature? To be clear, I am not arguing that the courts are more powerful than the legislature. Rather, the legitimacy of our democracy lies in a balance of power and a working relationship between both institutions, both of which are designed and limited by our Constitution. In order for “*our Constitution to have life or not to be a dead letter*,” we need to talk about how we are interpreting and understanding the language in the Constitution. One way we can do this, for example, is by looking at the Supreme Court's interpretations of Article 21, which protects the right to life and liberty. Article 21 judgments are an example of how social change and the realization of freedoms occur indirectly and imperfectly, not by adherence to abstract ideas on rigidly construed ideologies; they happen when humans engage in a democratic process that creates something meaningful and changing.