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Judicial Activism

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Judicial activism is a process by which judges aggressively assert their power beyond the traditional role of dispute adjudication under a constitutional framework of separation of powers. The philosophical justification for judicial activism has varied depending on place and time, but discussion about the role of judges in constitutional democracies was reappraised during the late twentieth century. Some argued that judges did not merely adjudicate rights and wrongs but were vigilant sentinels (*qui vive*) as well. The judiciary was a profession with a passion for justice. Judges often developed a heightened political consciousness concerning the structures of society and the nature of the social transformation process. As Benjamin Cardozo, U.S. Supreme Court justice (1932–1938), wrote: “Judges are men not disembodied spirits, they respond to human emotions. The great tide and currents which engulf the rest of mankind do not turn aside in their course and pass the judges idly by” (1921). Activist judges have used this “heightened consciousness” to promote and actively participate in actualizing the enlightened values of socioeconomic justice embodied in their country's constitution. The Indian Supreme Court since the late 1970s provides an interesting example of this phenomenon.

Supreme Court of India

As the Indian Supreme Court emerged from the dark days of Indian democracy, it was on a quest for its identity. The celebrated decision of *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597, was a step in that direction. In redefining “procedure established by law” as “just, fair and reasonable law,” the Court by the stroke of a pen shook off the limitations imposed on it by the framers of the political document. Although this important decision gave the Court the power to review legislative action, the Court continued to function within the narrow British precincts that it had inherited.

However, between 1978 and 1982, four crucial events occurred that completely revised India's judicial functioning. In 1978, the Court treated a postcard addressed to a Judge of the Supreme Court as a writ petition. In 1980, the Court ruled on a habeas corpus petition filed, based on a newspaper report, on behalf of prisoners languishing in the remote jails of Bihar; the Court held that defendants have the right to a speedy trial, as part of the Constitution's article 21. That same year, the Supreme Court, in *Minerva*

Mills v. Union of India, A.I.R. 1980 S.C. 1789, held that parts III and IV were “the core of social revolution” under the Indian Constitution and added that “to give absolute primacy to one over the other [would be] to disturb the harmony of the Constitution.” Finally, in *S. P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149, the Court widened the principle of *locus standi* under the Constitution, holding that any public-spirited individual could approach the Court for a remedy when the victims themselves were precluded from approaching the Court on grounds of illiteracy, inaccessibility, or disability.

There were two important consequences of these events. First, article 21 became the repository of all socioeconomic rights mentioned in part IV of the Indian Constitution, including rights not otherwise enumerated in the Constitution. Second, “publicspirited” individuals had a new constitutional role. The result was the formation of a new order of rights that affected India's constitutional dynamics in many ways. The floodgates opened. Social action litigation became the word of the town and the tool of the judiciary. The Supreme Court was more eager than ever before to “democratize justice,” and “socially spirited” individuals and organizations were ever more willing to oblige the Court.

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Social Action Litigation

In the last two decades, social action litigation has so deeply affected constitutional law in India that one could not discuss judicial functioning today without addressing this aspect. The action that began with freeing prisoners awaiting trial in jails in remote districts of the state of Bihar has extended to many areas of crucial importance. Hardly any area of constitutional importance has remained untouched by the passion of social action litigation. Its impact has been particularly strong in the evolution of law relating to fundamental rights and directive principles. Although difficult to enumerate all of the areas of constitutional law that have benefited from social action litigation, one can list broad categories. Social action litigation has affected in important ways police functioning, jail reforms, health care facilities, the welfare of children, including child labor and adoption, environmental pollution, educational rights, privacy concerns,

gender issues, issues related to prostitution, economic rights, and transparency in public life.

A closer analysis of social action litigation as a judicial tool in promoting the constitutional vision reveals three functional phases. First, during the creative phase, the Supreme Court employed social action litigation to read rights into the Constitution. Second, during the lawmaking phase, new laws were passed and principles were imported from the international corpus of law. Finally, during the super-executive phase, the Court made and implemented policies.

The creative role was dominated by the Court's attempts to widen the spectrum of rights granted under the Indian Constitution. Frustrated by its inability directly to enforce the socioeconomic rights guaranteed by part IV (Directive Principles of State Policy), because of their unenforceable nature, the Court ingeniously expanded the meaning of "life and personal liberty" under article 21. This action gave citizens a larger "Magna Carta" from which they could draw inspiration. The Court expanded the meaning of the guarantee of life and personal liberty to include the following rights: human dignity, shelter, good health, work, safe environment, clean air, clean water, privacy, access to information, speedy trial, fair trial and hearings, protection against unnecessary handcuffing, protection against cruel punishment, access to legal aid, medical aid in government hospitals, travel to foreign countries, and education. Even the right not to be deported is guaranteed.

As active as the creative phase was, the lawmaking and super-executive phases have been even more controversial. During the lawmaking phase, the Supreme Court legislated on matters of constitutional importance on the pretext of a legislative vacuum. In *Laxmi Kant Pandey v. Union of India*, A.I.R. 1984 S.C. 469, the Court formulated a compulsory procedure to be followed during intercountry adoption of Indian children. In *M. C. Mehta v. State of Tamil Nadu*, A.I.R. 1997 S.C. 699, it laid down a mechanism to ensure compliance with the Child Labor (Prohibition and Regulation) Act of 1986, with additional obligations for offenders and duties for statutory authorities. Judicial "legislation" in the area of environmental law has been particularly farreaching. Although the Court rejected the application of the English principle settled in *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330, it held that

an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken.

In *Vishakha v. State of Rajasthan*, A.I.R. 1997 S.C. 3011, the Supreme Court laid down a twelve-point set of guidelines for promoting gender equality in the workplace. The *Vishakha* judgment has institutionalized judicial lawmaking. It shows how lawmaking principles have evolved over time. It indicates that a two-pronged trend has been taking place: first, the Court has laid down elaborate guidelines for specific issues, and second, it has incorporated concepts and principles from the corpus of international law. The effect of both trends has been to *add* to the positivist content of domestic law.

In its super-executive role, the Court attempted to direct the nation from its “headquarters” in New [p. 846 ↓] Delhi, unconcerned about the constitutional ramifications of such endeavors. In *T. N. Godavarman Thirumulkpad v. Union of India*, A.I.R. 1997 S.C. 1228, the Court provided a thirty-point guideline, including an order suspending licenses for woodbased industries and appointing a high-powered committee to oversee the strict and faithful implementation of the orders of the Court. This judgment was only the first in a series of orders that the Court passed to prevent degradation of the forest cover in the northeast region of India. In *Vineet Narain v. Union of India*, A.I.R. 1996 S.C. 3386, the Court developed the procedure of “continuing mandamus,” making the principal investigating body in India accountable to it. Later, noting the harmful consequences of vehicular pollution on the population's general health, the Court restricted the use of commercial vehicles, including taxis, which were fifteen years old. This was followed by a relentless spate of directives, including the conversion of the city bus fleet in New Delhi to a single mode of compressed natural gas and the introduction of certain European vehicular pollution norms known as Euro-I and Euro-II.

From an institution entrusted with the task of adjudicating disputes between parties, the Indian Supreme Court has transformed itself into an institution directed to promote the ideals of socioeconomic and political justice that the Constitution envisions in its

preamble. Critics of judicial activism describe this “extended” functioning as “judicial transgression” or, worse, as the French indictment of “government by judges.” Judicial activism as a constitutional phenomenon seems to be expanding in the twenty-first century, perhaps as an aspect of globalization.

The reinvention of the judicial role in the guise of promoting the socioeconomic aspirations of a constitution raises many larger issues, especially about the meaning and future of the doctrine of separation of powers. For critics, increasing judicial intervention in the domains of the executive and legislative branches presents a direct challenge to the separation theory. Although judicial activism may not *per se* be a usurpation of legislative or executive functions, it also should not be uncritically celebrated. The judicial role needs careful consideration and cautious execution. Unrestrained activism by the judiciary may strike a deathblow to democracy.

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- [Cause Lawyers](#)
- [Constitutional Law, Politics of](#)
- [Courts, Lawmaking by](#)
- [India](#)
- [Judges](#)
- [Judicial Decision Making](#)
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Further Readings

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