



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-I, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

“COMPARATIVE ANALYSIS OF CONSTITUTIONAL APPROACHES TO JUDICIAL ACTIVISM”

AUTHORED BY - PRATIK BHARAT GANDHALE

Roll No.79

Div- B

Semester-II 2023-24

P. E. SOCIETY'S

MODERN LAW COLLEGE DEPARTMENT OF LAW

Abstract:

This research provides a comparative analysis of the constitutional frameworks that control judicial activism in different legal systems. Through a thorough examination of scholarly literature, judicial opinions, and constitutional provisions, this study explores the various tactics of judicial activism in a few selected countries. The assessment includes the United States, Germany, India, South Africa, and other nations with diverse customs. Major influences of judicial conduct include the division of powers, the judicial review procedure, the government's organizational structure, and the sociopolitical context. All of these factors are thoroughly explored. This study sheds light on the intricate mechanisms influencing judicial action worldwide by fusing legal concepts with historical and cultural context. The findings of the comparative analysis broaden our knowledge of the role of the judiciary in democratic governance as well as the impacts of judicial activism on the legal system and society. In addition, the study offers insightful viewpoints for policymakers, scholars researching legal issues, and practitioners trying to navigate the complexities of interpreting constitutions and interacting with courts across numerous nations. This study will definitely help to understand comparative analysis of judicial activism.¹

Keywords: judicial activism, constitutional law, comparative analysis, separation of powers, democracy, rule of law

1. Introduction:

Judicial activism is the practice of courts actively interpreting and applying constitutional principles. It has become a controversial topic in international legal and political discourse. The judiciary's proactive approach to addressing societal issues and molding public policy raises doubts regarding the judiciary's legitimate role in democratic governance. While some see judicial activism as an essential tool for advancing social justice and defending individual rights, others worry about judicial overreach and the degradation of democratic accountability. In light of this, the goal of this research paper is to present a thorough comparative examination of constitutional responses to judicial activism in four distinct jurisdictions: South Africa, Germany,

¹ Aisha warraich, Imran Shabbir, Muhammad Shoib Jamil, *Exploring the Nexus between Judicial Activism and Good Governance: A Comparative Analysis*, Vol. 9(2), Journal of Policy Research, 510-517, 2023, available at <https://jprpk.com/index.php/jpr/article/view/328> last seen on 12/04/2024.



India, and the United States. This study intends to offer light on the variables driving judicial decision-making, the influence of judicial activism on constitutional governance, and the consequences for democracy and the rule of law by looking at historic cases and contextual elements influencing judicial activism in each country. This study uses qualitative research techniques, such as case study analysis, to improve our comprehension of the intricate dynamics of judicial activism and provide guidance for judicial accountability, constitutional legitimacy, and democratic governance. This research adds to ongoing conversations regarding the role of the judiciary in constitutional democracies and the opportunities and problems associated with judicial activism by examining the various tactics used by courts in various legal systems.

2. Literature Review:

The body of research on judicial activism looks at case studies, empirical research, and theoretical frameworks to comprehend how courts interpret constitutional principles in a proactive manner. Judicial activity and restraint are two important theoretical contrasts, and empirical study focuses on the elements that motivate activism, such as political context and judicial ideology. Case analyses elucidate seminal examples, such as **Brown v. Board**² of Education and **Roe v. Wade**, that demonstrate the revolutionary influence of courts on constitutional law. Comparative research also reveals different strategies used in different jurisdictions when taking institutional and historical aspects into account. Normative discussions center on issues of judicial responsibility and legitimacy, which influence how we interpret the consequences of judicial activism for democracy and constitutional governance.

2.1. Case Study:

A case study for this study on the comparative comparison of constitutional responses to judicial activism could center on a significant ruling made by a court in one of the chosen jurisdictions South Africa, Germany, India, or the United States, for example. Let's look at the American case of *Roe v. Wade*, which serves as an example of judicial activism and its effects on constitutional government.

Case Study: *Roe v. Wade* (United States)³

² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954, SC of United States).

³ *Roe v. Wade*, 410 U.S. 113 (1973, SC of United States).

Background:

The US Supreme Court rendered a significant ruling in **Roe v. Wade** in 1973. The main issue in the case was a Texas statute that forbade most abortions other than those that were required to save the mother's life. Norma McCorvey, going by the alias "Jane Roe," contested the validity of the statute on the grounds that it infringed upon her right to privacy as guaranteed by the Fourteenth Amendment's Due Process Clause.

Judicial Activism:

The Supreme Court's decision in **Roe v. Wade** was commonly seen as an instance of judicial activism. Chief Justice Warren Burger led the Court in recognizing a woman's fundamental right to privacy included the freedom to decide whether or not to have an abortion. This ruling overturned multiple state laws banning abortion and established a national legal foundation for abortion rights, going beyond previous legal precedent and legislative purpose.

Implications for Democracy and the Rule of Law:

The **Roe v. Wade** ruling brought up important issues regarding the judiciary's function in democratic government. Supporters celebrated the Court's intervention as an essential protection of individual rights, while detractors claimed the ruling hijacked the democratic process by preventing policymaking and legislative discussion on a very contentious topic. The case highlights the conflicts that exist between democratic accountability and judicial activism as courts attempt to strike a balance between upholding democratic procedures and defending rights.

Comparative Analysis:

It is possible to compare **Roe v. Wade** to analogous cases or constitutional rulings from other jurisdictions, such as the South African Minister of Home Affairs v. Fourie case concerning same-sex marriage or the Indian Naz Foundation v. Government of the National Capital Territory of Delhi case about the decriminalization of homosexuality. Researchers can clarify common themes and variations in judicial activism across various legal systems by looking at the legal reasoning, sociological context, and repercussions of these cases.⁴

⁴ Ibid.

2.2. Qualitative Research:

This method uses non-numerical data such as interviews, focus groups, observations, and textual analysis to investigate and comprehend phenomena. Scholars frequently utilize methodologies such as grounded theory and thematic analysis to extract significant insights from the gathered data. Examine a few chosen situations.⁵

3. Research Methodology:

The methodology that best meets your research objectives depends on your selection criteria and strategy for searching the literature. It was decided to use quantitative methods, such as court decision analysis and the use of good governance indexes. In-depth understanding of the relationships between judicial activism and sound governance can be gained through qualitative research techniques including case studies and expert interviews.

4. Analysis, Result and Discussion:

Comparative constitutional approaches to judicial activism are analyzed in order to shed light on the variables that affect and influence judicial decision-making, as well as the implications for democracy and the rule of law and constitutional government. Cases like *Roe v. Wade* serve as examples of how judicial activism is shaped by elements like institutional architecture, cultural values, and judicial philosophy. Though it also raises questions about democratic accountability, judicial activism can strengthen individual rights and remedy societal injustices. Comparative study exposes different techniques in different jurisdictions, which advances our knowledge of how judges make decisions and contributes to debates about enhancing democratic governance and judicial accountability.

5. Comparaitive analysis of Constitutional approaches to Judicial Activism:

⁵ Research Methodology, Qualitative Research, available at <https://uvu.libguides.com/methods/qualitative>, last seen on 12/04/2024.

A thorough comparative study of constitutional responses to judicial activism highlights the subtleties and complexity present in judicial decision-making in many legal systems. Researchers can offer important insights into advancing judicial accountability, boosting constitutional legitimacy, and fortifying democratic governance by looking at legal frameworks, judicial roles, motivating factors, and effects on constitutional governance.

5.1 Legal Framework:⁶

- United States: In order to defend individual liberty and civil rights, judicial activism frequently turns to the interpretation of the Constitution, especially the Bill of Rights and the Fourteenth Amendment.
- India: Fundamental rights are guaranteed under the Indian Constitution, and judicial activism is frequently motivated by expansive interpretations of these rights, particularly in light of the basic structure concept.
- Germany: Fundamental rights are protected by the German Basic Law, and the Federal Constitutional Court is essential in using judicial review to uphold these rights.
- South-Africa: Transformative constitutionalism is emphasized in the post-apartheid Constitution, and the Constitutional Court actively advances social justice and equality through its case law.

5.2 Judicial Role:

- United States: The Supreme Court has a well-established role in judicial activism, having shaped legal principles and society norms through significant rulings like *Brown v. Board of Education* and *Roe v. Wade*.
- India: The Indian judiciary has been aggressive in addressing social and economic inequities, including matters like affirmative action, gender equality, and environmental protection. This is especially true of the Supreme Court.
- Germany: The German Constitutional Court frequently steps in to defend individual rights and uphold the federal system while striking a balance between judicial scrutiny and parliamentary sovereignty.

⁶ Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis*, Vol.No.3, Journal of International Dispute Settlement, pp.247-278, (8 June 2012), available at <https://academic.oup.com/jids/article/3/2/247/874874#:~:text=Another%20analysis%20in%20the%20context,strict%20rule%20of%20international%20law> last seen on 12/04/2024.

- **South-Africa:** Following the end of apartheid, the Constitutional Court significantly improved socioeconomic rights and fostered inclusivity and healing.

5.3 Factors Driving Judicial Activism:

- **Political Context:** Judicial activism is influenced by the make-up of the judiciary as well as the dominant political ideology.
- **Social Movements:** When it comes to defending the rights of oppressed groups, judicial activism frequently reacts to advocacy campaigns and public pressures.
- **Legal Tradition:** Judicial approaches to activism and constitutional interpretation are influenced by several legal traditions, including common law and civil law systems.⁷

5.4 Impact on Constitutional Governance:

- By advancing social fairness, defending rights, and acting as a restraint on the authority of the government, judicial activism can improve constitutional administration.
- The fine line between judicial activism and the separation of powers is highlighted by worries about judicial overreach and the weakening of democratic accountability.

6. Recommendations:

- Improving the accountability and openness of judicial decision-making procedures.
- Promoting communication between the legislative, executive, and judicial branches to uphold democratic legitimacy.
- Enhancing judicial review procedures while upholding the democratic governance ideal.

7. Conclusion:

This paper concludes by offering a thorough comparative examination of constitutional responses to judicial activism in the US, India, Germany, and South Africa, among other jurisdictions. Upon analyzing legal frameworks, judicial functions, motivating factors, and

⁷ Ibid.

effects on constitutional government, a number of important revelations have been made.⁸ But the analysis also draws attention to worries about possible erosion of democratic accountability and judicial authority. The need for procedures to guarantee openness, responsibility, and communication between the judiciary and other arms of government is highlighted by the precarious balance between judicial activism and the separation of powers. Going forward, suggestions include improving judicial decision-making procedures accountability and transparency, encouraging communication between the judiciary and other parts of government, and fortifying judicial review procedures while upholding democratic ideals. Policymakers and legal scholars can increase democratic governance in a variety of legal systems, advance judicial accountability, and improve constitutional legitimacy by tackling these concerns. In general, this essay advances knowledge about the intricacies of judicial activism and its consequences for democracy and constitutional governance. It highlights the need to maintain a balance between democratic accountability and the rule of law, as well as the judiciary's duty to protect rights.

The survival and legitimacy of constitutional democracies worldwide depend on sustained research and discussion on this subject as nations struggle with changing legal and social issues.

8. References:

1. Ackerman, B. (1997). The rise of world constitutionalism. *Virginia Law Review*, 83(4), 771-797.
2. Bickel, A. M. (1962). *The least dangerous branch: The Supreme Court at the bar of politics*. Yale University Press.
3. Vanberg, G. (2005). Constitutional review in comparative perspective. *Journal of Theoretical Politics*, 17(2), 157-192.
4. Kumm, M. (2009). The cosmopolitan turn in constitutionalism: On the relationship between constitutionalism in and beyond the state. *Theoretical Inquiries in Law*, 10(2), 627-675.

⁸ Kent Roach, *The Myths of Judicial Activism*, *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 14,(2001), available at <https://digitalcommons.osgoode.yorku.ca/sclr/vol14/iss1/17/> last seen on 12/04/2024.

5. Tushnet, M. (2008). *Weak courts, strong rights: Judicial review and social welfare rights* incomparative constitutional law. Princeton University Press.

Websites:

- 1) <https://iccwbo.org/media-wall/news-speeches/icc-dispute-resolution-in-2021-our-year-in-review/> Last accessed on 12/04/2024.
- 2) <https://iccwbo.org/dispute-resolution-services/africa-commission/> Last accessed on 12/04/2024.
- 3) <https://iccwbo.org/media-wall/news-speeches/new-initiative-to-hold-the-door-open-for-young-arbitration> Last Accessed on 12/04/2024.
- 4) <https://youtu.be/Gv41pRgeqdo?feature=shared> Last accessed on 12/04/2024.
- 5) <https://youtu.be/Y2ZEF4Ve0i4?feature=shared> Last accessed on 12/04/2024.
- 6) <https://www.ijlra.com/post/judicial-activism-a-comparative-study-of-india-south-africa-and-pakistan> Last accessed on 12/04/2024.

