

Judicial Adaptability: Research on Judicial Activism and the Principle of Separation of Powers in Common Law

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Abstract: The relationship between judicial activism and separation of powers has been a hot topic in the judicial field. This paper studies the consistency between judicial activism and the principle of separation of powers in common law. Judicial activism involves judges taking an active role in promoting legal and social change, thereby challenging the traditional judicial role. The main argument is that judicial activism is essential to maintain the adaptability and flexibility of the law, especially in a rapidly changing social, technological and economic environment. Through the analysis of landmark cases such as *Mabo v Queensland, No. 2* and *R v Dugan*, this paper shows how judicial activism can address legislative gaps to ensure justice and equity. In addition, it discusses the need to improve the legal framework to enable judges to make proactive decisions within clearly defined parameters. The conclusions highlight the indispensable role of judicial activism in maintaining a dynamic and responsive legal system, upholding democratic values, and preserving public trust.

Keywords: Judicial Activism; Separation of Powers; Common Law; Legal Adaptability.

1. Introduction

The term "judicial activism" was first introduced by Arthur M. Schlesinger in an article on the United States Supreme Court, which was published in the January 1947 issue of *Fortune* magazine. Judicial activism, the practice of judges taking the initiative to promote legal and social change in their decisions, has been at the forefront of legal discussion. In the context of globalization and rapid change, traditional legal frameworks are often unable to respond to emerging challenges promptly, which requires judges to take a more proactive role in filling legislative gaps and protecting civil rights. The concept of judicial activism challenges the traditional role of judges under the doctrine of separation of powers, giving rise to meaningful discussions about the scope of judges' powers. The *Dugan v Mirror Newspapers Ltd* case is one of the prominent examples showing how judicial activism can work in practice to advance social justice and legal progress through positive decisions by judges.[1] This article supports judicial activism and will explore its necessity in the common law system, as well as provide an in-depth analysis of the functions and of the judiciary the functions of judges. This paper will analyze the practical application of judicial activism through cases and discuss how to effectively balance maintaining legal principles and fairness and justice, as well as how to optimize its implementation effect through appropriate strategies and reforms. Furthermore, the implementation and influence of judicial activism vary across different countries and regions. In the United States, for instance, judicial activism is frequently associated with the protection of civil rights and the advancement of social progress. Conversely, in Australia and other common law jurisdictions, judicial activism largely pertains to how judges interpret and apply legal statutes. This diversity underscores the significance and necessity of judicial activism within the global legal framework. Consequently, this paper will extend beyond a theoretical overview by examining its practical application and associated challenges within distinct legal contexts through case studies from specific countries. By

conducting these analyses, we aim to provide a comprehensive perspective that assists readers in better understanding and assessing the role and value of judicial activism in contemporary legal systems.

2. Judicial Activism under the Separation of Powers

In common law systems, the doctrine of separation of powers aims to prevent abuse of power by dividing government functions into three separate branches: legislative, executive, and judicial. The tripartite agencies only check and balance each other, unable to maintain absolute independence. But the relative independence of the judiciary is crucial because it guarantees impartial enforcement of the law and monitors decisions made by the legislative and executive branches. Legislation is part of the function of the judiciary. There is no doubt about it. Judicial activism is a highly controversial term commonly used to describe a certain tendency of judges to consider outcomes, attitudinal preferences, and other extralegal issues when interpreting applicable law. The most direct expression of judicial activism is in legal interpretation. Then there is the impact on case law. The Constitution should be read in light of contemporary understandings of its meaning.[2] In 1983, the High Court of Australia described the core function of courts exercising federal jurisdiction under the Australian Constitution as quelling disputes by finding the facts, applying the law, and exercising judicial discretion as appropriate. This clarifies the proper function of the judge.[3] This interpretive function of the judge is essential in the common law system. The common law system relies on case law because a judge's prior decision guides later cases. By interpreting and applying the law, judges are not merely enforcing the law but helping it, adapting it to new social conditions. Judicial activism is not limited to a particular ideological or social perspective. It may be liberal. But it can also be conservative. Judicial activism manifests and impacts different common law countries and regions in varied ways.

In the United States, it is frequently associated with safeguarding civil rights and promoting social progress. Conversely, in Australia and other common law jurisdictions, judicial activism often revolves around how judges interpret and apply existing laws. This diversity underscores the importance and necessity of judicial activism within the global legal system. For instance, the United States Supreme Court's landmark decision in *Brown v. Board of Education* (1954) exemplified how judicial activism can advance social justice by overturning prior jurisprudence that had legalized segregation, thereby achieving equal rights in education. Nonetheless, judicial activism faces significant challenges and criticisms. Detractors contend that it may cause judges to overstep their boundaries, encroaching on the powers of legislative and executive branches, thus undermining the fundamental principle of separation of powers. Supporters argue that judicial activism is essential given our rapidly evolving society and emerging legal issues; they maintain that it addresses legislative gaps promptly while safeguarding civil rights effectively. In this context, this paper aims to delve into the imperative of judicial activism and critically examine how to harmonize the preservation of legal principles with the pursuit of fairness and justice by analyzing pertinent case studies. It will offer strategic recommendations and reform initiatives designed to enhance the efficacy of judicial activism. Through these comprehensive analyses, we seek to furnish a nuanced perspective that facilitates a deeper understanding and evaluation of the role and significance of judicial activism within contemporary legal frameworks.

3. Reasons to Support Judicial Activism

3.1. Improve the Adaptability and Flexibility of the Law

The first point of argument in favour of judicial activism is to improve the adaptability and flexibility of the law. In this regard, through positive legal interpretation, judges can fill the gap where legislatures update laws so that they can adapt more flexibly to new social, technological and economic realities. The *Mabo* case is the most typical example.[4] The court issued a decision that recognised the legal rights of indigenous people to their traditional lands for the first time. Essentially, it did so for two reasons. The first was the acceptance that the old theory of law had been founded on a factual error. The second stimulus to a changed approach was the international human rights law. The first point illustrates the possible mistakes in traditional legal theory, which only apply to today's society. The second point demonstrates how the Australian legal system can be influenced by international law. It also reflects its indispensable role in the modern legal system. The Supreme Court demonstrated its initiative in a case that struck down legislation restricting political advertising.[5] Through the re-interpretation of legal principles, the gap between law and social reality is filled to maintain the fairness of society. The High Court was preoccupied with the law and completely forgot about fairness and moral justice.[6] This is sad. Only by making correct and fair judgments can the judicial organs gain the trust of citizens and promote the development of the common law. To advance legal development through Judicial Initiative. Judicial activism extends beyond mere legal interpretation; it encompasses the proactive efforts of judges in addressing emerging social issues. In the wake of technological

advancements and societal changes, legislation frequently trails behind current needs. Under these circumstances, judges possess the flexibility to apply existing legal frameworks adeptly, thereby responding to novel challenges and demands through judicial activism. Furthermore, judicial activism serves as a catalyst for social progress, particularly in safeguarding vulnerable populations and promoting social justice. Through proactive judicial interpretation, judges are able to extend legal protections to marginalized groups and uphold their rights when legislative action is insufficient or delayed.

3.2. An Increasingly Sophisticated Legal Framework

As the limits on judicial activism become clearer and more refined, it is indeed possible to provide judges with clearer frameworks and boundaries in the exercise of their functions. Judges can be more confident in making judicial decisions because their decisions are made within a widely understood and accepted legal framework. The judicial review mechanism, which is the process by which courts review the actions of the executive and legislative branches, plays a crucial role in this. With the improvement of this mechanism, judges can ensure that their decisions are more in line with the social standards of fairness and justice when they make more active judgments. This mechanism not only ensures that the judge can adapt to the changing social environment, but also ensures the appropriateness of the judge's behavior and prevents arbitrary sentences. Strict and complete legalism does not prevent the creative refinement of new principles in appropriate cases.[7] On the premise of respecting precedent, fairness and justice should also be guaranteed in each case. Precedent is important, but the ultimate binding force of constitutional questions is not the doctrine of precedent.[8] Increasingly refined legal limits and guiding principles can empower judges to be bolder in pushing the law to adapt to social change, while ensuring that its behavior conforms to public and legal expectations. This balance is essential to maintain the authority of the law and the trust of society. Continuously, with the development of society, new legal issues and challenges appear. This has created a dilemma: when facing these new problems, the judges will have to interpret and apply the existing legal institutions creatively in order that laws can catch up with social changes promptly. Under the circumstances of rapid development in science and technology, which some legal issues are new therefore will be difficult to adapt law that have been defined traditionally. This is the very time national judicial activism can fill these legal gaps and make the law ahead of its days. Activist judiciary may also lead to advance in the improvement of law. Other times the legislature cannot, for political or other reasons, get its act together to amend a law in time and judicial activism can help fix that through the decisions of judges. Therefore, through the interpretation and application of current laws by judges in concrete cases, a certain degree of social justice could be reached temporarily and systematically further developed. The Supreme Court has also played an important role in the promotion of social progress and human rights by reading between the lines when it comes to enforcing our nation's values, they said.

4. Conclusion

Given society's intricate and evolving nature, the role of judicial activism in common law systems is necessary and a key mechanism for legal and social progress. Through the analysis of landmark cases, it is clear that judicial activism goes beyond mere legal interpretation and actively shapes the jurisprudential landscape to reflect the principles of fairness and justice central to social trust and legal integrity. Far from shrinking as the legal framework was further refined, the scope of judicial activism grew with more explicit boundaries and greater accountability. This evolution allows the judiciary to respond with wisdom and foresight, ensuring that the law remains a dynamic tool for meeting the dynamic needs of the people it is designed to protect. Thus, embracing judicial activism is not a call for unfettered judicial power but rather an acknowledgement of the judiciary's role in a vibrant democracy, explaining, accommodating, and preserving the balance between tradition and progress. It is through judicial activism that the law can remain solid and responsive, ensuring that the judiciary is not only served but also developed to meet the demands of changing times and progressive societies. We must, therefore, support and understand the subtle role judicial activism plays as a fundamental component of judicial accountability and legal development. In the current complex environment, judicial activism plays a crucial role in safeguarding the rights and interests of citizens and promoting legal innovation and social progress. In the face of emerging challenges, such as climate change and globalization, judges, by applying judicial activism, can provide real-time guidance and support to legislators to ensure that the legal system can effectively adapt to these new realities and demands. The promotion of transnational legal cooperation and the integration of international legal standards mainly benefits from the active implementation of judicial activism. With the continuous deepening of globalization, the legal systems of various countries are increasingly influenced by each other. Through positive judicial interpretation, judges can absorb and adopt

the advanced practices of other judicial regions, thus promoting the optimization and improvement of the legal system of their country. In the fields of human rights protection, environmental law and anti-monopoly law, judicial activism can help the innovation and development of domestic legal system by citing and interpreting international legal standards.

References

- [1] Dugan v Mirror Newspapers Ltd (1978) HCA 54[Z]. [https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1978/54.html?context=1;query=Dugan%20v%20Mirror%20Newspapers%20Ltd%20\(1978\)%20HCA%2054;mask_path=](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1978/54.html?context=1;query=Dugan%20v%20Mirror%20Newspapers%20Ltd%20(1978)%20HCA%2054;mask_path=).
- [2] Eastman v The Queen (2000) 203 CLR 1, 80 [242]. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/Trans/2000/5.html?context=1;query=Eastman%20v%20The%20Queen%20;mask_path=.
- [3] Fencott v Muller (1983) 152 CLR 570 at 608. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1983/12.html?context=1;query=Fencott%20v%20Muller%20;mask_path=.
- [4] Mabo v Queensland (No 2) (1992) 175 CLR 1. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html?context=1;query=Mabo%20v%20Queensland;mask_path=.
- [5] Australian Capital Television Pty Ltd v Commonwealth (1992) HCA 45. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/45.html?context=1;query=Australian%20Capital%20Television%20Pty%20Ltd%20v%20Commonwealth;mask_path=.
- [6] "Letters", Sydney Morning Herald (Sydney), 5 February 2016.
- [7] Yerkey v Jones (1939) 63 CLR 649. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1939/3.html?context=1;query=Yerkey%20v%20Jones%20;mask_path=.
- [8] Johnny M Sakr and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40 (1) University of Queensland Law Journal 119.