

# **JUDICIAL ACTIVISM OR JUDICIAL OVERREACH?**

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## **ABSTRACT**

The judiciary acts as a watchdog for our democracy. It is the guardian of the Fundamental Rights. It is important for such an institution to be active in securing the rights of the citizens with the changing society. It transforms to a more active role by taking up cases involving fundamental right violation in a suo moto action. The main aim of judicial activism is to ensure justice and equality to all. However, the judiciary must not take such decisions whimsically or interfere with the functions of executive and legislature. This encroachment is termed as “judicial overreach”. There are various instances where judicial activism took the shape of judicial overreach and the judiciary overstepped its boundaries which proved to be detrimental for the country. It is high time for courts to regulate such activities and follow “judicial restraint”.

## **INTRODUCTION**

India has separated the functions of law making, law enforcement and law interpretation into three independent institutions namely, the legislature, executive and judiciary that work within their established jurisdictions. However, we know that such a demarcation is not absolute, and the three organs are not divided into water-tight compartments. Interdependence of one organ over the other is inevitable. Each organ has the authority to maintain checks and balances over the other to prevent any encroachment. The judiciary is conferred with the power to review the actions of the Executive and Legislature to ensure that they are within the constitutional boundaries. It can strike down any law made by the legislature if it violates any constitutional provision and strike down any executive action if found illegal and arbitrary, according to Articles 13, 21, 32, 226 and 227 of the Indian Constitution. Article 142 extends the power of the Supreme Court by giving it extraordinary authority to pass any order or decree to provide ‘complete justice’ in any matter that is presented before it.

Judicial activism and its methods are not defined by the constitution or any authority to indicate its origin. The court takes up cases on a suo moto (latin for on its own) basis and through Public Interest Litigation. As office holders became less representative of people's will, the Supreme Court needed to expand its jurisdiction and issue directives to the executive and legislature. Suo moto cases and PILs discontinued the principle of locus standi and enabled the judiciary to take up public cases even when there was no formal complaint by the aggrieved party. When this practice goes overboard it becomes judicial overreach as it trespasses the functions of the executive and legislature. This is undesirable for any democracy.

## **STATEMENT OF PROBLEM**

Judiciary should uphold the constitutional values, rights, and interests of citizens if there are various legal hindrances that stand in the way of justice. And thus, emerged the concept of judicial activism. But with rise in the activist role of the judiciary, judicial overreach has also increased. Its embracement can menace good governance. The friction between the judiciary and executive has escalated due to the overreach by courts. This paper looks forward to finding suitable measures to resolve the above conflict.

## **LITERATURE REVIEW**

### **1. Judicial Activism, Overreach, or Romanticism: What Is the Supreme Court Up To?**

The article differentiates between activism and ordinary adjudication on the basis that there is no litigation between the parties and the advisory opinion of the court is not binding on the government and cannot be executed as a judgement of the court. It realizes the need for an active judiciary but at the same time recognizes judicial overreach goes against the spirit of separation of powers. It talks about the complications arising from the invention and ease of filing PILs. It argues that "democracy is not limited to the over-intellectualized counterparts of the urban areas who have easy access to courts and money to fight the case, but also to the 70% of the rural population who rarely get to visit courts and the urban poor who probably don't even understand what a PIL is"<sup>1</sup>. Courts have a duty to dispense affordable and speedy justice to the poor as well. Through judicial activism courts are trying to govern the country and correct every ill that exists. It finally concludes that for the rule of law to prevail judiciary must be impartial, impersonal, universal, and most importantly restrained.

## **2. Judicial Activism v. Judicial Overreach in India**

The research paper begins with defining the term “judicial activism” as the process in which the judiciary steps in the shoes of legislature and executive and comes up with new rules and regulations. It explains why the Supreme Court had to expand its jurisdiction because of failure on the part of other organs due to corruption, delay, non-responsiveness and other inefficiencies, violation of basic human rights. In matters of privacy in cyber space, right to life, environment the legislature sometimes fails to fulfill its duty and thus it becomes necessary for the judiciary to step in. It went on to describe the areas of judicial activism by citing recent Supreme Court cases. It defined ‘Judicial overreach’ as an “extreme form of judicial activism where arbitrary, unreasonable and frequent interventions are made by the judiciary into the legislature’s domain, with the intention of disrupting the balance of powers between the three organs of the government and is a challenge to the basic structure of the Constitution”<sup>2</sup>. There is a thin line between activism and overreach. It contends that the importance of judicial review and activism cannot be denied, but what is required by the courts is to ensure they don’t cross the line. It concluded that a country cannot be run by judicial decrees that create an unhealthy asymmetry in the institutions of the government.

## **3. Judicial Activism and Overreach in India**

The author has explained the significance of judicial activism with the help of wide variety of cases. Judicial activism was a response to several cases dealing with violations of fundamental rights. At the same time the courts must be aware of their limitation, within which it should function. Judges must not encroach upon the other two organs of the government. The research paper has been systematically divided into specific side headings ranging from history of judicial activism, its early cases, when it becomes overreach, the need for judicial restraint. The author is of the view that activism sometimes goes against the scheme of the constitution as frequent interventions by the courts weaken the legislature and executive. It must acknowledge the difference between activism and overreach. While according to the author judicial restraint is the need of the hour, he has also identified challenges to it, which are lack of accountability and abuse of power of contempt.

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<sup>1</sup> Judicial Activism, Overreach, Or Romanticism: What Is the Supreme Court Up To: By Shubehndu Anand, Ayush Anand and Mansi Agarwal

<sup>2</sup> Judicial Activism v. Judicial Overreach in India: B Nagarathnam Reddy

## RESEARCH GAP

The research papers discussed above have talked at length about how 'judicial overreach' goes against the doctrine of separation of powers and how it negatively impacts the functioning of a democracy but fail to provide effective measures to correct the same. How should the judiciary be restrained and how should it make sure it doesn't cross the 'line' is not explained with a practical approach.

## RESEARCH QUESTIONS

- When does judicial activism take the form of judicial overreach?
- What are the concerns relating to judicial overreach?
- What can be done to prevent judicial overreach?

## RESEARCH OBJECTIVE

- To critically analyze the overstepping of judiciary into the matters of legislature and executive.
- To suggest effective measures to regulate and prevent judicial overreach

## CONCEPT OF JUDICIAL ACTIVISM

It is impossible to imagine courts as 'inactive'. Rather than being silent spectators the judiciary has always strived to secure the rights and well-being of the citizens. It is compelled to do so because of the action/inaction of the executive and legislature that deprive the citizens of their basic freedoms such as right to life, livelihood, sleep, clean environment etc. It is imperative for the judiciary to assume the role of an activist and opt for suo moto action, or else the marginalized and vulnerable sections of the society will not be duly represented in merely because of financial constraints and social status. These factors obstruct justice. It is the court's duty to ensure that justice is affordable and accessible to all irrespective of such restraints. It prevents the judges from strictly adhering to the exact words of a law and allows them to use their own interpretation in certain cases.

## HISTORY OF JUDICIAL ACTIVISM IN INDIA

The first instance of judicial activism was seen in an 1893 Allahabad High Court judgement where the judge delivered a dissenting decision. The case involved an under-trial who did not have enough money to engage a lawyer. The question before the court was, whether to decide

the case by merely looking at the papers produced by him. The judge held that a case can only be heard only when somebody speaks. Thus, he laid down the foundation stone for judicial activism in India. The theory of judicial activism developed further in the late 1960s and 1970s during Indira Gandhi's regime. The abolishment of Privy Purses and privileges given to kings and princes of princely states and nationalization of 14 banks by the government was not taken well by the judiciary and so it declared the legislation as unconstitutional. The essence of judicial activism can be seen in the court's affirmation regarding the quality of judicial review. In *A.K Gopalan v. State of Madras*<sup>3</sup> the court asserted that judicial review is inherent to the Constitution. Even in its absence, if any legislative enactment violates any fundamental right the court has the authority to declare the act as invalid. In *Golaknath v. State of Punjab*<sup>4</sup>, while dealing the constitutional validity of 17th amendment held that Parliament cannot amend Part III of the constitution or take away any fundamental right. The Supreme Court in the *Keshavananda Bharti v. State of Kerala*<sup>5</sup> held that Parliament by no means can alter the contents of the basic structure. The *Bhagalpur Blinding case*<sup>6</sup> held that the right to free legal aid to the poor, representation of a lawyer are included under Article 21 and strictly mandated that the accused should be produced before the magistrate within 24 hours. In *Balaji v. State of Mysore*<sup>7</sup>, the court observed that, though the backward classes are eligible for protective discrimination, it must not deny right to equality and equal protection of law. In the *Asian Games case*<sup>8</sup>, the court held that the workers who were temporarily hired for construction services were to benefit from the relevant labor and industrial laws and could seek implementation under article 32. These were few examples that led to the origin and development of judicial activism in India.

### WHY JUDICIAL ACTIVISM?

- **Failure of the legislature and executive in discharging its functions**

The power of lawmaking is solely vested with the legislature. However, such separation of power between the three organs does not hold any ground in today's scenario because of rampant corruption, prioritizing personal interests, ignoring the exploitation of the masses. The legislative process has become more of a majority rule than reason<sup>9</sup> and so it fails to

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<sup>3</sup> 1950 AIR 27

<sup>4</sup> 1967 AIR 1643

<sup>5</sup> AIR 1973 SC 1461

<sup>6</sup> 1982 AIR 1008

<sup>7</sup> 1963 AIR 649

<sup>8</sup> 1982 AIR 1473

<sup>9</sup> <https://nickledanddimed.com/2019/07/14/defending-the-need-for-judicial-activism-within-the-indian-/>

satisfy the ends of justice. When the legislature fails to enact a suitable enactment with respect to the dynamic nature of the society and government agencies do not perform their duties sincerely, a democracy loses the faith and confidence of its citizens. In such extra-ordinary scenarios, it is only reasonable for the judiciary to take a proactive role.

- **Pressure to aid citizens in case of fundamental right violation**

Where the government, its agencies or any third party violates the fundamental rights of citizens, the judges may take upon themselves to aid citizens. When citizens require protection of their rights and interest they always turn towards the judiciary for help. The judiciary is always under tremendous pressure to provide such help. The courts have encouraged and initiated PILs on various occasions by relaxing the requirement of locus standi, adversarial form of litigation and also presumed the role of an investigator, counselor, and monitored administration.

- **Failure of legislature to fulfill all societal needs**

Despite having numerous legislations on various topics, there are questions of law which have no legislation yet. This is because of lack of exposure to such issues, lack of attention and indifference of the legislature. Where the legislature fails to make a law that is essential to meet the need and demands of the society, the judiciary indulges in judicial legislation.

- **Public confidence in the judiciary**

The faith and confidence of the public in the judiciary acts as an inspiration for the courts to exceed their capacity and go out of the way to fight for their rights. As the guardian of fundamental rights, it is natural for the citizens to expect the judiciary to safeguard their interests.

- **Role of Individual Players**

Individual players and NGOs such as people right activists, consumer right groups, environmental action groups, women right groups, civil right activists, lawyer-based groups etc are responsible for encouraging judicial activism<sup>10</sup>. Some judges have individually too laid down the path for judicial activism.

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<sup>10</sup> Upendra Baxi, —The Avatars of Indian Judicial Activism: Explorations in the Geographies of (in) Justicel in S.K.Verma and Kusum, Fifty Years of Supreme Court of India – Its Grasp and Reach 173 (2000).



## **BUT ARE JUDGES OVERREACHING?**

*“The line between judicial activism and judicial overreach is a thin one...A takeover of the functions of another organ may become a case of over-reach”*

*-Dr.Manmohan Singh<sup>11</sup>*

The then Prime Minister had accused the Supreme Court of judicial overreach as it had taken over legislative and executive functions. Instances where the courts arguably crossed the line and directed the executive to perform its obligations are many. While this may be desirable, it is against the order of the Constitution. In cases such as labour policy, environmental and ecological matters etc. judicial behavior can be proactive, but once it starts intervening in matters related to the financial policies of the government, political affairs of the country or even the proceedings of the legislature it commits judicial overreach. When the judicial activism goes beyond its scope and appropriates judicial adventurism it leads to judicial overreach. Following are the recent instances of judicial overreach in India:

### **a) The National Anthem Case- *Shyam Narayan Chouksey v. Union of India*<sup>12</sup>**

The Apex court made it compulsory for cinema halls to play the National Anthem before a film started and that all present should stand up to show their respect. The entry and exit doors shall be closed and the National Flag should be displayed on the screen while the Anthem is being played. The court neglected the landmark Bijoe Emanuel case and the Uphaar Tragedy case where the court said that under no circumstance should the doors of a cinema hall be shut. It violated the Prevention of Insults to National Honour Act, 1971 which mandates that no film, drama, or show can display the National Anthem as a part of the show.

### **b) Lodha Committee Report on the Board of Control for Cricket in India**

The Supreme Court set up the Lodha Panel as charges of corruption, match-fixing, and betting were made against the BCCI. The panel endorsed the inclusion of BCCI under the RTI, legalization of cricket betting and recommended that ministers and government servants should not hold office positions, one post per person etc. It was a case of judicial overreach because Lodha community had no authority because BCCI was listed under the Tamil Nadu Societies Act, received no funding from the government and was not controlled by the central or any state government. Autonomy of sports bodies should be respected. External

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<sup>11</sup> Speaking at the Conference of Chief Ministers and Chief Justices held in New Delhi in Apr 08, 2007.

interference is not good for their development. With the one state one rule, the court ignored that India has teams participating in the Ranji Trophy from Railways and Services. This strict provision of geographical territory excludes Mumbai, Baroda, and Saurashtra etc.

c) **NJAC Bill 99th Constitutional Amendment**

The Supreme Court order to declare the 99th amendment and the National Judicial Appointment Commission Act 2014 as unconstitutional and void to replace the collegiate system, has been the most controversial form of overreach. The Apex court rejected the government's plea to appeal the case to a higher bench but has invited suggestions to improve the existing collegiate system. The NJAC ensures transparency in judicial appointments. The commission to select judges comprises equal number of judges and non-judges so that power is not exclusively vested only in the hands of judiciary or the political class.

Judicial overreach negatively impacts a government in the following ways: -

**1. Violation of the doctrine of separation of powers**

Powers and functions of a government should be divided among three organs namely legislature, executive and the judiciary with proper checks and balances. But judicial activism created a scope for judge made laws which is abuse of constitutional power.

**2. Rule of Court is Detrimental**

Judicial activism does aid the execution of rule of law. But when a court overreaches itself it results in "judicial populism"<sup>13</sup>. Judges are not supposed to create laws but must ascertain their true meaning otherwise it would create a situation of turmoil.

**3. Lack of Accountability**

The extended jurisdiction of judiciary is a matter of concern as it causes abuse of power. Transparency and accountability are very important for a democracy; the judiciary is also required to be transparent and accountable. Unfortunately, this is not the case as it damages the checks and balances mechanism.

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<sup>12</sup> (2017) 1 SCC 42

<sup>13</sup> S. P. Sathe, „Judicial Activism: The Indian Experience“ (2001) 6 Washington University Journal of Law & Policy 29.



## CRITICAL ANALYSIS

When judicial activism is overtly exercised it encroaches the powers of the legislature and executive. The Supreme Court has laid down in various cases that a writ of mandamus cannot be issued to the Legislature by courts. The legislative power of the judiciary is derived from judicial activism. It cannot be used as a tool to fill gaps in legislation or create rights and liabilities that the law doesn't provide. "Judiciary is the least competent body to function as a legislative or administrative agency, as they lack the ability to make probing enquiries. It does not have any means to supervise the consequences/effects of its orders and judgements, or reverse the judgements if they require any modification or are found unworkable."<sup>14</sup>

The social dimension of PILs has diluted. It is observed that the court's intervention in the present times, does not enforce the rights of the poor but corrects the actions/ omissions of the executive, public officials or government bodies. Instances of such intervention can be seen where the court passed orders against the use of black films in automobiles, when it ordered exclusion of tourists in the certain areas of tiger reserves, banning of firecrackers, controlling of loudspeakers, interlinking of rivers which is clearly an executive function. The Apex Court did not hesitate to interfere into the military operations of the country. The verdict materially affected the operation.

It destroys the spirit of our constitution as India firmly believes in separation of powers and creates conflicts between the judiciary and legislature. The legislature is portrayed as an inactive institution. Courts are more interested in intervening with public policy matters in the name of judicial activism or fundamental rights violation, even when there is no such violation. Judicial overreach destroys the very reason as to why the concept of judicial activism was developed; to strengthen people's faith in the judiciary. It is a waste of the court's time and only increases the pendency of cases when that time can be utilized for hearing important matters that actually involve the public interest. The judgments given have the tendency to be influenced by the judge's bias or selfish motives. Repeated interventions by the judiciary diminish the confidence of people in the efficiency and integrity of the government.

"There is a very fine line between the judiciary instructing the executive to do something and instructing the executive on how to do something. There is a danger to courts engaging in the

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<sup>14</sup> Judicial Activism and Constitutional Democracy in India commended by Professor Sir William Wade, Q.C.

latter because from a broad perspective, such decisions should be the prerogative of the legislature and executive, and from a narrow perspective the subject matter often involves technical or economic decisions outside the expertise of the judiciary”<sup>15</sup>. Government’s policies are always subject to judiciary’s scrutiny. The distribution process of food grains for people below poverty line was monitored by the court. In the 2G license case, all public resources and assets were held as a matter of public trust and could be disposed only through a public auction. The judiciary has completely disregarded constitutional separation of powers and has taken up the role of a supervisor of all the other branches of the government. One judgement becomes the standard ruling for other cases which results in overreach. It restricts the law-making power of the legislature. The response of the judiciary with regards to overreach is that they are compelled to do so because the legislature and the executive fail to meet their obligations. The political branches of the government by the same logic claim that there are many areas where the judiciary has failed to meet the expectations of the public and that it must also be kept in regular check. This debate can go on and on. Hence, unless PILs are strictly formulated and observed they would encroach upon the other divisions of the government.

## RECOMMENDATIONS

The judiciary needs to understand and be aware of the thin line between judicial activism and overreach. The doctrine of separation of powers should be strictly considered. New methods should be adopted by the government to hold the judiciary accountable to ensure transparency. The legislature must aim to not leave any vacuum in laws so that there is less need for judicial review and intervention.

Most importantly the court must try to practice judicial restraint. The Supreme Court on various occasions has emphasized the importance of restraint to maintain a balance between the three organs of the government. It is a type of judicial interpretation that encourages judges to limit the exercise of their power. It requires them to strike down a law only when it is completely unconstitutional. It holds that law-making is not the job of the judiciary. It will only enhance its prestige and respect. It acknowledges the equality of the other two organs, and reduces judiciary’s interference into other branches. It also safeguards the independence of judiciary and complements the doctrine of separation of powers. An activist court cannot

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<sup>15</sup> <https://bit.ly/32ItSrK>

deal with cases involving details of a legislative subject and thus needs to apply breaks to it personal motives. Courts cannot enter the sphere of economic policy and conduct administration of the country. Every matter of public interest cannot be included in a PIL. Non-compliance of the government or its agencies and actual violation of the fundamental rights of citizens are the grounds on which the judiciary can intervene. Judiciary has to adopt the principle of judicial self-restraint while exercising their power of judicial review.

## CONCLUSION

A rightful judicial intervention is one which falls within the permissible limits of 'judicial review'. Matters regarding the government policy or politics which lack core legal issues are outside the purview of the judiciary. In cases where the government fails to discharge its responsibilities such as environmental degradation, sexual violence, educational reforms, corruption etc the judiciary can step in to secure the interests of the citizen and issue a writ of mandamus to the concerned public body. However, there is a thin line that separates judicial activism from overreach, and the courts must respect that. What makes activism as overreach is based upon the perception of citizens. Therefore, it becomes difficult to regulate it and more the reason for the courts to be cautious in the suo moto cases they undertake. It is concluded that the judiciary was not created to resolve the shortcomings of the government. It is essential for the judiciary to be impartial, independent but most importantly restrained.

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