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JUDICIAL ACTIVISM AND OVERREACH IN INDIA

AUTHORED BY - ANANYA SHAH

“Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time, the dividing line between judicial activism and judicial overreach is a thin one.”

ABSTRACT

Lord Hewart is well known for the adage, “It is fundamentally important that justice not only be done but also be clearly and undeniably seen to be done.” And this brought forth the idea of judicial activism. Judicial activism has always been a bone of contention in India due to its controversial past. The genesis of judicial activism can be tracked down to the theory of social want. In 1893, a significant judgment was delivered by the Allahabad High Court, in which Justice Mahmud expressed a strong dissenting opinion. This judgment is considered to be one of the early instances of the judiciary playing an active role in shaping the legal and political landscape of India. Nowadays, judicial activism has become an immensely popular instrument for criticizing the role of judges. The transformation of the Indian judiciary from a conservative one to an activist one has been a protracted and complicated process. In recent times, there have been several judgments delivered by both the Supreme Court and High Courts that have sparked intense debates, with some arguing that these judgments have exceeded the traditional boundaries of the judiciary and ventured into areas that are the domain of the legislative or executive branches of government. The main criticism behind this is that a judge is appointed and not elected. And “There cannot be too much arrogation of power into the hands of the people who are not elected by the people.” (Advocate Sai Deepak J.) We can hardly forget what Justice Robert H. Jackson eloquently commented about the Supreme Court of the U.S.A., “We are not final because we are infallible, but we are infallible because we are final.”¹ In this paper, the researcher aims to study the timeline of judicial activism in India with its evolving dimensions and its relevance in the present context

¹ Austin Granville, *The Indian Constitution- Cornerstone of the Nation*, (Wadhwa and Co., Nagpur, 2nd edn., 2007).

INTRODUCTION

The Indian Constitution is a document that stands out from others as it is not only the longest written Constitution in the world but also displays an intriguing uniqueness. The substantial size of the Indian Constitution is attributed to the fact that its drafters endeavoured to address the diverse range of issues that had afflicted India over the course of a decade. The democratic system of government rests on mainly three dominant pillars which are the legislature, executive and judiciary, the Trinity, is an accomplished phenomenon, Harmonious existence is a theory. Montesquieu- a French Philosopher, believed that concentration of power in one person or group results in disastrous consequences.

Therefore, governmental functions shall be vested in three different organs the Legislature, the Executive and the Judiciary. He further felt that each organ should be independent from others and they should not interfere with each other. For any of the two combined together could lead to disastrous consequences. For instance, if Judiciary combines with the Executive, it will result in judges becoming violent and oppressive. If the Judiciary combines with the Legislature, there would be no liberty. And if the Executive and the Legislature combine it would lead to arbitrariness. Thus, following Montesquieu's theory of Separation of Powers, the functions of the three organs of the Government can be categorised into Policy Making [Legislative Function], Policy Implementation [Executive Function] and Policy Adjudicating [Judicial Function]. This paper shall discuss Judicial Activism with Montesquieu's theory of Separation of Powers in the background.

The judicial system in India has a pyramidal structure with the Supreme Court of India as the apex institution. The judiciary is considered to be "*sentinel on the qui vive*" and also the highest authority in interpreting the Indian Constitution. According to G. Austin², "The Supreme Court has been called upon to safeguard civil and minority rights and play the role of 'guardian of the social revolution.'" Each of the pillars is assigned its own role by the Constitution of India. The legislative wing is responsible for making laws, while the executive branch is tasked with enforcing them, and the judiciary has the role of interpreting the laws. The Constitution of India establishes the fundamental principle of separation of powers and clearly delineates the powers vested in each branch of government. When the legislative vacuum is created, the judiciary steps in and the judges start playing a proactive role in society. In this context, the doctrine of

² L. Chandra Kumar v. Union of India, AIR 1997 SC 261.

judicial review becomes relevant. The doctrine of judicial review refers to the distinctive power of the Courts to decide on the constitutional validity of legislative and executive actions. “The power of judicial review is a basic structure of the Indian Constitution”³. It traces its origin to the American judiciary where it was first introduced in the well-celebrated case of *Marbury V. Madison* in 1803. Chief Justice Marshall remarked in *Marbury v. Madison*, “It is emphatically the powers and duty of the Judiciary to say what the law is.” Article 13 of the Indian Constitution vests with the Courts the power of judicial review. It states that the judiciary has the power to declare an act void if it contravenes Part III of the Indian Constitution. Additionally, Articles 32, 131-136, 143 and 226 of the Indian Constitution also lays down the principle of Judicial review. Judicial activism is an inherent part of judicial review. Addressing a conference of Chief Ministers and Chief Justices of the High Courts, the former Prime Minister of India, Dr. Manmohan Singh, stated that⁴,

“Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that.... There is growing dissatisfaction regarding the functioning of the executive and the legislature and their ability to deliver effective governance to meet the needs and challenges of our times. In this background, it is a matter of great satisfaction that the public at large continues to hold our judiciary in high esteem. The judiciary as custodians and watchdogs of the fundamental rights of our people has discharged its responsibility very well indeed.”

What is Judicial Activism?

‘Activism’ means “a policy of vigorous action of a philosophy or a creative will⁵” or “The doctrine or policy of being active or doing things with decision”. Judicial Activism would therefore mean taking recourse to judicial process leading to judicial pronouncements on different intricate issues whereby new approach towards legal philosophy is made or to put it simply it is active role played on the part of the Judiciary. In the words of Justice J.S. Verma, Judicial Activism must necessarily mean “the active process of implementation of the rule of law, essential for the preservation of functional democracy”. According to Prof. Upendra Baxi, “Judicial Activism is an ascriptive term. It means different things to different people. While some may exalt the term by ascribing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public

³ The Constitution of India, 1950.

⁴ M.P. Jain, *Indian Constitutional Law* (LexisNexis, Nagpur, 6th edn., 2010).

⁵ Government of India, “Constituent Assembly Debate Volume-11” 979-980 (November, 1949).

duties etc., others have criticised the term by ascribing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc.”

HISTORICAL DEVELOPMENT OF JUDICIAL ACTIVISM

During its early years, the Supreme Court of India was primarily focused on an interpretative role and had a more technocratic approach. For around a decade, the judiciary remained relatively inactive while the executive and legislative branches of the government took the lead and interfered with the functioning of the judiciary. Starting from the mid-1970s, the judiciary gradually evolved into an activist entity, as it became more involved in interpreting laws and statutes. The Apex Court slowly stood up against legislative and executive inactions and failures. Our honourable Courts have taken numerous astounding stands, be it the preservation of human rights or prevention of sexual harassment of women at the workplace or the protection of the environment and likewise.

The noble actions of J. P.N Bhagwati, J. V.R. Krishna Iyer, J. D.A. Desai and J. Chinappa Reddy laid the foundation for judicial activism, which was further reinforced by the provisions of Article 13.⁶ In the annals of judicial activism in India, Public Interest Litigation is widely regarded as a significant milestone. In 1976, the first case of public interest litigation was initiated in *Mumbai Kamgar Sabha v. M/S Abdul bhai Faizulla bhai and others*. Soon after this, the concept of PIL flourished with the active efforts of Justice Bhagwati in India. The Court through various landmark developments provided us with the doctrine of prospective overruling and the doctrine of basic structure in India. Judicial activism in India can be both positive and negative. The difference between activism and overreach is a narrow and delicate one. When judicial activism becomes judicial adventurism and eventually takes the form of judicial overreach or judicial anarchy, it sets a dangerous precedent for democracy. Sometimes under the veil of activism, the judges put forward their own personal opinions which undermine the legislative wing of the government. The Supreme Court of India in the case of *The Indian Drugs & Pharmaceuticals Limited v. Workmen* (2007) commented that “the Supreme Court cannot arrogate to itself the powers of the executive and the legislature.... There is a broad

⁶ Kartik Kalra, *Understanding Income-Based Affirmative Action in India* available at: <https://www.jurist.org/features/2022/11/23/explainer-income-based-affirmative-action-indian-supreme-court/#> (last visited 5th November 2023).

separation of powers under the Constitution of India, and the judiciary, too, must know its limits.”

CONSTITUTIONAL POSITION

The two primary sources of law are legislative enactments and precedents, i.e., judge-made laws. The Indian Constitution provides various provisions that empower the judiciary to take a proactive stance and assert its authority. One such provision is Article 13, which prohibits the State from enacting any law that infringes upon the fundamental rights of its citizens. The Supreme Court opined “The inclusion of Article 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights are infringed by any legislative enactment, the Court has the authority to declare the enactment to the extent that it transgresses the limits, invalid.”

The Supreme Court has the authority to issue any orders or writ for the enforcement of fundamental rights under Article 32. In the case of *Fertilizer Corporation Kamgar Union v. Union of India*, the Supreme Court of India ruled that the authority under Article 32 is an essential component of the fundamental framework of the Indian Constitution. “Because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.” Article 226 of the Constitution of India grants the High Courts of each state the power to issue writs, orders or directions to any individual, authority, or government within their respective jurisdiction, for the enforcement of fundamental rights or for any other legal purpose. Article 226 of the Indian Constitution provides the High Courts with a broader jurisdiction in issuing writs, orders, or directions as compared to Article 32 of the Constitution. Article 227 confers upon every High Court the authority to exercise superintendence over all other courts and tribunals under its jurisdiction.⁷ Article 136 of the Constitution of India grants the Supreme Court the power to grant special leave to appeal against any judgment, decree, or order passed or made by any court or tribunal in the country, including the High Courts, subject to certain limitations and conditions. Under Article 142, the Supreme Court is provided with discretionary powers and it draws sweeping authority to exercise executive and legislative responsibilities in order to do “complete justice in any cause or matter pending before it.”⁸

⁷ M. Hidayatullah, *Constitutional Law of India 2* (Arnold-Heinemann, New Delhi).

⁸ *Ibid.*

DEVELOPMENT OF JUDICIAL ACTIVISM IN INDIA

In *A.K. Gopalan v. State of Madras*, Article 21 was given a narrow interpretation by the Apex Court. The verdict, in this case, was pronounced by a six-member constitutional bench of the Supreme Court, with a majority of six judges in favour and five against it. The dissenting opinion was given by Justice Fazl Ali. Barrister M.K. Nambiar, in this case, advocated for a conjoined reading of Articles 19 and 21, arguing that “a common thread” ran through all the liberties enshrined in Part III. The court while rejecting all the contentions, held that personal liberty means freedom of the physical body only and nothing else. The court gave a restrictive meaning of Article 21 of the Constitution on the basis of “mutual exclusivity of Fundamental rights.”⁹

Later, in *Rustom Cavasjee Cooper v. Union of India* (1970), the “theory of mutual exclusivity” got rejected which was in use for 20 years prior to this case right from the time of A.K. Gopalan. The Court ruled that it cannot dismiss a petition that unequivocally demonstrates that people’s fundamental rights are being infringed based only on technicalities. The Court also established the “Effect” test and abolished the “Object” test. The case of *Maneka Gandhi v. Union of India* saw a seven-member bench of the Supreme Court overturning the earlier verdict of the A.K. Gopalan case, which had been delivered by a five-judge bench. The ruling in the Maneka Gandhi case also introduced the concept of the due process clause in the Indian Constitution. Overruling the Gopalan case, it was held as follows: “... The expression “personal liberty” in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19....”

The Supreme Court therefore, in the Maneka Gandhi case, endorsed the due process clause which had been previously dismissed in the Gopalan case. Additionally, it was ruled that fundamental rights are interconnected and cannot be interpreted in isolation from each other.¹⁰ They should be interpreted as a unified whole. Consequently, Article 21 must be interpreted in conjunction with Articles 14 and 19. Additionally, it was held that “procedure established by law” must be “fair, just and reasonable” and it should not be “fanciful, oppressive and arbitrary.”

⁹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 477.

¹⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 248.

THE DOCTRINE OF BASIC STRUCTURE

Judicial activism in India evolved from a rigid interpretation of fundamental rights in *A.K. Gopalan v. State of Madras* (1950) to a more expansive and rights-based approach in *Maneka Gandhi v. Union of India* (1978), where the Supreme Court held that Articles 14, 19, and 21 must be read together. This marked a shift from procedural to substantive due process and emphasized fairness in law.

The doctrine of basic structure, established in *Kesavananda Bharati v. State of Kerala* (1973), limited Parliament's power to amend the Constitution, reinforcing the judiciary's role as its guardian. The Emergency period (1975–77) saw serious violations of judicial independence, including the 39th Constitutional Amendment, prompting judicial pushback in *Indira Gandhi v. Raj Narain* and subsequent activism rooted in constitutional protection.

Post-Emergency, cases like *Minerva Mills*, *S.R. Bommai*, and *State of Rajasthan* reaffirmed limits on executive power and preserved constitutional federalism. In *Kihoto Hollohan*, the Court subjected the Speaker's powers to judicial review, and in *S.P. Gupta*, emphasized dynamic interpretation of laws in line with justice and social values. Together, these developments illustrate how judicial activism in India has grown to protect constitutional morality, democratic values, and the rule of law.

IMPLICATIONS OF JUDICIAL ACTIVISM

According to G. Austin, the Supreme Court of India has to safeguard the rights and future of The Indian minorities of socio-economic and religious clothing. "The Indian judiciary is considered to be the defender of The Indian democracy and the holy grail of the land which is the Indian Constitution." Judicial activism has significantly expanded the role of the Indian judiciary by empowering it to use its authority to promote social and economic equality through the enforcement of the directive principles of state policy outlined in Part IV of the Indian Constitution.¹¹

CONCEPT OF PUBLIC INTEREST LITIGATION

Public Interest Litigation (PIL), also known as social interest litigation, has significantly advanced judicial activism in India by enabling the protection of constitutional rights for

¹¹ *Ibid.*

marginalized groups. Unlike traditional litigation, PIL allows any concerned individual to file a case on behalf of those unable to access the courts due to social or economic barriers. Introduced by Justice P.N. Bhagwati, this expanded the concept of *locus standi*.

Notable early PILs include *Hussainara Khatoon v. State of Bihar*, which led to the release of thousands of undertrial prisoners, and *Bandhua Mukti Morcha v. Union of India*, which addressed child labour. In *Vishakha v. State of Rajasthan*, the Supreme Court issued guidelines on sexual harassment at the workplace, while *D.K. Basu v. State of West Bengal* laid down safeguards against custodial violence.

Though PIL has been a powerful tool for social justice, concerns about its misuse have led to calls for regulation. Former Attorney General Soli Sorabjee proposed measures such as rejecting frivolous PILs, penalizing delays, and requiring compensation if a PIL is ultimately dismissed.

ACTIVISM AND HUMAN RIGHTS

Human rights are fundamental to all individuals, encompassing not only physical needs but also the conditions necessary for intellectual, moral, and spiritual development. These rights reflect core values such as justice, equality, and dignity, particularly for vulnerable and marginalized groups. Activism and judicial intervention play a vital role in upholding these rights. The Indian Constitution empowers the Supreme Court and High Courts under Articles 32 and 226 to enforce fundamental rights through writs like habeas corpus, mandamus, and certiorari. This judicial authority ensures quick redress for rights violations.

However, in *ADM Jabalpur v. Shivakant Shukla*, the majority upheld the suspension of fundamental rights during an emergency, a decision widely criticized, with Justice H.R. Khanna's dissent affirming that life and liberty cannot be denied without due process. The landmark case *Maneka Gandhi v. Union of India* broadened the scope of Article 21 to include the right to live with dignity, setting the foundation for later decisions like *Francis Coralie Mullin* and *PUCL v. State of Maharashtra*.

In *PUCL v. Union of India*, the Court gave Article 23 a wide interpretation to cover forced labour, including cases where economic compulsion forced workers to accept wages below the legal minimum. In *Sheela Barse v. State of Maharashtra*, legal aid and protection for detained

women were mandated under Articles 14, 19, and 39A. In *Shayara Bano v. Union of India*, the Supreme Court, by majority, declared instant triple talaq unconstitutional, reinforcing the principle of gender justice under Articles 14 and 13(1).

WOMEN EMPOWERMENT AND SUPREME COURT

Chief Justice N.V. Ramana highlighted the essential role of women in building a progressive nation, stressing their importance as key stakeholders in society. The Indian Constitution promotes gender equality through provisions for affirmative action and protection against discrimination. Alongside legislative efforts, the judiciary has played a vital role in interpreting constitutional guarantees to empower women.

In *Air India v. Nargesh Meerza* (1981), the Supreme Court struck down discriminatory employment conditions related to retirement and pregnancy. In *Laxmi v. Union of India* (2014), the Court recognized acid attacks as a separate offense, restricted acid sales, and ensured compensation for victims. *Babita Puniya's case* (2020) secured equal opportunities for women in the armed forces by granting permanent commission rights.

In *Rekha Sengar v. State of Madhya Pradesh* (2021), the Court condemned female foeticide and upheld strong measures against prenatal sex determination. In *Vineeta Sharma v. Rakesh Sharma* (2020), it upheld daughters' equal rights in Hindu Undivided Family property. The *Sabarimala* judgment (2019) affirmed women's right to religious freedom by allowing their entry into the temple and invalidating discriminatory practices.

Collectively, these rulings showcase the judiciary's proactive stance in safeguarding women's rights and promoting equality in India.

PROTECTION OF ENVIRONMENT

Environmental protection in India has gained constitutional importance, reflected in Articles 47, 48, 48A, and 51A(g), following India's participation in the 1972 Stockholm Declaration. Parliament has enacted key environmental laws such as the Environment (Protection) Act, 1986, and the Water and Air Acts.

The Supreme Court has played a pivotal role in environmental jurisprudence. In *Subhash*

Kumar v. State of Bihar, it recognized the right to a healthy environment under Article 21. In *M.C. Mehta v. Union of India* (Taj Mahal Case), it ordered industries near the monument to switch to cleaner fuels. In *Vellore Citizens Welfare Forum*, the Court imposed penalties on polluting tanneries and promoted the idea of Green Benches.

Other major rulings include directives for Ganga River cleanup and vehicular pollution control, advocating cleaner fuels. The judiciary also relaxed *locus standi* to allow PILs in environmental matters, advancing principles like the Precautionary Principle and Polluter Pays Principle.

RECENT CASES ON JUDICIAL ACTIVISM

The Indian judiciary has taken a very assertive role in providing justice to the general populace, ensuring that India develops into a thriving democratic nation. This includes creating the “basic structure” doctrine, bringing constitutional amendments under the scrutiny of the courts, and expanding the scope of the right to life and liberty by reading into it the non-justiciable directive principles of state policy such as the duty to promote education and the duty to preserve the environment.⁴⁸The judiciary has acquired considerable traction in recent years.

SUO MOTU CASES

In April 2021, the Supreme Court of India, consisting of a three-judge bench comprising Dr. DY Chandrachud, L. Nageswara Rao, and S. Ravindra Bhat, JJ., initiated a suo motu case titled “Re: Distribution of Essential Supplies and Services During Pandemic” in response to the grim situation in the country during the second wave of the COVID-19 pandemic. The Court observed that it cannot remain a silent spectator during a national crisis and took note of the shortage of COVID-19 essentials. The Court emphasized that it was arbitrary and unreasonable for individuals between the ages of 18 and 44 to bear the cost of vaccination when it is provided by State/UT Governments and private institutions.

In another suo motu case titled “Delay in Release of Convicts After Grant of Bail,” the Supreme Court addressed the issue of inmates’ delayed release after being granted bail. This case was initiated in response to a news report that prisoners in the Agra Central Jail were not being released even three days after being granted bail by the court.

RECOGNISING NEW FUNDAMENTAL RIGHTS

In the case of *Budhadev Karmaskar v. State of West Bengal*, a bench of Justices, including L. Nageswara Rao, B.R. Gavai, and A.S. Bopanna, emphasized that every individual in India, regardless of their profession, has the right to a dignified life under Article 21 of the Constitution. The Supreme Court, in this landmark decision, recognized consenting sex workers as entitled to dignity and equal protection under the law, acknowledging sex work as a legitimate “profession.” Additionally, the Court invoked its inherent authority granted by Article 142 of the Constitution to issue directives for the rehabilitation of sex workers and ordered the Unique Identification Authority of India (UIDAI) to provide Aadhaar Cards to sex workers based on a proforma certificate.

In the case of *Anuradha Bhasin v. Union of India*, the Supreme Court declared that the freedom of speech and expression on the Internet, as well as the freedom to engage in any profession, employment, trade, or business, is a constitutionally protected right. The Court further held that the continuous imposition of internet restrictions through orders issued under Section 144 of the Criminal Procedure Code amounted to an abuse of authority and was not permissible. This decision was made in response to a case challenging the internet blackout in Kashmir.

UPHOLDING THE RIGHTS OF WOMEN

In the case of *Aishat Sifha v. State of Karnataka* (2022), commonly known as the Hijab Ban case, a bench of Justices Hemant Gupta and Sudhanshu Dhulia delivered a verdict with each justice providing a different opinion. Justice Sudhanshu Dhulia stated that the High Court had taken a wrong approach in the matter. He emphasized that the issue ultimately comes down to a matter of choice and is protected by Article 19(1)(a) and 25(1) of the Constitution. Whether to refer the case to a 3-judge bench or a 9-judge bench is now pending the decision of the Chief Justice of India.

In the case of *State of Jharkhand v. Shailendra Kumar Rai*, it was established that the “two-finger test” lacks any scientific basis and instead re-victimizes and re-traumatizes women. The Court strongly emphasized that this test should not be conducted. It was based on an erroneous assumption that a sexually active woman cannot be raped, which is far from the truth. The Court condemned the patriarchal and sexist notion that a woman’s claim of rape should be disbelieved solely because of her sexual activity.

JUDICIAL OVERREACH IN INDIA

The efforts of the Indian judiciary during challenging times are commendable, as it played a crucial role in safeguarding the country from a severe emergency situation. The Indira Gandhi administration, during and before the Emergency, attempted to undermine and manipulate the Constitution, including using a compliant parliament for such purposes. In such critical situations, people view a strong and independent judiciary as a necessary check against an authoritarian government.

While the Indian judiciary is often criticized for judicial overreach, there are instances that indicate its assertiveness. Even within the legal system, supporters of the positivist conception of law and politicians have raised concerns about this issue. Some critics argue that the judiciary's active approach poses a risk to the principle of the separation of powers, which is fundamental to the constitution.

In his book, "Nature of the Judicial Process," Justice Cardozo of the U.S. Supreme Court emphasized that a judge should not act as an independent idealist. However, in recent years, the Indian Supreme Court has leaned towards the sociological school of law rather than the positivist school. This shift has raised concerns about the increased use of judicial activism over judicial restraint.

Several instances of judicial overreach have garnered attention, including:

- The 2018 judgment in *Shyam Narayan Chouksey v. Union of India*, where the court ruled that the national anthem should be played in movie halls.
- The censorship of the movie "Jolly LLB II," where a writ petition claimed that the film mocked the legal system and constituted contempt, leading to the formation of a redundant committee. This was seen as infringing upon freedom of speech and expression.
- In *Rajiv Sharma v. The State of West Bengal* (2019), the Supreme Court required the defendant to apologize for posting a meme in a bail ruling, stating that when speech violates the rights of others, it is no longer protected by Article 19(1)(a) of the Indian Constitution.
- In the case of *State of Tamil Nadu v. K. Balu & others*, a public interest litigation led to the Supreme Court prohibiting the sale of alcohol near highways, which led to financial

losses and job cuts for state governments. This decision was viewed as an overreach since it involved an administrative issue that required executive intervention.

JUDICIAL ACTIVISM V. JUDICIAL OVER REACH

The distinction between judicial activism and judicial overreach can be challenging to draw, as it often depends on one's perspective. Former Chief Justice of India, Justice Ahmadi, pointed out that judicial activism can sometimes cross the line into populism and excessivism. Activism may turn into populism when it exceeds the judiciary's capacity to implement its doctrines, and it becomes excessive when the court takes on roles typically performed by other branches of government.

Whether an action is seen as activism or overreach can vary from one judge to another, and it may depend on whether someone agrees or disagrees with a particular judgment. While strict guidelines for distinguishing the two are hard to establish, our Constitution contains provisions like Article 32, Article 226, and Article 227 that empower the judiciary to play a significant role. The Constitution has entrusted the higher judiciary with the responsibility of judicial governance.

Judicial activism can be justified due to the judiciary's non-elective nature, which allows it to address counter-majoritarian issues. The judiciary is the enforcement institution because it has the greatest institutional capacity to impartially enforce legal norms. The executive and legislature, driven by the desire for re-election, may sometimes disregard constitutional limits to please the electorate.

According to former Chief Justice of India, Justice R.C. Lahoti, the legitimacy of legislation is not solely based on whether it was enacted by elected representatives but on whether it aligns with the general will or the common good. Judicial lawmaking is justified for several reasons, such as the natural ability of judges to engage in rational dialectic. Judicial decisions are heavily reliant on reasoning, and judicial lawmaking can encourage the legislature to act, possibly leading to more comprehensive and proper legislation. Additionally, the judiciary's non-elected status prevents it from catering to vote banks. Moreover, there is a constitutional obligation for judges in India to play an active role in lawmaking.¹²

¹² *M. Nagraj v. Union of India*, AIR 2007 SC 71.

In a modern democratic setup, judicial activism serves as an agency to restrain legislative and executive actions that exceed constitutional limits. Judicial activism can be either negative or affirmative. A negative approach involves the judiciary evaluating legislative and executive actions for their constitutionality, declaring them as *intra vires* or *ultra vires* based on constitutional conformity. In contrast, an affirmative approach occurs when the judiciary interprets the constitution in a way that reflects constitutional values and principles beyond a literal interpretation.

TRENDS OF JUDICIAL RESTRAINT

The concept of Judicial activism is thus the polar opposite of Judicial restraint. The principle of judicial restraint can be seen in various cases, such as the *State of Rajasthan v Union of India*, in which the court declined to hear a petition because it pertained to a political matter outside its jurisdiction. Similarly, in *S.R. Bommai v Union of India*, the judges acknowledged that there are instances where political considerations take precedence and judicial review is not feasible.

ISSUES AND CONCERNS

The following are the main issues or areas of concern with an activist Judiciary-

- Where the Judiciary interferes with the functions clearly of administrative or legislative nature, in such cases, is the Judiciary responsible /accountable to anyone for the discharge of such functions and what are constitutional and legal sanctions behind such orders made and directions given by courts, by way of Judicial Activism?
- The dilution of the theory of Separation of Powers is inadvertent when there is an activist Judiciary. The critics believe that it goes against the Constitution.
- Judicial Activism could be used by the current day political establishments to get their interests protected. And thus, there could be misuse of the Judicial Process.

ACCOUNTABILITY OF JUDICIARY

Critics of judicial activism raise concerns about the effectiveness of laws made by judges, as they argue that judicially created laws may lack the means for implementation. The legislature, as the primary law-making body, has the mechanisms to enact and enforce laws, while the judiciary does not have the executive power for implementation. This situation can lead to a gap between the legal principles articulated in court judgments and their actual enforcement,

raising questions about the judiciary's capacity to execute its own laws effectively.¹³

S.P. Sathe distinguishes between judicial lawmaking in the "Realist Sense" and the "Non-Realist Sense." In the realist sense, judicial lawmaking involves expanding the meanings of constitutional terms like personal liberty or freedom of speech and expression. An example would be when the court ruled that commercial speech (advertisements) is protected under freedom of speech and expression. However, when the court goes beyond interpreting the Constitution and lays down specific guidelines for areas like inter-country adoption, preventing sexual harassment at workplaces, or the abolition of child labour, it may be considered judicial excessivism. These situations involve the judiciary functioning more like a legislature, creating laws beyond interpreting the Constitution.¹⁴

The challenge arises when the legislature does not take action to codify these judicially created laws into actual legislation. Courts lack the resources, competence, and authority to perform legislative functions, as they belong to the other coordinate branches of government. This gap between pronouncing legal principles and enacting effective laws can create difficulties in the implementation of court-mandated rules and guidelines.

The discussion ultimately raises questions about the applicable laws and principles guiding the judiciary when deciding matters typically within the purview of other state organs. It also highlights the need for an enforcement mechanism and procedures defined by the constitution or law to ensure the implementation of court orders. When courts create numerous rights without effective means for enforcement, it can undermine the credibility of the judiciary and render the entire process of lawmaking ineffective.¹⁵

SEPARATION OF POWERS

The doctrine of Separation of Powers, as articulated by Montesquieu, is a foundational feature of the Indian Constitution. Critics of judicial activism argue that it blurs this separation, potentially leading to judicial overreach. Judicial actions can range from minimal interpretation to creative reinterpretation and oversight of the executive and legislature, with the line between permissible activism and overreach becoming increasingly unclear. While excessive judicial

¹³ Arvind P. Datar, *Commentary on The Constitution of India*, (Wadhwa and Co., Nagpur, 2nd edn., 2007).

¹⁴ P.P. Rao, "right to equality and the reservation policy" 42 *journal of the Indian law institute* 194 (2000).

¹⁵ *Ibid.*

intervention may seem to encroach upon legislative or executive domains, such actions often arise when these branches fail to act. The Constitution allows for some institutional overlap and grants the judiciary powers like judicial review and Article 142 to do complete justice. In this context, judicial interventions, especially in areas lacking legislation, function more as gap-fillers than as violations of the separation of powers. Thus, judicial activism, when responsive to constitutional mandates and public needs, does not necessarily contradict the Constitution.¹⁶

INFLUENCE BY POLITICAL ESTABLISHMENTS

A judicial decision can either criticize or legitimize a legislative or executive action. Benjamin Cardozo emphasized the importance of the judiciary's role, stating that its primary value lies not only in cases where the legislature exceeds its limits but also in vocalizing and preserving ideals that might otherwise remain unheard. The judiciary offers continuity and guidance within the established boundaries.

Cardozo's perspective highlights the transformative power of the judiciary. While a judicial decision should not be politically motivated or inclined, the nature of judicial activism inherently carries political implications. Through its decisions, the constitutional court becomes a significant power centre in a democracy. Thus, a politicized judicial decision can undermine democracy, and a judiciary influenced by the current political establishment can jeopardize justice.

The Court ruled that the Bombay Rent Control Act of 1947, which froze rents at 1947 levels, unreasonably restricted the right to carry on any trade or business, guaranteed by Article 19(1)(g) of the Constitution. The Court advised the government not to extend the law and recommended enacting a new law that would provide landlords with adequate returns. This decision raised several significant issues:

- It was a matter of policy that should have been determined by the legislature.
- The issue fell under the jurisdiction of the legislature, and the legislative body chose to resolve it through the judicial process.

¹⁶ Ashok KM, *Basic Structure Not Violated: Supreme Court Upholds Application of EWS Quota to Private Unaided Educational Institutions*, available at: <https://www.livelaw.in/top-stories/supreme-court-ews-quota-private-educational-institution-janhit-abhiyan-vs-union-of-india-2022-livelaw-sc-922-213522>. (last visited on 3rs November 2023).

- The Court's decision appeared to serve the interests of the political establishment of that time.

The example illustrates how, if the judiciary does not exercise self-restraint, it can become a tool manipulated by the legislature. While the Court seemingly directed the legislature in the case mentioned, a deeper analysis reveals that the legislature used the judicial process to resolve the matter in its favour.

CONCLUSION

Throughout the history of the nation, it is evident that judicial activism has been a significant force in addressing social issues such as prison reform, environmental concerns, and individual liberties. Although the judiciary has an important role to play in addressing social issues, it is crucial that it recognizes its own limitations. Like other branches of government, the judiciary should not overstep its bounds by attempting to take on the responsibilities of the legislative and executive branches. While the judiciary can certainly intervene in extreme cases, such actions may upset the delicate balance of power outlined in the Indian Constitution. Rather than interfering in the domains of other branches, the judiciary can instead encourage the proper functioning of these branches.

The Doctrine of Separation of Powers underlies the major concerns discussed earlier. These concerns stem from the balance and boundaries between the judiciary, legislature, and executive. The framers of the Constitution deliberately allowed for some flexibility and interaction among these branches, recognizing that a strict separation might hinder governance. While the legislature can exercise judicial power in certain disputes, and the executive can take on an adjudicatory role and make laws through subordinate legislation or ordinances, it is the judiciary, through Article 142, that has been granted substantial powers to pass orders in the interest of justice.

This trust in the judiciary comes with the responsibility to exercise these powers responsibly. Judicial legitimacy is derived from the public's trust, and maintaining this trust is vital. Critics and media play a role in scrutinizing judicial decisions to ensure accountability. Justice Y.K. Sabharwal emphasized that when the judiciary declares that the executive and legislature have exceeded their limits, it acts on behalf of the people of India to whom these branches are accountable. While the separation of powers is a fundamental feature of the Constitution, judicial activism serves as a safety valve in a democracy. However, certain concerns must be

addressed to prevent the judiciary from overstepping its role.

In cases where the judiciary needs to decide in favour of the political establishment, self-restraint is the most effective mechanism. Ultimately, the judiciary holds the solution to the issue of “over-reach”, and self-restraint is the best way to maintain a check on its actions. To conclude, judicial activism has played a crucial role in India’s democratic experiment, adding vitality and ensuring the balance of power between the three branches of government.

