



Judicial Activism vis-à-vis Judicial Overreach¹

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Abstract

The Constitution of India has envisaged three different organs assigning them with their respective roles. It is true that due to change in the society the role of Judiciary has marked significant change from performing its traditional function to a more participatory role thereby catering the needs of the society. The paper attempts to analyse various basic principles which outlines the Indian Constitution i.e. Rule of Law and Separation of Power and the impact of the newly assumed creative role of the Judiciary on these principles. Further, the paper also analyses the impact of the Judicial Activism. And whether Judicial Activism has turned into Judicial Overreach?

INTRODUCTION

“Have we not lived enough to know that two men may honestly differ about a question, but both be right? In this paradox lies the secret of judicial process. There are areas where the judges must be activists and there are areas where they must be passivists. In which areas they should be activist, and in which areas they should be passivist, can be gathered from the knowledge we get by experience.” Abraham Lincoln

The Framers of the Indian Constitution envisaged three vital organs of the State i.e. The Legislature, The Executive and The Judiciary. The Legislature consists at the Centre, of the President and two Houses to be known respectively as the Council of States (*Rajya Sabha*) and the House of the People (*Lok Sabha*)². Parliament embodies the will of the people and in turn is answerable to the people. In the states, the Legislature comprises of the Governor, the Legislative Assemblies known as *Vidhan Sabhas* and in some states includes the Legislative Councils, (*Vidhan Parishads*). It is the prerogative of the Legislature to legislative and of the executive to implement the laws thus made. The executive consists of the President and his council of ministers (Cabinet) headed by the Prime Minister at the Centre, and the Governor and

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² Art 79

his council of ministers headed by the Chief Minister in the States. The President is the Constitutional head and holds a ceremonial position, and he is to act and exercise his powers solely on the aid and advice of the council of ministers.³ The advice of council of ministers is binding on the president. The council of ministers exercises all its functions in the name of the President. The third organ i.e. the Judiciary has been entrusted with the function of adjudication of the disputes. The Indian judiciary consists of the Supreme Court having its seat at Delhi⁴, the High Courts of the respective states and the subordinate judiciary. The Supreme Court is a court of record and every Court in India is subordinate to it. It exercises its powers in its original jurisdiction as power to issue various kinds of writs and over disputes between the centre and states or amongst various states, vide Articles 32 and 131. The Supreme Court is the custodian of the fundamental rights enumerated in Part III of the Constitution. Its powers are so vast in the sphere of interpretation of the Constitution and other laws, and of judicial review that in the words of *Krishna Iyer, J.*, “We (the Supreme Court) can fly upto the moon to follow injustice”.

RULE OF LAW

The concept of Rule of Law is of old origin. Sir Edward Coke is said to be the originator of this concept, when he said “King must be under God and Law” thus, vindicated the supremacy of law over the pretensions of the Executives.⁵ The concept of Rule of Law has been developed by A.V. Dicey in the course of his lectures at Oxford University in his book “The Law of the Constitution” published in 1885. According to him “whenever there is discretion there is room for arbitrariness.”⁶

Thus, according to the Doctrine of Rule of Law it is the Law which is supreme and nobody is above law. Analysing this doctrine in the light of present evolving concept of Judicial Activism can we say that Judiciary is making an attempt to rise above the law in the grasp of doing *Social Welfare* and *acting as guardian of Fundamental Rights*?

SEPARATION OF POWER

Montesquie, a French Scholar found that concentration of power in one group or person would result in tyranny. And therefore he felt the necessity of decentralizing the powers among three different organs of the state i.e. The Legislature, The Executive and The Judiciary. Each functioning independently within its own sphere.

Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity yet the Constitution makers have meticulously defined the functions of various organs of

³ Art 74

⁴ Art 130

⁵ Judicial Activism and enforcement of Socio- Economic Rights- The Indian Experience by C.J. Balakrishnan

⁶ Dicey: LAW OF THE CONSTITUTION, 8th Edn. P. 198

the state. The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*⁷, speaking through *Mukherjea, C.J.* has held that “the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.” Thus, the Legislature, Executive and judiciary have to function within their own spheres demarcated under the Constitution and no organ can assume a function assigned to another. The framers of the Constitution have reposed ultimate trust in each organ to perform its functions as per the duties and powers conferred upon it by the Constitution.

Now when the Judiciary performs the functions of other organs of the state in the form of issuing directions to impose patriotism as in the *National Anthem Case*⁸ or issuing directives as to banning sale of liquor at retail outlets, as also in hotels, restaurants, and bars, that are within 500m of any national or state highway can we say that it is encroaching the ambit of other organs and thereby violating the doctrine of Separation of Power?

JUDICIAL ACTIVISM

Judicial Review is a process wherein the judiciary reviews the actions or decisions made by a public body. Judicial Review does not involve the court in deciding whether the public body has made the “correct” or “right” decision, but whether the correct legal basis has been used in reaching the decision.⁹ The Power of Judicial Review gave birth to Judicial Activism in India.¹⁰

As an ideology of the judicial process, ‘judicial activism’ implies the “use of the court as an apparatus for intervention over the decisions of policymakers through precedent in case law.”¹¹ In doing so, the Court often creates law and seeks to play a greater part in the governance of a country through “allowing their personal views about public policy”¹² to aid them in their decisions. The role of judges in such cases goes beyond the conventional “interpretative” job that has been relegated to them, and shifts to a model by which judges make law, infringing on the Separation of Powers doctrine, which structures the bedrock of the Indian constitutional system.

Since its inception, Judicial Activism has been the subject matter of controversy. Some claim that in the grasp of being the Custodian of Fundamental Rights the Judiciary encroaches within the domain of other organs and as a result delays its own primary role of adjudication of disputes leading to increase in the

⁷ AIR 1955 SC 549

⁸ *Shyam Narayan Chouksey v. Union of India* WP No. 855 of 2016

⁹ The Public Law Project

¹⁰ Article : Judicial Activism and Democracy by Anil Diwan

¹¹ Nicholas Katers, *Judicial Activism and Restraint: The role of the Supreme Court*. Available online at http://www.associatedcontent.com/article/21725/judicial_activism_and_restraint_the.html

¹² JUDICIAL ACTIVISM, Black’s Law Dictionary,

number of pendency of cases while on the other hand its supporters argue that due to legislative and executive underreach they have to step in and pass the directions needed to uphold the principles of justice and welfare of its people.

Though, the experience shows that Judicial Activism has done more good to the society. In following the philosophy of Judicial Activism the Supreme Court has played assertive and powerful role starting from development of a new non-adversarial form of “ Public Interest Litigation” in 1980’s to expansion of constitutional right to information Post -2000 and expansion of Article of 21 to include Right to Free Environment, Health, Education to Basic Structure Theory and the Creamy Layer Concept.

Its creative role in giving meaning to Article 21 and expanding its ambit to include plethora of rights is worth mentioning.

Article 21 states: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

In *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 the Indian Supreme Court rejected the argument that to deprive a person of his life or liberty not only the procedure prescribed by law for doing so must be followed but also that such procedure must be fair, reasonable and just. To hold otherwise would be to introduce the due process clause in Article 21 which had been deliberately omitted when the Indian Constitution was being framed.

However, subsequently in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 this requirement of substantive due process was introduced into Article 21 by judicial interpretation. Thus, the due process clause, which was consciously and deliberately avoided by the Constitution makers, was introduced by judicial activism of the Indian Supreme Court.

Another great arena of judicial activism was begun by the Indian Supreme Court when it interpreted the word ‘life’ in Article 21 to mean not mere survival but a life of dignity as a human being.

Thus the Supreme Court in *Francis Coralie vs. Union Territory of Delhi*¹³ held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The Court held that:

“... the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and comingling with fellow human beings.”

¹³ AIR 1978 SC 597

The 'right to privacy' which is a new right was read into Article 21 in *R. Rajagopal Vs. State of Tamil Nadu*.¹⁴ The Court held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education, among other matters.

The Supreme Court also ruled that the right to life guaranteed under Article 21 includes the right to livelihood as well.¹⁵ The right to food as a part of right to life was also recognised in *Kapila Hingorani Vs. Union of India*¹⁶ whereby it was clearly stated that it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food. The Court has also held that the right to safe drinking water is one of the Fundamental Rights that flow from the right to life.¹⁷ Right to a fair trial,¹⁸ right to health and medical care,¹⁹ protection of tanks, ponds, forests etc which give a quality life,²⁰ right to Family Pension,²¹ right to legal aid and counsel.²²

Apart from giving creative interpretation to Article 21 and including within it plethora of rights, the Supreme Court has also evolved landmark principles and issued various important directions in the areas where there was absence of legislation. Some of these are :

- Rule of Absolute Liability

In *M.C. Mehta v UOI*²³, the Hon'ble Supreme Court introduced the doctrine of Absolute Liability. The Court directed the Company manufacturing hazardous and lethal chemicals and gases posing danger to life and health of workman and people living in neighbourhood, to take all necessary measures and to pay compensation to the victims of oleum gas.

- Sexual Harrasment at Workplaces

In *Vishaka v State of Rajasthan*²⁴, the Supreme Court has laid down exhaustive guidelines to prevent Sexual Harasment of working women at places of their work until a legislation is enacted for that purpose. The Court it is the duty of the employer or other responsible person at workplaces or other institutions, whether private or public, to prevent sexual harassment of working women.

¹⁴ (1994) 6 SCC 632

¹⁵ *Olga Tellis Vs. Bombay Municipal Corporation*; AIR 1986 SC 180

¹⁶ (2003) 6 SCC 1

¹⁷ *A. P. Pollution Control Boards Vs. Prof. MV Nayudu*; AIR 1999 SC 822

¹⁸ *Police Commissioner, Delhi Vs. Registrar, Delhi High Court*, AIR 1999 SC 95

¹⁹ *Consumer Education and Research Vs. Union of India*, AIR 1995 SC 922

²⁰ *Hich Lal Tiwari Vs. Kamla Devi and Others*, (2001) 6 SCC 496

²¹ *S. K. Mastan Bee Vs. GM South Central Railway*, (2003) 1 SCC 184

²² *M. H. Hoskot Vs. State of Maharashtra*, AIR 1978 SC 1548

²³ (1986)2 SCC 176

²⁴ AIR 1997 SC 3011

- Right to Information

In *S.P. Gupta v UOI*²⁵, Justice Bhagwati stated that the concept of an Open Government is direct emanation from Right to Speech and Expression guaranteed under Article 19(1)(a). Therefore disclosure of the information in regard to functioning of the Government must be the rule and secrecy as exception justified only when the strictest requirement of public interest so demands.

IS IT JUDICIAL OVER ACTIVISM?

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 Singh²⁶

In other words, the PM had all but accused the SC of judicial over-reach and taking over executive or legislative functions. There are several high-profile instances where courts had arguably crossed the line.

Of late the Indian judiciary appears to have become overactive, and is often accused of judicial overreach. There are various instances wherein the Judiciary is said to over-stepped its powers.

Some of the instances of Judicial Overreach are :

- Imposition of Patriotism in National Anthem Case.

The Supreme Court on December 2016, passed its judgment in the case of *Shyam Narayan Chouksey v. Union of India*, which makes it mandatory, that:

1. All the cinema halls in India shall play the National Anthem before the feature film starts.
2. All present in the hall are obliged to stand up to show respect to the National Anthem.
3. The entry and exit doors shall remain closed prior to the National Anthem is played or sung in the cinema hall so that no one can create any kind of disturbance.
4. The doors can be opened after the National Anthem is played or sung.
5. The National Flag should be displayed on the screen while the National Anthem is played in the hall.

²⁵ SCC Supp. (1981)87 p. 275

²⁶ Speaking at the Conference of Chief Ministers and Chief Justices held in New Delhi in Apr 08, 2007.

A case of Judicial Overreach

1. **Neglected the Bijoe Emmanuel Case** – The court in the order have not referred to the landmark judgment in Bijoe Emmanuel case. In this case, three children were expelled from the school in Kerala for not singing the National anthem because their religion did not permit them to join any rituals except in their prayers to Jehovah. The court had ruled that there is no legal provision that obliges anyone to sing the anthem and ordered the school to take back three children it had expelled. The court has ignored the situations where the people may not be able to stand up for physical reasons, intellectual or religious reasons because they may consciously believe that their religious beliefs, prevent them from standing up.
2. **Ignored the Uphaar Tragedy Case** – In ruling that entry and exit doors be closed while playing the National Anthem, the Supreme Court ignores its own earlier judgment in the Uphaar tragedy case where the court had held that under no circumstances should the doors in a cinema be shut from the outside.
3. **Implementation Issues** – This order will face implementation issues as who will count how many people are standing and how many are sitting while the anthem is playing? Who will see if one can't stand up due to physical problems or some other reasons? And then, what if there is an emergency? What if somebody urgently needs to go to the washroom?
4. **Goes beyond the Prevention of Insults to National Honour Act, 1971** – The direction goes beyond the Prevention of Insults to National Honour Act, 1971, which says that no film, drama or show of any sort can have the National Anthem as part of the show.
 - Proactive Censorship in case of Jolly LLB 2

In this case after the certification of the movie Jolly LLB 2 by the Central Board for Film Certification (CBFC), a petition was filed claiming that the film was in violation of Section 5B of the Cinematograph Act, 1952, which deals with the prevention of the certification of films that involve defamation or contempt of court. The Bombay High Court admitted the petition and appointed a committee to report. The Court also gives Committee the power to suggest the changes. After the recommendations by the committee, the Court ordered to cut four scenes from the movie and also directed the CBFC to re-certify the film. The reasoning given by the Court was that this was defamatory to the lawyer's profession.

A case of Judicial Overreach

1. **Unnecessary Interference** – The Cinematograph Act, 1952 which deals with the provisions relating to the certification of films and makes it very clear that only the Board of Film Certification has the power to censor movies and suggests the cuts with an appeal lying to an Appellate Tribunal and under the Act, the Government also has revisional powers. Under the Cinematograph Act, the Courts have no power to certify, modify, or refuse certification of films.

2. **Violation of Article 19(2)** – The order of the court is seen as a restriction on freedom of speech and expression as provided under Article 19(2) of the Constitution. And as it also states that only a law can impose reasonable restrictions. It is pertinent to note that an order of a court does not come under the law for the purposes of Part III of the Constitution which defines fundamental rights. Thus, it can be said that the Bombay High Court’s order mandating excisions in Jolly LLB2 was passed without any authority.
3. **The committee was Illegal** – The Bombay High Court’s decision to set up a committee was not legal and without jurisdiction. The finding of contempt on the basis of trailer goes against a range of Supreme Court judgments that make it clear that films have to be seen as a whole. In fact, this was the exact reason that the Delhi High Court dismissed the PIL against Jolly LLB 1. The Committee acts as an entirely fresh censor board, and thus reduces the statutory Board itself to a nullity.
4. **Contradicting order against the Delhi High Court Judgement** – In 2013 also Jolly LLB 1, ran into legal trouble. A PIL was initiated in the Delhi High Court, asking the Court to direct the Film Certification Board to cancel the license. The Court, in this case, dismissed the PIL, as they find nothing of “public interest” in it, and also said that it would be premature as it had been filed purely on the basis of trailers. A further appeal to the Supreme Court was also dismissed with Justice Lodha memorably remarking, “if you don’t like it, don’t watch it.”

- Liquor Ban

In the Supreme Court, ruling on a PIL which was about road safety, has banned the sale of liquor at retail outlets, as also in hotels, restaurants, and bars, that are within 500m of any national or state highway.

A case of Judicial Overreach

1. **Unnecessary Interference** – The directive principles of state policy are policy issues which should be left to the government to decide. It is not the court’s job to force the government to implement them. These orders are felt to be against the spirit of separation of powers given by our constitution. It was an administrative matter where the decision rests with state governments. The court was not the appropriate authority for such decisions.
2. **Not a fit case to use Article 142** – This was certainly not a fit case to invoke the extraordinary powers of the court using Article 142, which talks about “the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it...” In the absence of any similar notification by any of the State governments, the court extended the ban to State highways as well. It will give rise to many problems such as how to measure 500m, how to reduce the impact and what about places like Goa, these all matters requires executive knowledge and requires the accountability of the governments.

3. **Lacked Evidence** – No empirical evidence was present before the court that by banning liquor sale on highways will reduce the deaths. It may be noted as found by the court from the statistics of 2015, that the total percentage of accidental deaths caused due to drunken driving, was only 4.2% as against the 44.2% caused by over-speeding. So, there was no empirical reasoning behind the order.
4. **Loss of Revenue** – The order has caused much collateral damage for the governments. For state governments, there is a massive loss in the form of revenue collection. According to various estimates by the experts, suggests that state governments could lose as much as Rs 50,000 crore per annum. The problem becomes more noticeable by the fact that at least one-half, possibly two-thirds, of retail outlets, bars, restaurants, and hotels are located within a range of 500m of national or state highways. Due to this, some states have started even denotifying state highways as municipal roads.
5. **Loss of Employment** – Employment and livelihoods are expected to be badly affected by the order. The loss in business for hotels, restaurants, and bars will directly affect the jobs and indirectly will reduce the jobs in enterprises that form part of their supply chains. The court had itself held the right to employment as a basic right under Article 21. However, with the order of banning the sale of alcohol along highways will make a loss of employment to lakhs of people.

- Lodha Committee report on the Board of Control for Cricket in India

The Lodha Panel was set up by the Supreme Court, following the allegations of corruption, match-fixing and betting scandals in Indian cricket. The committee was set up in an attempt to bring back law and order into the BCCI and the game of cricket. The recommendations made were aimed at making the reforms and changing the year-old elite formation of BCCI that ruled the Indian cricket at central and state levels.

The key recommendations of the committee are:

1. BCCI should come under RTI.
2. Cricket betting should be made legal.
3. More than two consecutive terms for holding office positions should be barred.
4. Ministers or government servants should not hold official positions in BCCI.
5. There shall be only one post per one person.
6. Only the cricket bodies that represent states should have full membership and voting rights in BCCI.
7. Other members of the board like All India Universities, Railway Sports Promotion Board etc. should be given the status of associate members without voting rights.

A case of Judicial overreach

1. **Lodha committee had no authority** – The BCCI is registered and governed by the Tamil Nadu Societies Act. And it also does not take money from the government and was an was not controlled by the central or any of the state government. The BCCI president, secretary, and other office-bearers are elected on the basis of its bye-laws. So, the Lodha committee has no authority to make the recommendations. The court could have instructed that the BCCI run in accordance with the provisions of the Societies Act.
2. **Not the Courts job to run Sports bodies** – It is not for the court to run a sports body or to prescribe how it should be run. The autonomy of the institutions should be respected. It is in the best interest of sports that bodies that look activities in these fields are given autonomy. External interference and violation of their autonomy are not good for the developments in these areas. If they have violated the rules or otherwise shown themselves to be unfit for their positions, they should be removed through the proper prescribed procedure.
3. **Flawed Recommendations** – With the one state one vote rule, the court has ignored the cricket history in India going back over a century has teams participating in the Ranji Trophy from Railways and Services. They have now been given a status of associate members with no voting rights. Sticking to its strict provision of geographical territory criteria, teams like Bombay, Baroda, Saurashtra, and others will now be wiped out.

Implications of Judicial Overreach

1. It destroys the spirit of the constitution as the democracy stands on the separation of powers between the organs.
2. It creates a conflict between the legislative and the judicial system. As the message which is conveyed with these decisions among the people is of legislative inactivity.
3. When Judicial activism helps in strengthening the people's faith in the judiciary, the very act of overreach destroys it. As it appears an act of 'tyranny of unelected' in a democracy where elected representatives rule.
4. It reduces the trust of the people in public institutions which can be dangerous for democracy.
5. It is a waste of Judicial time, which can otherwise be utilized for hearing various important matters relating to public importance pending before the court.

CONCLUSION

Thus, with the advent of time there has been a drastic change in the role of the Judiciary. Today, the function of the Judiciary is not only restricted to its performing primary function of adjudication of disputes but has gone beyond that. It is primarily because of the changing needs of the society and Judiciary being regarded as the Custodian of Rights. Some have supported this new and emerging role of the Judiciary while others have criticized it. Judicial Creativity even when it takes the form of Judicial Activism should not result in re-writing of the Constitution or any legislative enactments. Though the new Jurisprudence that has emerged has undoubtedly resulted in the welfare of the people. And the faith of the people in the judiciary has even been more stronger. But, if this trend continues, it would be hazardous to the principles of democracy as the inevitable consequence of such a trend would might be the dictatorship of the Judiciary. Judicial Activism with Judicial Restraint is bound to restore the faith of the people in the democratic setup And Judiciary instead of performing itself the task of Legislature and Executive, directing the organs to perform their assigned task efficiently. Thus, giving the theory of Checks and Balances the real and the true meaning.

