‘JUDICIAL ACTIVISM’ VIS-À-VIS ‘JUDICIAL OVERREACH’

6.1 BACKGROUND

It is true beyond doubt that the role of judiciary in the changing times has marked a significant shift from its traditional role to a more participatory one to cater to the changing needs of the society. Apart from its traditional role of dispute resolution, it discharges certain other vital functions within the constitutional scheme such as acting as the final interpreter of the Constitution and other organic laws, the protector of fundamental rights of the citizens, and as a guardian to keep necessary checks upon constitutional transgressions by other organs of the state525.

As discussed in the preceding chapter, under the constitutional scheme, judiciary has been amply endowed with powers to carry out these functions ranging, inter-alia, from issuing writs of certain nature to the entertainment of petitions by special leave etc. Further, new innovations resulting in a broad expansion of such powers also serve as a tool in the hands of judiciary to carry out its objectives manifested in the Constitution. The concept of PIL and its journey from rhetoric to a trusted court procedure also clarifies the point in this regard526.

In recent times, such an enormous expansion of unaccountable judicial power has attracted the attention of a many since the change in its role; there has been a remarkable shift in the working pattern of the courts by virtue of which the judiciary is said to have occupied an ascendant position within the nation’s politics527. What it could not do under the traditional pattern now seems evidently possible with growing judicial intervention in other spheres of state businesses528.

525 The range of judicial review recognized in the superior judiciary of India is perhaps the widest and most extensive known in the world of law. See Pathak CJ. In Union of India v. Raghubir Singh (1989) 2 SCC 754 at 766.
527 See Pratap Bhanu Mehta, “The Rise of Judicial Sovereignty‖ 18 Journal of Democracy 70 (2007). To the same tune Anndhyarujina opines that a body which can theoretically review each and every action of other organs functioning under the Constitution and order their courses of action necessarily possesses power in a political sense.
528 Ibid.
A look at the judicial behaviour in India in the last five decades shows how the Supreme Court has gone through many an oscillation in its approach and conduct, depending on factors like strengths and weaknesses of the political organs of the state etc. Such a shift, as epitomized by catena of judicial pronouncements, is however perceived differently with different connotations\(^{529}\). In this process, on the one hand the judiciary has taken upon itself the task of ensuring maximum freedom to the masses and to galvanize the executive and the legislature to work for public good and on the other, there have been instances where it has acted whimsically without having regard to the spirit of the Constitution and has thereby manifestly encroached in the domain of other state organs.

This changing stance of judiciary from moderate to an ‘activist’ and from an ‘activist’ to a ‘super activist’s role has invited the wrath from many sections of the society since there have been rampant instances that suggest the same. Such an intentional extension of power to practically rule over the nation taking refuge in the guise of being ‘activist’, has given rise to a new philosophy in intellectual quarters branding it as ‘Judicial Overreach’ which the present chapter attempts to address in contrast with its predecessor philosophy of ‘Judicial Activism’.

**6.2 ‘JUDICIAL ACTIVISM’: AN UNDEFINED FICTION**

In its literal parlance, the term ‘Judicial Activism’ is defined as a “judicial philosophy which motives the judges to depart from the strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters”\(^{530}\).

Considering it an abstractive term Professor Baxi defines it as “that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes”\(^{531}\). To it, he further adds that ‘judicial activism’ is the use of judicial power to articulate

\(^{529}\) As Prof. Baxi rightly suggests that judges are evaluated as activists by various social groups in terms of their interest, ideologies and values. See Upendra Baxi, *Courage, Craft & Contention* 7 (1985).


\(^{531}\) Supra note 528 at 10.
and enforce counter ideologies which when effective initiates significant re-
codifications of power relations within the institutions of governance\(^{532}\).

Notwithstanding his view that an objective assessment of judicial activism is
problematic, Baxi does provide a definition for an activist judge as one that pays close
attention to the issues of governance and political development. According to him “an
activist judge is a person who has disappointed the expectations of the governing elite
which put her in the judgment seat”\(^ {533}\).

He further distinguishes an ‘active’ judge from an ‘activist’ judge. According
to him, “An active judge regards herself, as it were, as a trustee of state regime power
and authority. Accordingly, she usually defers to the executive and legislature; shuns
any appearance of policy making; supports patriarchy and other forms of social
exclusion; and overall promotes ‘stability’ over ‘‘change’’. In contrast, an activist
judge regards herself as holding judicial power in fiduciary capacity for civil and
democratic rights of all peoples, especially the disadvantaged, dispossessed, and
deprived\(^ {534}\).

However, by referring to his latest writing published as a preface to Professor
Sathe’s work on Judicial Activism in India, one may experience a significant shift from
his earlier versions where he draws a distinction between two different types of
activism viz., “Reactionary Activism” and “Progressive Activism”\(^ {535}\). Reactionary
Activism, according to him, is associated with instances where the judiciary reacts to
particular political and social situation. Thus, the Nehruvian era activism that dealt
with issues such as land reform, the right to property, and the pro-emergency activism
in the 1970’s can be understood to illustrate this kind of activism\(^ {536}\). On the other
hand, he describes progressive judicial activism, as a kind of activism relating to social
action litigation.

\(^{532}\) Id at 13.
\(^{533}\) Id at 8.
\(^{534}\) Id at 165.
\(^{536}\) Ibid.
Another attempt of defining judicial activism can be traced in the writings of Professor Sathe though he has not subjected the term to such a rigorous analysis as compared to Baxi, according to him537.

Judicial Activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial Activism however does not mean governance by the judiciary. Judicial Activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimatizing, the actions of the other bodies of government-more often legitimizing than stigmatizing.

For Prof. Laxminath, “if the court leaps into a new territory by enunciating the widest decision possible in a particular case, even though the case could be decided on narrower grounds, then it is said to be indulging in ‘Judicial Activism’”538. He further points out another definition which concerns the court’s relationship with other branches of the government, and says that “if the court becomes a principal legislator in the governmental process and if its decisions pronounce it fit to assume this role then others will call it judicial activism”539.

The foregoing discussion suggests that the expression ‘Judicial Activism’ has eluded a definition as an abstract concept and is therefore incapable of formulation by definition only. As Prof. Baxi rightly suggests, it means different things to different people540. For some it is the dynamism of judges and for some others, it means judicial creativity or a tool for bringing social revolution through the judiciary. The present author, however, accedes to the view taken by Prof. Sathe in the sense that when the political organs of the state fail to discharge their constitutional obligations effectively or if their indifference to certain constitutional objects brings the constitution to a state of repose, if the judiciary steps in to meet the constitutional ends assuming the role of a policy maker, legislator and even the role of a monitor to oversee the implementation

537 Id at 106.
539 Ibid
540 Supra note. 528.
of its directions, then its behavior or attitude can be rightly summarized as ‘Judicial Activism’\textsuperscript{541}.

This definition however lacks comprehensiveness and doesn’t hold the field completely in the present scenario because since its formulation and publication in the year 2002, there have been many developments and instances where day to day and on case to case basis, judiciary has shown an upright and straight forward approach by unhesitatingly encroaching in the domain of the other organs of the state with an authoritative hand on the name of ‘Judicial Review’ and its sympathetic and object oriented extension, the so called ‘Judicial Activism’. Today, without any settled definition, the term ‘activism’ serves as an excuse for each and every action performed by the judiciary. For these reasons, the concept needs a re-look towards a newer and updated definition. Since the term has no settled meaning, it is worth ascertaining in the detail the reasons that can be attributed for its coming into existence.

6.3 WHY ‘JUDICIAL ACTIVISM’?

Though it is utmost difficult to enlist all possible reasons giving rise to ‘Judicial Activism’ which would be acceptable to all at all times, the following can be said to constitute some well accepted ones which compel a judge or a court to be ‘active’ while discharging the judicial functions assigned to it \textsuperscript{542}.

6.3.1 NEAR COLLAPSE OF RESPONSIBLE GOVERNMENT

When the other political branches of the government viz. the legislature and the executive fail to discharge their respective functions, it gives rise to a near collapse of responsible government. Since a responsible government is the hallmark of a successful democracy and constitutionalism, its collapse warrants many a drastic and unconventional steps.

When the legislature fails to make the necessary legislation to suit the changing times and governmental agencies fail miserably to perform their administrative functions sincerely, it leads to an erosion of the confidence of the citizens in the constitutional values and democracy. In such an extraordinary scenario, the judiciary

\textsuperscript{541}Baxi also subscribe to this view when he says that judicial activism is a “struggle for the recovery of the Indian Constitution,” Judicial Discourse: Dialectics of the Face and the Mask” 35 JILI 9 (1993).

\textsuperscript{542}For a detailed discussion on reasons for judicial activism, see G.B.Reddy, Judicial Activism in India 56 (2001).
steps into the areas usually earmarked for the legislature and executive and the result is
the judicial legislation and a government by judiciary.

6.3.2 PRESSURE ON JUDICIARY TO STEP IN FOR AID

In case the fundamental rights of the people are trampled by the government or
any other third party, the judges may take upon themselves the task of aiding the
ameliorating conditions of the citizens. In these circumstances, it becomes natural for
the citizens to look up to the judiciary to step in their aid and to protect their
fundamental rights and freedoms. This mounts tremendous pressure on the judiciary to
do something for the suffering masses, which in turn leads to ‘Judicial Activism’.

As persons involved in interpreting and applying a law which is not static but
dynamic, judges do participate in the social reforms and changes that take place due to
the changing times. Under such circumstances, judiciary has itself claimed to be an
active participant in social reformative changes. It has encouraged and at times
initiated Public Interest Litigation (PIL) in India. In such cases, the courts have
discarded the traditional constraints on themselves such as requirements of standing,
ripeness’ of the case and adversarial forms of litigation and have assumed the
functions of investigator, counsellor and monitor of administration.

6.3.3 FILLING THE LEGISLATIVE VACUUM

It is said that even if the Parliament and State Legislatures in India make laws
for 24 hours a day and 365 days a year, the quantum of law cannot be sufficient to the
changing needs of the modern society543. The same holds good in respect of many a
legislations passed by the competent legislatures. In spite of the existence of a large
quantum of pre and post constitutional laws, there still remain certain areas which may
not have been legislated upon. This may be due to inadvertence, lack of exposure to
the issues, the absence of legislation or indifference of the legislature. Thus, when a
competent legislature fails to act legislatively and make a necessary law to meet the
societal needs, the courts often indulge in judicial legislation thereby encroaching in
the domain of legislature.

6.3.4 PUBLIC CONFIDENCE IN THE JUDICIARY

The greatest asset and the strongest weapon in the armoury of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even handed justice and keep the scales in balance in any dispute544.

6.3.5 ENTHUSIASM OF INDIVIDUAL PLAYERS

As Prof. Baxi points out, many individual players are responsible for activating judicial activism545. They are civil right activists, people right activists consumer rights groups, bonded labour groups, citizens for environmental action, women rights groups and assorted lawyer based groups etc. He further points out that although judicial activism is a collective venture, some judges have individually paved a foundation path in this regard546. These judges include Krishna Iyer J., P.N.Bhagwati J., Chinnappa Reddy J., D.A. Desai J. etc.

6.4 DIMENSIONAL ANALYSIS OF ‘JUDICIAL ACTIVISM’

Ronald Dworkin has remarked in one of his celebrated works that “the courts are the capitals of the law’s empire, and judges are its princes, not its seers and prophets.”547 It is however difficult to understand as to when the judges may be performing each of these roles. Often the answer turns on one’s preferences and prejudices, that is, the actions of a judge are criticized because one doesn’t agree with them, and not so much because the judge ought to have acted differently.

This leaves the controversy eternally alive since all such debates claim satisfactory discourse without any proper dimension. In order to understand the concept scientifically at depth, important is to focus and emphasize that what actually makes a decision ‘activist’. One such attempt is made by Cohn and Kreminitzer by proposing a model which suggests a methodology by which one can analyze the term taking into account the dimensions within which ‘judicial activism’ takes place548. This

546 Ibid.
model is an attempt to provide with the tools to understand the activist quotient of judicial decisions and sets forth a variety of factors necessary to understand judicial activism, in addition to the commonly used factor known as ‘majoritarianism’. It is an impressive model central to which is the belief that activism is a function of several factors, each of which require an individual assessment and due consideration. It puts forth seventeen parameters in order to arrive at the activist quotient of a decision. These seventeen parameters are further divided into three categories depending upon their relationship with the three main judicial functions suggested.

6.4.1 RESOLUTION OF DISPUTES

The very first undisputed function is the traditionally regarded primary function of the judiciary, i.e. resolution of disputes. Under this functional category, the model postulates a list of following twelve parameters:

I. Judicial Stability: Judicial stability can be measured by the extent to which a decision deviates from the previous legal position. This parameter, hence, incorporates the common law doctrine of precedent, and decisions that diverge from precedent are regarded as more activist as compared with those that stay true to the established legal position.

II. Interpretation: Decisions that conform to the original intent or literal linguistic meaning of a provision are regarded as fewer activists than those that adopt a purposive interpretation.

III. Majoritarianism and Autonomy: Under this, the courts can impede the democratic process by interfering with policy decisions or by providing alternate solutions to the government, which are regarded as more activist.

IV. Judicial Reasoning: It analyses whether a decision relies more on strict grounds of procedure, or on “open ended” grounds of substance. The former results in a lower degree of activism as compared with the latter.

V. Threshold Activism: It looks for whether courts are prepared to relax the rules of locus, delays, justifiability, and so on. If the court relaxes
such standards, particularly in a controversial or sensitive matter, it exhibits a high degree of activism.

VI  Judicial Remit:  It regards those decisions that increase the scope of judicial review as activist.

VII  Rhetoric:  Decisions that exhibit an extralegal rhetoric are activist.

VII.  Obiter Dicta:  Decisions that pronounce views on issues beyond the specific question of the case are highly activist.

IX.  Reliance on Comparative Sources:  The model regards decisions that rely on foreign law to be more activist than those that rely on domestic law.  Since the usage of foreign law by constitutional courts has become an important facet of public law adjudication, courts can buttress their arguments by the reliance on foreign law notwithstanding the nature of their argument.  Further, because the foreign sources are not binding, their reliance may take place in an undisciplined manner.  Two recent cases are illustrative in this regard.  In Anug Garg v. Hotel Association of India\(^{549}\), the Supreme Court borrowed ‘strict scrutiny’ from American Constitutional Law holding that “protective discrimination” legislations must be assessed with reference to whether interferences with personal freedom are justified in principle and appropriate in measure\(^{550}\).  However, in A.K. Thakur v. Union of India\(^{551}\), a few months after Anuj Garg, the Supreme Court refused to apply this test, noting that this American Constitutional doctrine found no place within Indian Law\(^{552}\).  Thus, on the basis of present analysis, one can say A.K. Thakkur is less activist as compared to Anuj Garg.

X.  Judicial Voices:  It relates to the extent of concurring opinions.  The more the concurrences between the judges, the lower the activism.

\(^{549}\) (2008) 3 SCC 1.
\(^{550}\) Id. at 48.
XI. **Extent of Decision:** It deals with the impact of the decision. If the decision is meant to apply strictly to a narrow set of scenarios, the decision would be less activist as compared with one which has a wide application.

XII. **Legal Background:** It examines the legal provisions that are at issue in the case and studies whether the provisions are clear and unambiguous, or whether they are vague and deficient. In cases where rules are insufficient, courts need to be imaginative and adopt other cannons of interpretation, thereby illustrating a high degree of activism.

An analysis of the relevant legal provisions in a particular decision is central to determining whether or not the decision is activist. These twelve parameters provide a comprehensive guide to assessing judicial activism when the judiciary performs the function of dispute resolution.

### 6.4.2 JUDICIARY AS A PLAYER IN CONSTITUTIONAL DIALOGUE WITH OTHER BRANCHES

The second category as described by Cohn & Kreminitzwer relates to the role of judiciary as a player that “operates in the public sphere as a participant in a network of actors, comprising other governmental branches, individuals and civic bodies”553. As the authors note, arguing that the judiciary serves a function as a party in a constitutional dialogue with other branches of government means that they “reject visions of the omnipotence of the third branch”554. The existence of this vision in the model is driven by the belief that it is necessary to locate decisions in their social context. Evaluating judicial decisions without reference to the reaction they socially receive has, according to this model, two shortcomings. First, it regards the courts as the final word on a particular issue and secondly, it does not account for its role as a direct participant in a constitutional dialogue.555. Thus, according to the model, if a decision is regarded as a welcome change in the society it would not be regarded as ‘activist’, and if on the other hand, the same decision is opposed by the members of the society and the “other members of the social network”, a higher degree of activist,

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553 *Supra* note 547 at 335.
555 *Id.* at 343.
would have to be associated with a decision. Under this category, there are four parameters through which the model suggests the measurement of activism.

I. Reaction of the Legislature: If the legislature, the model argues, undertakes measures to overturn the decision, then the decision is regarded to possess a higher degree of activism as compared with legislative affirmation of the decision. Often, there is no legislative response to a particular decision. Such cases, as Cohn and Kreminitzer rightly note, are likely to signify acceptance with the decision and should thus be regarded as instances of a median degree of activism.

II. Administrative or Executive Response: This parameter assesses the administrative or executive response to the decision, essentially by examining its compliance. The greater the compliance, the less is the degree of activism.

III. Reaction by the Judiciary: This parameter studies the extent to which future decisions will fall in line with the decision under examination. The greater the affirmation of the decision in subsequent cases, the less is the extent of activism.

IV. Vox Populi: In performing its function as a player in a constitutional dialogue, the judiciary’s decision is examined with reference to the public reaction the decision receives. A high level of disapproval by civil society will signify a high activist quotient and similarly social acceptance of the decision will mean that the decision should not be viewed as ‘activist’.

6.4.3 JUDICIARY AS A PROTECTOR OF CORE CONSTITUTIONAL VALUES

The third function that the judiciary performs, according to this model, is to protect the core constitutional values and decisions that do so are not to be regarded as activist. The inclusion of this function in the model rests on the assumption that “Purely value free judicial decision making is not only impossible but also untenable”. Naturally, the question arises as to how such core values are to be determined. It would seem that in most cases they are likely to turn one one’s

557 Supra note 547 at 348.
interpretation, and perhaps even preference. Cohn and Kremnitzer foresee this criticism and argue that while it may be valid in general, it is largely inapplicable to their model. The reason they attribute to it is that they regard a limited scope to a narrow range of such core values, which they believe “remain uncontested in constitutional arenas”. This may be because of the fact that scholars often disagree on the conception of a core value. Even if there is a consensus on which core values underlie legal systems, there may be disagreement on what that particular core value means.

At any rate, the discussion on the third function of the judiciary makes it clear that this particular aspect of the model requires much greater debate and discussion. The same holds true for the inclusion of the second function of the judiciary in the model, as there is by no means a consensus on the view that the judiciary must play a role as a participant in a constitutional dialogue. In addition to these concerns, there are others that arise with respect to the model. The most apparent of these is the fact that since the parameters do not have relative weights, it is uncertain as to which parameter one ought to prioritize. Cohn & Kremnitzer, however, acknowledge the existence of these methodological concerns, and only attempt to provide a preliminary framework to refine the debate on ‘Judicial Activism’.

6.5 PERILS OF JUDICIAL ACTIVISM

Judicial Activism when overtly exercised results in usurping the powers of the Executive or the Legislature, which are the other two important organs of governance. It has been consistently laid down by the Supreme Court of India that there cannot be a writ of mandamus from any court directing the Legislature to legislate on a given subject. The power to legislate is squarely conferred on the Legislature by the Constitution. The power to legislate is squarely conferred on the Legislature by the Constitution. No such legislative power is given to the Courts by the Constitution. The legislative action done by the Courts is to be derived from its Judicial Activism done in permissible limits for proper and complete interpretation of the provisions of law. Judicial Activism cannot be used for filling up the lacunae in Legislation or for providing rights or creating liabilities not provided by the Legislation. In this regard,

558 Id. at 349. Reflecting on the literature the identifies core constitutional values, Cohn and Kremnitzer do not advance their own version of core values, although they seem to endorse values such as equality, liberty, and human dignity as being “core”.

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the judgments of the Supreme Court in relation to admission to the Post Graduate education in Medicinal Science need consideration. These judgments, starting with the judgment in Pradeep Kumar Jain’s case\textsuperscript{559} and three or four directions issued in Dr. Dinesh Kumar’s case\textsuperscript{560} appear to be yet another avoidable exercise in Judicial Activism. The Supreme Court went on to lay down the manner in which Post Graduate seats in different Post Graduate Medical Institutions in India would be filled, the manner in which the examination for filling those posts is to be conducted, the manner; in which the seats are to be distributed in every discipline, and the manner in which the question of the reservation for backward classes candidates would be dealt with. All this, in my humble opinion, was clearly in the domain of the Executive administering the Department of Education. It was certainly a specialized field which ought to have been left for governing to the Specialized Bodies like the Indian Medical Council. To the same effect are cases in the matter of capitation fees dealing with education in Engineering Branches in particular. In deciding all these cases, and giving numerous directions in those cases, I in all humility, submit that in these instances the Supreme Court has transgressed the limits under the specious cover of Judicial Activism.

Professor Sir William Wade, Q.C.,\textsuperscript{561} while recording appreciation of judicial activism, sounds a note of caution “It is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if courts have to rely on their own knowledge or research, it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification”.

\textsuperscript{559} Dr. Pradeep Jain and Others v. Union of India and others AIR 1984 SC 1420.
\textsuperscript{560} Dinesh Kumar and others v. Motilal Nehru Medical College, Allahabad and others AIR 1985 SC 1059.
\textsuperscript{561} In a monograph “Judicial Activism and Constitutional Democracy in India” commended by Professor Sir William Wade, Q.C. as a “small book devoted to a big subject”.

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6.6 ARE JUDGES OVER REACHING?

“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

In other words, the PM had all but accused the SC of judicial overreach and taking over executive or legislative functions. There are several high-profile instances where courts had arguably crossed the line. In the context of Delhi sealing drive, Prime Minister could have been referring to the controversial monitoring committee set up by the SC to oversee all the executive agencies involved in sealing shops and offices. Or, in the context of reservations for OBCs, he was probably drawing attention to SC’s stay on his government’s ambitious plan of introducing quotas in central institutions in a staggered manner.

But then CJI, speaking at the same function, sought to play down the significance of the differences that have arisen between the judiciary and the political class. “The application of judicial review to determine the constitutionality of the legislation and to review the executive decision sometimes creates tension between the judge and the legislative and executive branch. Such tension is natural and to some extent desirable”

Thus, in Justice Balakrishnan’s view, the tension between the organs, far from being a cause for worry, is an inevitable consequence of judicial review, the power of the superior courts (borrowed by our founding fathers from the US) to strike down any legislative or executive act found to be volatile of the Constitution. By calling the tension “natural” and “desirable”, the CJI has, by implication, rejected the charge of judicial over-reach.

The truth, as often, lies somewhere between the two extreme positions. Take the two examples cited by Lok Sabha Speaker Somnath Chatterjee on April 4, 2007 at a seminar organized by the Supreme Court Bar Association.

562 Speaking at the Conference of Chief Ministers and Chief Justices held in New Delhi in Apr 08, 2007.
First, despite all the controversy generated by his refusal to accept a notice from the Supreme Court, Chatterjee acknowledged that the judges had done their job by upholding his landmark decision to expel MPs exposed in the cash-for-questions and MPLAD scams. But in second as for the SC’s intervention in the proceedings of the Jharkhand legislative assembly, Chatterjee maintained that ‘there has been an encroachment in the legislative arena’.

Much as it sought to undo the UPA’s attempt to foist Shibu Soren on a hung assembly, the SC drew flak for taking over legislative function and directing the chief secretary and DGP to oversee the proceedings of the assembly. That was clearly an instance of judicial over-reach.

Similarly, the judiciary has failed to address another major cause for confrontation between the judges and the political class; the alleged misuse of public interest litigation. As the PM emphasized in the same April 8 conference, “PILs cannot become vehicles for settling political or other scores. We need standards and benchmarks for screening PILs so that only genuine PILs with a justifiable cause of action based on judicially manageable are taken up.”

6.7 CONSTITUTIONAL POSITION

The Constitution, under various provisions, has clearly drawn the Lakshman Rekha for both the Legislature and the Judiciary to maintain their independence in their respective functioning. Where Articles 121 and 211 forbid the legislature from discussing the conduct of any judge in discharge of his duties, Articles 122 and 212 on the other hand preclude the courts from sitting in judgment over the internal proceedings of the legislature. Article 105 (2) and 194(2) protect the legislators from interference of the Courts with regards to his/her freedom of speech and freedom to vote.

Thus, in theory, there is ample provision for each side to maintain its autonomy. But activism of any sort, whether by the judiciary or the legislature, throws up a million-dollar question: what happens when one side does not abide by the separation envisioned in the Constitution? On this, the Constitution is apparently silent, leaving it to the learned and responsible legislators and the judges to themselves ensure that they remain within their bounds. The sad fact, however, is that there have been numerous
instances where these rather pious intents of the Constitution have been flouted without check by both the sides.

For example, during the phase of stand-off between the Supreme Court and the Delhi government on the issue of converting the public vehicles from diesel to CNG mode in Delhi, the Chief Minister Ms. Sheila Dikshit had lambasted the Apex Court inside the Legislative Assembly. Taking note of this from the media reports, the Apex Court sought explanations from the CM. The CM simply made an affidavit denying the media reports, and there ended the story. Similarly, in another such instance, a Janata Dal (S) MLA of the Karnataka Assembly cast grave aspersions on the integrity of judges who gave a ruling against the State Government in the Bangalore-Mysore Infrastructure Corridor project case.

On July 19, 2006 presiding over a Bench comprising Justices C.K. Thakkar and P.K. Balasubramanian, Chief Justice Y.K. Sabharwal reacted with restraint and dignity: “We express our deepest anguish over such statements made on the floor of the House.”

Therefore, broadly speaking, in so far as adhering to the separation of powers by different organs of the state is concerned, this can only be done by self-restraint and self-discipline; there is no punitive mechanism in case of violation of the aforesaid provisions. Mechanisms like ‘contempt of court’ and ‘breach of privilege’ are not effective in maintaining the separation, and merely make passing appearances during individual incidents.

6.7.1 JUDICIAL INTERVENTION IN LEGISLATIVE ARENA

In recent years there has been gradual but conspicuous flexing of muscles by the judiciary vis-à-vis lawmakers, often in cases involving tests of ruling parties’ strengths in the state and central legislatures. In 1998, when there was ugly drama by the contending claimants for the Chief Minister ship of Uttar Pradesh between Jagadambika Pal and Kalyan Singh – and the partisan role played by the then Governor Romesh Bhandari, the Apex Court salvaged the situation by intervening and directing the Speaker to conduct the Composite Floor Test in the State Assembly. A similar situation was repeated in 2005 in the case of the Jharkhand Assembly, where among the competing parties were Sibu Soren and Arjun Munda. The three judge
bench of the Apex Court did not follow the same precedence of Jagdambika Pal’s case.

Differences in the approaches of the two Supreme Court benches to these similar cases largely went unnoticed during the debates of that time. In the first case, when asked if the SC was overseeing the proceedings inside the Assembly, the bench headed by Chief Justice M.M. Punchhi replied that it was not overseeing the proceedings, but any attempt to create a disturbance would be viewed seriously. But in case of the Jharkhand Assembly, the SC bench went a step further and ordered a video recording of the proceedings to be presented before it. In the event, this direction of the Apex Court was not adhered to by the Jharkhand House, and the matter eventually settled with the resignation of Soren from the post of Chief Minister. Various questions remained, in particular whether since the court had ordered a floor test, any contempt of court had occurred in not holding this test. And if yes, who would be punished? - the Proterm Speaker who failed to conduct the floor test as per the direction of the court or the MLAs who showed unruly behaviour despite the strictures by the court. There were no answers.

It is also noteworthy that while the apex court; has been rather straightforward in disciplining errant members of the State Legislators, it had been more cautious in the case of Parliamentarians. When the JMM bribery case—where Prime Minister Narasimha Rao was accused of buying votes – was before the Constitution bench of the SC in 1998, legal circles were divided on their understanding on how the SC would hear the case since it was an internal matter of the Parliament, and Article 105(2) provides protection to MPs for anything said or any vote given inside the house, punishing the ones who had abstained (not taken part) from exercising their vote. This conservative stand of the Apex Court was frowned upon by the National Commission on Review of the Working of the Constitution which disagreed with the judgment and recommended that necessary amendment need to be done to Article 105 so that nothing should bar the prosecution of a Member of Parliament, in any court of law, for an offence involving receiving or accepting bribes directly or indirectly.

There have been other incidents where courts and legislators found themselves on opposite sides. In 2003, on the issue of the mandatory disclosure of educational qualification, assets/liabilities and the details of criminal antecedents (if any) by
candidates filing nominations for elections, there was a series of assertions and counter-actions by Parliament and the apex court, in which the judges finally prevailed in establishing the need for such disclosure. Similarly, the very recent verdicts of the SC on extending the concept of a ‘creamy layer’ to reservations for Scheduled Castes and Scheduled Tribes, and on invalidating the immunity of legislations (passed after 1973) placed in the Ninth Schedule of the Constitution from judicial review, were not taken well by Parliamentarians who treated these verdicts as usurpation of power by judges.

In some cases, judicial verdicts have included some views that legislators found to their liking, and others that they disagreed with. For instance, in the cash-for-questions case (where MPs were accused of receiving money to raise particular questions in Parliament), the SC upheld the power of Parliament to expel its members. There was much appreciation of this part of the judgment from almost all legislators, including the Speaker Somnath Chaterjee who has been vociferously opposing the alleged over-reaching of the judiciary into the legislative domain. At the same time, another part of that judgment, where the court held that the Legislature cannot claim immunity from judicial scrutiny in respect of their internal proceedings, has created apprehensions in legal and political circles, with some wondering if this rendered Articles 121 and 211 obsolete.

The observation of the Apex Court in the said case reads “if the proceedings of a legislature are tainted with substantive or gross illegality or unconstitutionality or are malafide or have denied natural justice to a person, their proceedings would not be protected”. By implication, the judicial interference in the internal proceedings of the Legislature, which was previously done as rather occasional responses to rare incidences, has now been formally established through this order. Though the Court observed that “it would make a generous presumption of honesty and good faith in the proceedings of the legislature, and its power of judicial scrutiny would not be the usual type of judicial review over the actions of government”, the bottom line is that the Court has assumed the power to judge the manner the house is managed the legislators.

In India, the content and reach of judicial power is not defined—neither in our Constitution nor anywhere else. Many believe that written Constitution that gives power to the courts to strike down legislation made by a country’s elected Parliament is undemocratic: it enable unelected judge (they say) to thwart the wishes of elected
representatives of the people in Parliament. There may be something to be said for this point of view. But it is too late in the day to complain. For more than 60 years, we have been working a Constitution which is federal in nature with allocated subjects of legislation separately and exclusively given to the States and to the Union; there is also a chapter on Fundamental Rights: all laws and all executive actions inconsistent with them are expressly declared to be “void”. Some authority then would have to be the final arbiter-in a controversy. And that arbiter under our Constitution is ultimately the country’s highest court the Supreme Court of India.

After 64 years of Independence, and after 14 general elections to the Lok Sabha, and all the publicity that is given to proceedings in Parliament, ordinary people-people who have voted their elected representatives into Parliament – remain generally unsatisfied as to how MPs function: if and when they function at all.

The reason for what Prime Minister characterized a “judicial over-reach” is that since power grows by what it feeds on, judicial power also grows by accretion, by the mere circumstance that other constitutional bodies and authorities set up to legislate and to pass administrative orders have failed when called upon to act. The “judicial over-reach” the Prime Minister spoke about is the direct result of legislative and executive neglect or “under-reach”: poor performance in the making of laws and their execution. If judges need to introspect, politicians also need to introspect and ask them whether they have fulfilled the aspirations of the people who put them at the wheel of governance. If judges are to get off the backs of parliamentarians, politicians and bureaucrats, those who claim the right to govern must come up with a much better record of performance; only when they do, will the people of this great country give us back majority governments both at the Centre and in the states.

6.8 JUDICIAL RESTRAINT

6.8.1 JUDGES CANNOT CREATE LAW, ONLY ENFORCE

Judiciary has been under attack from the executive and the legislature for “encroaching” upon their domain. In an unprecedented confession in Aravali Golf Club case\textsuperscript{564} the Supreme Court has admitted that the judiciary has erred in the recent

\textsuperscript{564} Aravali Golf Club case 2008 I SCC 683.
past usurping the powers of the executive. Cautioning against judicial activism, it said that if the trend continued, politicians would step in and clip the judiciary’s wings.

“If the judiciary does not exercise restraint and overstretches its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the power, or even the independence of the judiciary,” said an SC bench comprising Justices A.K.Mathur and Markandey Katju in **Aravali Golf Club case**.565

The bench added that in orders to maintain the judiciary’s independence; judges had to exercise restraint and honour the separation of powers among the three wings of governance, as mandated by the Constitution. “The constitutional trade off for independence is that judges must restrain themselves from areas reserved for the other separate branches (executive and legislature)”, said the bench. In a 22-page judgment, in which the SC overturned a trial court and the high court’s ruling on regularizing certain employees of a private golf course, the two judges devoted 15 pages to reiterate judicial norms which, in the main, underline that judges as umpires are meant to uphold laws not crate them.

At least 15 other such examples of judicial encroachments cited by the Bench were mainly from the Delhi High Court, which included the recent order on the Delhi government’s education policy relating to “pre-nursery” admissions for tiny tots, reservation of 25 per cent free seats in private schools for poor students and poor patients in private hospitals set up on public land, demolition of unauthorized constructions, growing accidents and the regulation of city buses, use of ambulances, speed-breakers, overcharging by auto-rickshaws, pollution and begging.

The SC listed instances where the judiciary had strayed into the executive’s domain. These cases include: nursery admissions in Delhi; legality of constructions, identifying buildings to be demolished in Delhi; overcharging by Delhi auto rickshaws; growing road accidents and enhancing fines; nature of buses for public transport air-pollution, free beds in hospitals on public land, world-class ambulance services, world-class burns ward.

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The observations came in a 22 page verdict with the Court’s setting aside a Punjab and Haryana High Court order directing creation of posts of tractor driver to Tourism Corporation and were asked to perform the duties of tractor drivers.

“If the judiciary does not exercise restraint and over-stretches its limit there is bound to be reaction from politicians and others. The politicians will then step in and curtail the powers or even independence of the judiciary. The judiciary should, therefore, confine itself to its proper sphere, realizing that in a democracy many matters and controversies are best resolved in non-judicial settings.” It said, “the judiciary as the protector of the Constitution of course has the power to intervene but in exceptional circumstances when situation forcefully demands it in the interest of the nation.”

The court said that justification often given for judicial encroachment into the domain of the executive or legislature is that the other two organs are not doing their jobs properly. Even assuming this is so, the same allegation can then be made against the judiciary too because there are cases pending in courts for half-a-century, bench said. If they are not discharging their assigned duties, the remedy is not judicial interference as it will violate delicate balance of power enshrined in the constitution, remarked the court. “We are compelled to make these observations because we are repeatedly coming across where judges are unjustifiably trying to perform executive or legislative functions. In our opinion, this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of state” said the bench. The court cited many examples where judiciary had encroached upon the turf which was unwarranted.

The *Jagdambika Pal case* of 1998 involving UP legislative assembly and the Jharkhand assembly case of 2005 are the two glaring examples of deviations from the clearly provided constitutional scheme of separation of powers, said bench. It further said that the Delhi High Court order banning interviews of children for admissions into nursery class was illegal as there is no statute or rule which prohibits such interviews.

Further, according to a news item by CJI (Rtd.) P N Bhagwati\textsuperscript{566}, who was the head of Supreme Court hard-pedalled the judicial innovation of PILs, said he too thinks courts needn’t get involved with issues such as nursery admissions, and take on

\textsuperscript{566} Times of India December 27, 2008.
a lawmaker role. “The courts can’t frame laws. They have to ensure that the executive is acting in accordance with laws, and policy enacted by the government is not arbitrary,” he said in a phone interview from Mumbai. “The SC bench reportedly disapproved of the way courts are getting involved in day to day running of the administration. For example, I don’t see why Delhi High Court should involve itself with the nitty gritty of nursery admissions like interview of child, neighborhood policy and other criteria. That is the business of school management and government to frame policies,” the former chief justice said. He however said he didn’t want to give a detailed reaction since he hadn’t read the SC observations on judicial overreach into executive turf.

Recalling his days in the SC when PILs revolutionized the concept of justice, allowing any public spirited person to knock on the apex court’s doors, Justice Bhagwati said a fine line between public good and private benefit had to be drawn by courts if independence of judiciary was to be maintained. “The poor and underprivileged sections of society are the ones who must benefit from judicial activism. Providing healthcare and medical assistance, cleaning of the Yamuna River, reducing pollution via CNG in public transport, these are clearly public welfare measures which became possible only due to judicial intervention.” In these cases, he said, “The executive was not acting in accordance with the law of the land so courts were only enforcing it for public welfare. But it appears SC had other cases like demolitions and directions on traffic in mind when it made those observations on.”

On December 13, 2007 A Supreme Court Bench, headed by Chief Justice K.G. Balakrishnan, dispelled the impression on judiciary’s “overreach” in the public interest litigation (PIL) cases, gained in the wake of a judgment of a Division Bench given on December 07 in Aravali Hills case that had raised a controversy on the judicial “over activism”. 567

“We are not bound by the two-judge Bench (orders),” the CJI sitting in a three-judge Bench with Justices R.V.Raveendran and J.M.Panchal said and even refused look of the judgement of Justices A.K.Madhur and Markendey Katju when it was sought to be placed on record by a counsel arguing a PIL on the plight of widows in Brindaban. Though the CJI’s Bench did not say anything further on the

567 An article in TOI of December 13, 2007: Judicial ‘overreach’: CJI steps in to remove confusion.
controversial judgment, the terse one-line observation made by Justice Balakrishnan on it apparently sent a message to the judiciary that it should not read much in the judgment with several “harsh” observations made by Justices Mathur and Katju in their verdict even questioning the orders of some of the larger Benches of the apex court. The two judges had also questioned the validity of Delhi High Court’s orders in at least 15 PILs relating to various important issues, in which authorities had not even acted under the provisions of the law and the laid down rules.

Some of the memorable quotes from the judgments given by the apex courts emphasizing restraint are given as under:

“The principle that when a Court can resolve a case based on a particular issue it should do so without reaching unnecessary issues;”

“A philosophy of judicial decision making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent.”

“Judicis est jus dicere, non jus dare. It is for the judge to administer, not to make law. It is the part of the judge to enunciate, not to give or make law.”

“Judicial activism and judicial restraint are two sides of the same coin.”

The Hon’ble Supreme Court observed in the decision of *A.M. Mathur v. Parmod Kumar Gupta* 568 and quoted the observations in the case of *State of Rajasthan v. Prakash Chand* 569 as under:

“The duty of restraint (in the administration of justice), this humility of function should be the constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Respect to those come before the Court as well as to other coordinate branches of the State, the executive and the legislative. There must be mutual respect. The Judge’s Bench is a seat of power. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or

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witnesses. We concede that the Court has inherent powers to act freely on its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case.”

6.8.2 LITIGANTS WASTING VALUABLE TIME OF THE COURT

The Supreme Court in *Janata Dal v. H.S. Chowdhary*570 expressed its total displeasure and disgust in wasting the Court’s time on account of trumpery proceedings initiated under the garb of PILs in the following words:

“It is depressing to note that on account of such trumpery proceedings initiated before the Courts innumerable days are wasted which time otherwise could have been spent for the disposal of cases of the genuine litigants the busy bodies, meddlesome interlopers wayfarers or officious interveners having profit either for themselves or as proxy of others or for any other extraneous motivation of for glare of publicity break of the queue muffling their fats by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous pet and thus criminally waste the valuable time of the Courts and as a result of which queue standing outside the doors of the Court never moves which piquant situation creates a frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.”

“A person who desires to persist with his view point despite the fact that the point which he canvases before a judge has no legs to stand by the binding decisions of the larger Benches of the Court and in the process wastes the Court’s time shall be made to pay the price for the wastage of public time, at least notionally, if not fully. Such course is a ‘must not only to curb unjustified and vexatious PILs but also to do justice to the public.”

The observation of the Supreme Court in *S.P. Anand v. H.D. Deve Gowda*571 is apt to be quoted:

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“...it must also be borne in mind that no one has a right to the waiver of the locus standi rule and the court should permit it only when it is satisfied that the carriage of proceedings in the competent hands of a person who is genuinely concerned in public interest and is not moved by other extraneous considerations. So also the Court must be careful to ensure that the process of the Court is not sought to be abused by a person who desires to persist with the pint of view almost carrying it to the point of obstinacy by filing a series of petitions refusing to accept the Court’s earlier decisions as concluding the point. We say this because when we drew attention of the petitioner to earlier decisions of this Court, he brushed them aside, without so much as showing willingness to deal with them and without giving it a second look, as having become stale and irrelevant by passage of time and challenged their correctness on the specious plea that they needed reconsideration he had no answer to the correctness of the decisions. Such a casual approach to considered decisions of this Court even by a person well versed in law would not be countenanced. Instead, as pointed out earlier he referred to decisions on cow slaughter cases, freedom of speech and expression, uniform of civil code etc. We need say no more except to point out that indiscriminate use of this important lever of public interest litigation would blunt the lever itself.”

Chief Justice of Jharkand HC expressed his righteous indignation against the misuse of the process of the PIL in Mani Shankar Pandey v. Union of India and others572 in the following words:

“This case beings to the fore how a noble, laudable and public justice-oriented legal process, that is what we call “Public Interest Litigation” which is essentially and initially meant to provide legal representation to previously unrepresented groups and citizens, can be misused and abused by unscrupulous persons without any element of public interest.

“The time of the Court is public time it is neither of the Judges nor the time of the litigant or his counsel; the public time should be spent judiciously nor economically; insistence of such rule is absolutely necessary particularly in the context of alarming pendency of cases in Law Courts a other judicial land quasi-judicial for today. The Courts time should not be allowed to be misused or abused by unscrupulous litigants or busy-bodies in the garb of PILs. This is also responsibility

cast on the learned members of the Bar in espousing the cause of public by way of PILs. The Court’s time is not meant for the satisfaction of the ego of a judge who presides over the Court that he knows the whole law correctly and there cannot be a second opinion on the point addressed to the Court…Fruitful management of the Court’s time is need of the hour and that cannot be achieved without constructive cooperation between the Bar and the Bench.

6.8.3 IMPORTANT CASES ILLUSTRATING JUDICIAL RESTRRAINT

Judicial self restraint is not a new concept; our courts have been applying judicial restraint since long time as it is evident from the following cases;

In T.N. Rugmani v. C. Acchuta Menon\textsuperscript{573} the Supreme Court held that –

“It would have been more appropriate if, High Court could have exercised restraint in light of law laid down by this Court in Chhetriya Pradushan Mukti Sandharsh Vahini v. State of U.P.\textsuperscript{574}, Ramsharan Autyanuprasi v. Union of India\textsuperscript{575}, and Sachidanand Pandey v. Stae of West Bengal\textsuperscript{576}; merely because authorities constituted under the statute failed in their effort to get the interim order vacated was hardly any occasion for invoking jurisdiction under Article 226 by way of public interest litigation”.

On the question of disinvestments policy of the Central Government in BALCO Employees’ Union (Regd.) v. Union of India\textsuperscript{577}, Supreme Court held that –

“Whenever the court has interfered and given directions while entertaining PIL, it has mainly been where there has been an element of violation of Article 21 of human rights or where the litigation has been initiated for the benefit of the poor and the under privileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which are secured by the courts. However, public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. The decision to disinvest and the implementation thereof is purely an administrative

\textsuperscript{573} T.N. Rugmani v. C. Acchuta Menon AIR 1991 SC 983 : (1991) Supp 1 SCC 520
\textsuperscript{575} Ramsharan Autyanuprasi v. Union of India 1989 Suppl (1) SCR 251 : AIR 1987 SC 549.
\textsuperscript{577} BALCO Employees’ Union (Regd.) v. Union of India AIR 2002 SC 350 : (2002) 2 SCC 333.
decision relating to the economic policy of the State and challenge to the same at the judicial interference by way of PIL is available if there is injury to public because of dereliction of constitutional or statutory obligations on the part of the Government. Here it is not so and in the sphere of economic policy or reform the court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of constitutional or statutory provisions or non-compliance by the state with its constitutional or statutory duties.”

An apt case of Judicial Restraint.

In *Janta Dal v. H.S. Chowdhary*, Supreme Court warned about the abuse of the Public Interest Litigation and held.

“While this court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that Courts should not allow its process to be abused by a mere busy body or meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration”

In *Narmad Bachao Andolan v. Union of India*[^578] , it was held by the Supreme Court that.

“It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the courts are ill-equipped to adjudicate on policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people’s fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means overrun in the costs and the decision to undertake a project, if challenged after its execution has

commenced, should be thrown out at the very threshold on the ground of latches if the petitioner had the knowledge of such a decision and could have approached the court at that time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Latches are one of them.

The Supreme Court in *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of UP*\(^{579}\) held that-

“PIL can only be done by any person interested genuinely in the protection of the society on behalf of the society or community. This weapon as a safeguard must be utilized and invoked by the Court with great deal of circumspection and caution. Where it appears that this is only a cloak to “feed fact ancient grudge” and enmity, this should not only be refused but strongly discouraged. While it is the duty of the Supreme Court to enforce fundamental rights, it is also the duty of the Court to ensure that this weapon under Art. 32 should not be misused or permitted to be misused creating a bottleneck in the superior Court preventing other genuine violation of fundamental rights being considered by the Court. That would be an act or a conduct which will defeat the very purpose of preservation of fundamental rights.”

In *Nandjee Singh v. PG Medical Students’ Association*\(^{580}\), a question was raised about the eligibility of the appellant to appear for the M.D. (General Medicine) Examination of the Ranchi University as a teacher candidate. A Writ application was filed by the Students’ Association questioning the eligibility of Nandjee Singh on the ground that he was not a teacher and that he had not completed the three years training after full registration. The Writ Application was allowed on the ground that the candidate had not a teacher and that he had not completed his thesis and he failed to produce certificate that he had undergone adequate training. High Court held that acceptance of the thesis was prerequisite for appearing in the examination. In this case the Supreme Court held-

“This was a dispute relating to an individual and turned on the facts. There was no question of law involved in it. We have, therefore, not understood how the respondent association could convert an individual dispute into public interest litigation. We are of the view that cases where what is strictly an individual dispute is


sought to be converted into a public interest litigation should not be encouraged. The present proceeding is one of these kinds. The learned counsel appearing for the respondent-state wanted to support the respondent association. We did not think it necessary to hear the state since the dispute was essentially with regard to the interpretation of the facts relating to the training of an individual medical officer, viz., and the appellant. The University had on the facts of the case accepted the contention of the appellant that he had completed 3 years training. We have not been able to understand as to what stake the state had in denying the same factual position.”


“If the litigation between the member of the family to settle their own scores, it cannot be a Public Interest Litigation. It was not pro bono publico, for the benefit of the public, but for the benefit for the particular section of people for their personal rights. Hence, the assertion that this dispute is public interest dispute is wrong. In the instant case the allegations are too vague, too indirect and too tenuous to threaten the quality of life of people at large or any section of the people. The acts complained of resulting in the threats alleged are too remote and, to be amenable under Art.32 of the Constitution.”

Another example of judicial restraint was shown by the Supreme Court in *State of J&K v. Swami Sachchidanand S.C.S. Purmanand*[^582] by restraining to give direction to the State Govt. regarding arrangements for Amarnath Yatra High Court in response to writ petitions filed in public interest by various organizations directing the State Govt. to keep the Balta route open on a permanent basis and to make improvements in the traditional Pahalgam route-State Govt. indicating by way of affidavit that weather conditions and terrain both are very inhospitable- for example two to three feet snow accumulation overnight in some areas; temperatures reaching minus 15 degrees (-15) during day and below minus 30 degrees (-30 degree) at night; six to seven feet snow accumulation in certain areas even in august; constant danger of avalanches-Physical, technical and financial constraints making it almost impossible to keep routes open on permanent basis-State Govt. undertaking to continue to make

[^581]*Ramesh Autyanyprasi v. Union of India* AIR 1989 SC 549.
improvements on Pahalgam route during the usual 40 days yatra – Supreme Court accepting the contentions and undertaking of the State Government and modifying the High Court order accordingly.

In *R.K. Garg v. Union of India*, where constitutional validity of the Special Bearer Bond (Immunities and Exemptions) Ordinance, 1981, 1981 was challenged as volatile of Article 14 of the Constitution. In this connection the Supreme Court observed that- “There is a practical and real classification made between persons having black money and persons not having such money and this de facto classification is clearly based on intelligible differential having rational relation with reference to the object of the legislation and if that is done, there can be no doubt that the classification made by the Act is rational and intelligible and the operation of the provisions of the Act is rightly confined to persons in possession of black money.

The court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary.”

In *State of Bihar v. Kamlesh Jain*, Supreme Court held that Public Interest Litigation cannot be used to remove distress of any particular individual. A judicial process should not be allowed to be used for satisfaction of individual whims, pious though they may apparently look. Espousing cause of an individual is permissible only if it falls within the purview of policy decision of general application.

In *Nandjee Singh (Dr.) v. P.G. Medical Students’ Association*, Supreme Court held that individual dispute such as the eligibility of a particular student for MD examination could not be turned by an Association into a Public Interest Litigation. It was observed by the Supreme Court that a case seeking to convert what is strictly an individual dispute into a Public Interest Litigation. It was observed by the Supreme Court that a case seeking to convert what is strictly an individual dispute into a Public Interest Litigation should not be encouraged.

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585  *Nandjee Singh (Dr.) v. P.G. Medical Student’s Association*, AIR 1993 SC 2264 : 1993 (3) SCC 400.
In *State of West Bengal and Ors. v. Sampat Lal*, what had happened that because of unnatural death of two young boys Calcutta High Court appointed special officer but the Supreme Court held that the High Court should not have appointed a special Officer as the matter fell within the jurisdiction of the police, and that the conduct of such investigation is a police power. It was held that possible exceptions to the investigative power of police were not applicable in this case and that the High Court should have allowed the appellants a hearing and; not taken evidence prima facie and in this connection Supreme Court observed:

“We have therefore, thought it a proper exercise of discretion not to enter into the facts and express any opinion one way or the other so as not to prejudice the trial but might take place. It is sufficient to indicate that there is a residuary jurisdiction left in the Court to give directions to the investigating agency when it is satisfied that the requirements of law are not being complied with an investigation is not being conducted properly or with due haste and promptitude. The Court has to be alive to the fact that the scheme of the law is that the investigation has been entrusted to the police and it is ordinary not subject to the normal supervisory power of the Court.”

In the case of *Hindustani Andolan and Others v. State of Rajasthan*, wherein the petition was filed by an organization a question was raised whether the Government and police were unauthorized to enter a place of worship even when there is a criminal suspected to be sheltering there. In this case Supreme Court held-

“It is impossible and undesirable for any Court to issue a general writ of mandamus to the effect that whenever a criminal is suspected to have taken shelter in a place of worship, the police must enter that place, regardless of the overall situating of law and order. Speaking generally, courts cannot enforce law and order by issuing generally direction without reference to specific instances. The Government has to assess, in the context of the prevailing conditions, the impact of the steps taken to enforce law and order. And, it is the executive which has to take a policy decision as regards the steps to be taken in a given situation, after taking into account the demands of the prevailing situation.”

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In the landmark case of *Raunaq International Limited v. IVR Construction Ltd*\(^{588}\), Justice Sujata V Manohar rightly enunciated that when a stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. In other words the public must be compensated both for the delay in the implementation of the project and cost escalation resulting from such delay.

In *Sachidanand Pandey v. State of West Bengal*\(^{589}\), wherein the question of ecological imbalance was alleged in connection with construction of a hotel near Zoo Garden, the Supreme Court observed—

“Today public spirited litigants rush to Courts to file cases in profusion under this attractive name. They must inspire confidence in Courts and among the public. They must be above suspicion. Public interest litigation has now come to stay. But one is led to think that it poses a threat to Courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidance and to outline the correct parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases in the name of Public interest litigations, the traditional litigation will suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions. This does not mean that traditional litigation should stay put. They have to be tackled by other effective methods, like decentralizing the judicial system and entrusting majority of traditional litigation to Village Courts and Lok Adalats without the usual populist stance and by a complete restricting of the procedural law which is the villain in delaying disposal of cases.

It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts, especially the Supreme Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and

\(^{588}\) *Raunaq International Ltd v. IVR Construction Ltd* (1999) 1 SCC 492.

miseries of the needy, the under-dog and the neglected. It is necessary to have some self imposed restraint on public interest litigants.”

A writ petition was filed before the Bombay High Court690 challenging the grant of permission for establishment of 500 MW Thermal Power Station the it will have an adverse effect on environment. This case was filed by Bombay Environmental Action Group against the State of Maharashtra, wherein the Court on consideration of the matter found that the Environment Department of the Govt. of Maharashtra granted the site clearance from environment angle of the said project and found that on the part of the authority an expert of the seriousness that was required in the matter was shown and the proper condition and precautions were taken and in this connection the Court observed that-

“Environment issues are relevant and deserve serious consideration. But the needs of the environment require to be balanced with the needs of the community at large and the needs of a developing country. If one finds, as in this case, that all possible environment safeguards have taken, the check and control by way of judicial review should then come to an end. Once an elaborate and extensive exercise by all concerned including the environmentalists the State and the Central authorities’ and expert-bodies is undertaken and effected and its end result judicially considered and reviewed, the matter thereafter should in all fairness sand concluded. Endless arguments, endless review and endless litigation in a matter such as this, can carry on to no end and may as well turn counterproductive. While public interest litigation is a welcome development, there are nevertheless limits beyond which it may as well cease to be in public interest any further.”

This is an apt example of judicial restraint and changing face of judiciary in accordance with the changing requirement of the Society.

In Madhu Kishwar v. State of Bihar,591 the Apex Court held, “Judge-made amendments to provisions, over and above the available legislation, should normally be avoided. In the facts of the divisions and visible barricades put by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on

equality principle, by judicial activism, is a difficult and mind-boggling effort. An activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at advice and focus attention on the state polity on the problem and shake it from its slumber, March and reach the goal. For in whatever measure be the concern of the court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motives, described in judicial parlance as self restraint.

6.9 **JUDICIAL OVERREACH**

The term ‘Judicial Overreach’ can be understood as being closely associated with its predecessor philosophy of ‘Judicial Activism’ in the sense that it begins from the point where legitimate ‘activism’ ends. In other words, the point at which ‘Judicial Activism’ loses its legitimacy in entirety, any further judicial exercise of power beyond that point would tantamount to ‘Judicial Overreach’. According to Justice Verma, “If the court starts doing a job not supposed to be his, then other than the problem of lack of expertise, it leaves the aggrieved party with no forum to ventilate his grievances. Whenever courts take over the function of other bodies or experts, it amounts to overreach; when they adjudicate a legal issue and the decision has a juristic basis, it is legitimate judicial activism and is justified”\(^{592}\). He further clarifies that” Judicial Activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ad hocism nor judicial tyranny. These constitute the broad parameters for testing the propriety and legitimacy of judicial interventions.”\(^{593}\)

As the name suggests, the term concerns itself at addressing the highhandedness of the exercise of judicial power in the domains not constitutionally earmarked for the judiciary. The idea can very well be conceived as an offshoot of the words of Lord Acton when he says that “all power corrupts and absolute power corrupts absolutely.”

Since the term ‘judicial activism’ takes on vast meanings in an attempt define it, the ascertainment of its limits become next to impossible since the line between appropriate judicial intervention and judicial overreach is often tricky.\(^{594}\) However the


\(^{593}\) Ibid.

criterion is one related to ‘justifiable interventions’ and ‘judicially manageable standards’. In this regard, the United States Supreme Court has laid down a pragmatic test in *Baker v. Carr* for judicial intervention in matters with a political hue. It has held that the controversy before the court must have a “justifiable cause of action” and should not suffer from “a lack of judicially discoverable and manageable standards resolving it.” This is a pre-requisite for judicial intervention. The past history of judicial activism in India has interestingly shown myriad instances of ‘overreach’ in a catena of decisions as a result of which the term “overreach” which was amalgamated with judicial activism before, has come into existence. In his book, Prof. Sathe has called it as “Typical Instances of Judicial Activism”. It is these typical instances that form the subject matter of ‘Judicial Overreach’ since they seem to have assailed unwarranted judicial interventions.

Objectively, the term ‘Judicial Overreach’ aims at acting as a bulwark against the unjustifiable attempt by the judiciary to perform executive or legislative functions and emphasize upon the limit within "Judicial which the judges are constitutionally mandated to be ‘activists’. It considers the broad and functional separation of powers, though not strict, within the constitutional scheme and argues that no state instrumentality can overstep or usurp the functions earmarked to it by the Constitution.

The term presupposes that in a democratic set up, any functional inaction on the part of other state organs, apart from judiciary, is constitutionally to be corrected by the people only since the state is actually a conglomerate of popular will in a democracy and at the same time argues that an unaccountable judiciary, in the name of ‘activism’, cannot run the government.

The glaring instances of judicial overreach reveal how the judiciary has assumed jurisdiction in deciding policy matters which constitutionally fall within the domain of the executive and legislative organs. Some of them can be referred to where the judiciary has intervened to questions a ‘mysterious car’ down the Tughlaq Road in Delhi, allotment of a particular bungalow to a Judge, specific bungalows for the judges’ pool, monkeys capering in colonies, stray cattle on the streets, clearing public conveniences, levying congestion charges at peak hours at airports with heavy traffic etc. under the threat of use of its contempt power to enforce compliance with its

orders. Misuse of the contempt power to force railway authorities to give reservation in a train is an extreme instance.

In Aravali Golf Club v. Chandra Hass & Hass & Ors. the High court gave directions to the government for the creation of the post of a tractor driver and further directed to regularize the petitioner on the same created post. At the outset, it can be said that creation or abolition of posts under the services of the government is purely an executive-administrative function and the judiciary has no legitimate business to direct the executive in this regard. However, the Supreme Court, taking note of this and the judicial trend of transgressing its limits, declaimed to give any relief to the respondent-petitioner.

To the same tune, in Mansukhla Vittal Das Chauhan v. State of Gujarat the Gujarat High Court directed the Secretary to the government to grant sanction to prosecute, so that the sanction order may be treated to be an order passed by the Secretary of the Gujarat government and not that of the high court. This was a classic instance where the judiciary tried to enforce its own sweet will by exercising its power to regulate the statutory discretion vested with the sanctioning authority in the guise of ‘judicial activism’.

Recently, the courts have apparently, if not clearly strayed into the executive domain or in the matters of policy. The orders passed by the Delhi High Court in recent times dealt with subjects ranging from age and other criteria for nursery admissions, unauthorized schools, supply of drinking water in schools, number of free beds in hospitals on public land, use and misuse of ambulances, requirements for establishing a world class burns ward in the hospital, the kind of air Delhi ties breathe, begging in public, the use of subways, the nature of buses commuters board, the legality of constructions, identification of buildings to be demolished, size of the speed breakers, overcharging by the TSR.

597 Ibid.
598 (2008) 1 SCC 683.
599 This was further reiterated and clarified by the Supreme Court in Hindustan Aeronautics Ltd. v. Dan Bahadur Singh & Ors. (2007) 6 SCC 207.
600 AIR 1997 SC 3400.
601 Ibid.
In this process, the judiciary has not only overreached to direct the designated authorities to perform their duty, but it has also taken over their implementation through non-statutory committees formed by it. Had there been a law to these effects, judiciary could have been rightly understood as being ‘activist’ to enforce them and appreciated in its urge to do justice, however creating a law and then enforcing it by wrong and unconstitutional exercise of its power is clearly unwarranted under the constitutional scheme. For running the nation is something not expected out of the judiciary?

6.10 FINDINGS

Having seen the scope for ‘judicial activism’ under the constitutional scheme in the preceding chapter, it can rightly be argued that a legitimate judicial intervention is the one which clearly falls within the permissible scope of judicial review. A thin line demarcating the appropriate and inappropriate judicial intervention can only be drawn on the basis of functions earmarked to the different branches by the Constitution. In the borderline cases, a legal question at the epicentre of the dispute determines the need for judicial intervention. Purely political questions and policy matters not involving decision of a core legal issue is therefore outside the domain of judiciary.

In case of governmental inactions or institutional failures, the power of superior judiciary to issue a writ of mandamus or other suitable direction to the concerned public authority commanding performance of its legal obligation is the remedy. However, there stands a clear distinction between commanding performance by such public authority and the judiciary taking over such function on its own. The former, and not the latter, is legitimate judicial intervention.