CHAPTER 5

'JUDICIAL ACTIVISM' VIS-A-VIS 'JUDICIAL OVERREACH'

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 State.

As discussed in the preceding chapters, 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 regard.

In recent times, such an enormous expansion of unaccountable judicial power has attracted the attention of 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 politics.[68] What it could not do under the

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[68] See Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty" at 18, *Journal of Democracy at 70.(2007)*
To the same tune Andhyarujina 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.

traditional pattern now seems evidently possible with the growing judicial intervention in other spheres of state business.[69]

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 epitomised by catena of judicial pronouncements, is however perceived differently with different connotations.[70] In this process, on one hand the judiciary has taken upon itself the task of ensuring maximum freedom to the masses and to galvanise the executive and 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' 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'.

Why Judicial Activism?

Though it is almost difficult to enlist all possible reasons giving rise to 'Judicial Activism' which would be accepted to all at all times, the following can be said to constitute some well accepted reasons which compel a court or a judge to be 'active' while discharging the judicial functions assigned to it.

- Near Collapse of Responsible Government. When the two political branches of the Government viz. the Legislature and the Executive fail to discharge their respective functions, there will be a near collapse of responsible government. Since a

[69] Ibid

[70] As Prof. Baxi rightly suggests that judges are evaluated as activists by various social groups in terms of their interests, ideologies and values.

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 when the governmental agencies fail miserably to perform their administrative functions sincerely and with integrity, it would lead to erosion in confidence in the constitution and democracy, among the citizens. In such an extraordinary scenario, the judiciary may legitimately step into the areas usually earmarked for the legislature and executive. The result is the judicial legislation and government by judiciary.

- Pressure on Judiciary to Step in Aid. Now, it has become fully established that the judiciary cannot remain a silent spectator when the fundamental or other rights of the citizens are trampled by the government or third parties. The judges, as responsible members of the society do feel that they have a role to play in ameliorating the worsening conditions of the citizens. As Upendra Baxi has rightly highlighted, the Indian nation is obsessed with judicial salvation.[71] It has become natural for the citizens to look up to the judiciary to step in their aid and to protect their fundamental rights and freedom. This mounts tremendous pressure on the judiciary on the whole to do something for the suffering masses. It may lead to an activist role being taken up by the judiciary.
- Judicial Enthusiasm to Participate in Social Reform and Change. As has been already pointed out, the judges cannot be idle and silent spectators when the times go on changing. As the persons involved in interpreting and applying a law which is not static but dynamic, the judges would like to participate in the social reforms and changes that take place due to the changing times. Under such circumstances, the judiciary has itself claimed to be an active participant in social reformative changes. It has encouraged and at times initiated PIL in India. In such cases, the courts have discarded the traditional and necessary constraints on themselves such as the

[71] Upendra Baxi, *"Courage Craft and Contention- The Indian Supreme Court in the Eighties."*Bombay 1985 p.21.

requirements of standing, ripeness of the case and adversarial forms of litigation and have assumed the functions of investigator, counsellor and monitor of administration. This liberalised approach of the judiciary would lead to relaxation of certain procedural and customary rules by invoking a court's jurisdiction which can be directly related to the expansion of judicial power. So when courts themselves initiate corrective actions for social ills, their activity becomes indistinguishable from that of the commissioners of grievances.

- Legislative Vacuum, Left Open. In Administrative Law, there is a saying that even if the parliament and all the State Legislatures in India make laws for 24 hours a day and 365 days in a year, the quantum of law cannot be sufficient to the changing needs of the modern society.[72] The same thing holds well in respect of many a legislation passed by the competent legislatures. In spite of the existence of a large quantum of pre and post constitutional laws, there may still be certain areas, which have not 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 social needs, the courts often indulge in judicial legislation. In this context, judicial legislation has to be understood as an incident to statutory interpretation. The courts often have acted to fill the void created by the legislature's abdication of legislative responsibility.[73]
- The Constitutional Scheme. The Indian Constitution contains number of provisions which give the judiciary enough scope to assert itself and play an active role. Under Article 13, the judiciary is implicitly empowered to review the validity of any law on the touch stone of fundamental rights and to declare the same void if it contravenes any of the fundamental rights. Under Article 32, any person whose fundamental rights are violated can straightaway approach the Supreme Court for the enforcement of those

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[72] I.P.Massey: Administrative Law Eastern Book Company, Calcutta.
[73] As happened in *Vishaka v.State of Rajasthan.*

fundamental rights. Further the right to approach the Supreme Court under Article 32 itself has been made a fundamental right under the caption 'right to constitutional remedies'. Thus the Supreme Court has been designated as the guardian of the fundamental rights of the citizens and while playing that role, the Supreme Court often indulges in legitimate judicial legislation and judicial government. Under Article 131 of the Constitution, the Supreme Court has been vested with jurisdiction to uphold the federal principle of the Constitution. The Supreme Court is the highest appellate Court and it exercises this appellate jurisdiction in all civil, criminal and constitutional matters.[74] The Supreme Court has been vested with advisory jurisdiction to advise the President on any question of fact or law, which may be referred to it.[75] The Supreme Court has rule making power under Articles 142 and 145. It has the power to punish any person for its contempt under Article 129.This list is only illustrative and not exhaustive. A cumulative analysis of all the above provisions makes it abundantly clear that the judiciary in India, in general and the Supreme Court in particular has vast powers under the constitution and has enough scope for being active, and to uphold the cardinal principle of Constitutionalism.

- Authority to Make Final Declaration as to Validity of a Law. The Supreme Court of India is the final arbiter and umpire as to the validity of law. Under Article 141, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. While adjudicating on the issue of any legal aspect, even though it has to be remembered by the Supreme Court that "(Supreme Court judgments) are not final because (they).....are infallible, but (they).....are infallible because (they) are final."[76] It may well be possible that the court also may overlook this principle. In *Indra Swaney v. Union of India,*[77]a three Judges Bench of the

[74] Under Articles 132 to 137.
[75] Under Article 143.
[76] As remarked by Justice Jackson of the U.S. Supreme Court in Brown v. Allen, 344 US 443-540 (1944).
[77] AIR 2000 SC 498.

Supreme Court encountered a peculiar and belligerent situation where one of its directions in the Mandal Commission Judgment[78] to the States to identify the advanced section among the Backward Classes of citizens that is *creamy layer* for the purpose of excluding them from availing the benefits of reservation etc. In the instant case the Kerala State Backward Classes (Reservation of Appointments/Posts in Services) Act, 1995 gave retrospective effect to the validating law containing statutory declaration to the effect that "no creamy layer" exists in State of Kerala was found unconstitutional by the court which took serious note of the action of Kerala Government and initiated contempt proceedings against the State. The final authority of the Supreme Court to decide the validity of a law, gives the Court a great discretionary power without any accountability whatsoever and a consequent development is the judicial activism.

- Role of Judiciary as Guardian of Fundamental Rights. The fundamental law of the land i.e. the Constitution of India, 1950 has designated the higher judiciary in India as the guardian of the fundamental rights of the citizens. A cumulative reading of Articles 13, 32 and 226 makes it very clear that the higher judiciary in India has been endowed with the onerous task of upholding the fundamental rights of the citizens. Under Article 13 of the Constitution any law which abridges fundamental rights shall be declared as void by the Supreme Court and the 18 High Courts. Under Article 32 of the Constitution, the Supreme Court has the power to issue any writ, order or direction to any person or authority violating fundamental rights of the citizens. In fact the right to approach the Supreme Court itself has been made a fundamental right on its own under Articles 32 to 35. Under Article 226 of the Constitution, the High Courts' enjoy a power which is even more wider, to enforce the fundamental or other rights of the citizens, by invoking the writ jurisdiction of the High Court. All these powers vested in the Constitutional Courts, enable them to exercise vast powers of judicial review in respect of any legislative, quasi-legislative,

[78] AIR 1993 SC 477.

executive, quasi- judicial or other actions of the State and its agencies. In fact this is the role which has been played by the Supreme Court and the High Courts' effectively. The result often is the brooding omnipresence of judicial activism.

- 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 dispute.[79] A recent study made by two law professors on the role of the Supreme Court of India reveals that 85% of the Law Students of Delhi University declared that they trust the Court rather than the Parliament.[80] Majority of the students liked the PIL and Judicial Activism of the Supreme Court. The study shows that there is an extraordinary high level of support for the institutions. Probably in no other country has any segment of the elite public ever demonstrated such overwhelming general esteem for a flagship constitutional court, or for any other major institution. This clearly shows the public confidence and trust reposed by the people of India in the Supreme Court as the ultimate guardian of their rights and liberties. The Supreme Court has withstood the test of times through the device of Judicial Activism.
- Enthusiasm of Individual Players. As rightly pointed out by Professor Upendra Baxi, many individual players are responsible for activating judicial activism.[81] They are civil right activists, people right activists, consumer right activists, bonded labour groups, citizens for environmental action, women rights groups and assorted lawyer-based groups etc. It may be noted that this list is only illustrative. The same jurist goes on to point out that although judicial activism is a collective venture, some individual justices have also played a foundational role. For instance without Krishna Iyer, P.N.Bhagwati, O.Chinappa Reddy and D.A. Desai,JJ, in the formative years of

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[79] H.R.Khanna, Judiciary in India and Judicial Process (1985) at 47.

[80] George H.Gadbois, Jr and Mool Chand Sharma: "Law Students evaluate the Supreme Court – A Case of Enchantment", Journal of the Indian Law Institute Vol. 31: No 1, 1989, pp. 1-46.

[81] In his article, "The Avatars of the Indian Judicial Activism: Exploration in the Geographies of Justice".

social action litigation, there would not have come into existence the activist judicial being, signified by social action litigation. The judicial actors have been classified by Prof. Baxi into the following categories:

- Inaugural Judicial actors who laid the foundation for Judicial Activism such as Desai and Chinappa Reddy,JJ who were quick to extend the realm of judicial activism to the protection of the rights of organised labour. Similarly subsequent new judicial actors like Justice Kuldip Singh in the case of Environmental Jurisprudence, Justice K Rama Swamy in the area of rights of depressed class and Justice J.S.Verma in the area of Corruption in High Places also made significant contribution for judicial activism in India.
- Restraint Judicial Actors such as Justice R.S. Pathak and Justice Venkat Ramaiah.
- Eclectic Judicial Actors who were neither friendly nor hostile to judicial activism.
- Gatekeeper judicial actors.
- Anti activism judicial actors and
- Revisionist judicial actors.

Prof. Baxi, considers another category of superannuated judicial actors who primarily consist of retired judges who with their long and active life in the service of the nation, occupy visible role in national bodies such as Law Commission of India, the Human Right Commission, the Minorities Commission and the Press Council of India. If one name has to be mentioned as the embodiment of these roles and processes, Justice V.R. Krishna Iyer furnishes a shining example of activist superannuated judicial actor. In the words of Prof. Baxi, "his impact off the Bench is even more enduring on the life of law in India than during the few years of his explosive activist presence and performance in the Supreme Court of India.

The above reasons are not the only reasons, which prompt the judiciary to be active. However these are the primary reasons that compel the judiciary to be active or conservative

at a given point of time, depending on the prevailing circumstances in the society, government and the world at large.

Dimensions of Judicial Activism

The six dimensions usually considered being important by the American scholars but which can be made applicable equally to the Indian context is as under:[82]-

1. Majoritarianism;
2. Interpretive Stability;
3. Interpretive Fidelity;
4. Substance Democratic-Process Distinction;
5. Specificity of Policy; and
6. Availability of Alternative Policy Maker.

In order to understand the applicability of one or more of the above dimensions of judicial activism of the Supreme Court, it would be necessary to analyse each of them in light of the decisions made by the court in the past.

- Majoritarianism. Majoritarianism is probably the most frequent criterion used in assessing Supreme Court's activism. When the court exercises judicial review, it substitutes its own public policy preferences for those enacted by elected representatives of the Parliament, State Legislatures or other local bodies. The violation of majoritarianism is most pronounced when the court declares legislation proper as unconstitutional. Thus when the court nullifies a law made either by the Parliament or any state legislature, the court can be described as active.
- Interpretive Stability. This dimension measures the degree to which a Supreme Court decision either retains or abandons a precedent or existing judicial doctrine. The most visible and dramatic instance of interpretive stability occurs when the court explicitly overrules one of its earlier decisions. Thus in India, the interpretation of the concept of "personal liberty" under Article 21 of the Constitution and its variance from

[82] Sinha Satyavarta "Judicial Activism: Its Evolution and Growth" 3 (2,DJA Journal 2003)

A.K.Gopalan v. State of Madras,[83] *to Maneka Gandhi v. Union of India*[84] exhibits a fine example of this kind of judicial activism. A lesser form of interpretive instability occurs when the court drastically weakens a precedent without formally overruling it. The interpretation of equality in terms of "reasonable classification" and the shift towards a focus on "rule against arbitrariness" as laid down in *E.P.Royapa v. State of Tamil Nadu,*[85] is a good example of this kind of judicial activism. However, the interpretive stability need not be measured against 'precedent' alone. Another base line is the "ongoing interpretation" of the Constitution.

- Interpretive Fidelity. This dimension measures activism in the Court's actual or inferential construction of particular provisions of the constitution. Activism occurs when an interpretation does not accord with the ordinary meaning of the wording of the provision and/or with known, consensual intentions or goals of its framers. The court may sometimes ignore the generic language of the constitutional provisions and may assign new meaning of them, in accordance with the changing times and needs of the society. While applying a document which was made about five decades ago to the problems being faced after 50 years, the courts would be called upon to give new construction to the old provisions, the judicial interpretation of the agrarian reform legislation in the 1950's and 1960's and the major shift afterwards is an example of this kind of judicial activism in India. The justification for such new and innovative interpretation seems to be that, what is important is the spirit of the document rather than the wording or the framers' time-bound intentions. Those decisions of the court, which appear to be in clear contradiction of one or more constitutional provisions in terms of the ordinary meaning of their wording or which are contrary to the logical implications of two or more provisions considered together, can be safely categorised as highly activist in this category. The best example is the way the Indian Supreme Court has propounded the theory of basic structure to have

[83] AIR 1950 SC 27.
[84] AIR 1978 SC 597.
[85] AIR 1974 SC 555.

an indirect control over the amending process of the constitution, contrary to the intention of the legislature.[86]

- Substance – Democratic Process Distinction. It is argued that there is greater justification for the court's engaging in policy making in some areas than in others. Thus, those decisions of the court which make economic policy regulate the non-political process activities of institutions or groups or impinge upon people's careers, life styles, or moral or religious values come under this category. In India these decisions also include certain sensitive areas like reservations for oppressed classes, the extent of reservation, the creamy-layer theory and the emergence of the doctrine of legitimate expectation etc.
- Specificity of Policy. While nullification of a law is still a prominent characteristic of judicial activism, in recent years the courts have increasingly become positive policy makers as well. The judicial actions like commandeering governmental agencies to undertake certain policies and taking over the management of schools, hospitals and other institutions come under this category. Positive policy making is most properly categorised as highly activist. It consists of those decisions which in effect, declare or develop a new policy or which specify in detail particular behaviour, governmental agencies need to follow in pursuance of an existing policy. In India, these decisions include the ordering of shifting of polluting industries around Taj Mahal, stopping of aquaculture and a code of conduct for trial of pending criminal cases etc.
- Availability of an Alternate Policy Maker. Julius stone reminded his brethren in *United States v. Butter,*[87] that "courts are not the only agency of government that must be presumed to have the capacity to govern." Thus when court makes policy when another agency is engaged or likely to be engaged in meaningful action to meet the problem, it becomes the final way of measuring judicial activism. In other

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[86] The 24th Amendment in so far it affected the meaning of 'law' under the Articles 13 & 368. However, in Keshavananda Bharti v. State of Kerala, the Supreme Court has asserted itself by invoking the 'Basic Structure' doctrine.

[87] 297 US 1 at p.87 (1937)

words, when the court substitutes its own policy in alternative to the one of the proper policy maker, the decision can be called an active one. In India, the Supreme Court has not become that active to make policy-making a habit. However, recently the Supreme Court has given many clear guidelines in certain specific areas, which can be called the judicial policy making. In the area of pollution prevention, the Supreme Court has laid down number of options before the State like closure of industries altogether, shifting of industries from one place to another and the like directions.[88] Similarly, the Supreme Court has formulated a policy to eradicate child labour in India, by suggesting certain comprehensive measures including payment of compensation to the child labour by their employers.[89] As regards the sexual harassment of working women, the Supreme Court has furnished many guidelines and norms to define and illustrate sexual harassment.[90] These are few instances where the Supreme Court has functioned like an alternative policy-maker, by substituting itself for the legislature, which obviously has failed to do the needful.

A clear analysis of the six dimensions of judicial activism as discussed above makes it clear that these dimensions cannot be isolated from each other and overlapping is bound to happen. Further it could be seen that the nomenclature used to describe the six dimensions is typically American[91]. However, the framework is applicable to the Indian scenario also.

From the foregoing discussion, it becomes obvious that every dimension of judicial activism, in whichever, category it might fall, revolves around the power of judicial review exercised by the court. The judicial activism is either an expansive use of judicial review or refusal to exercise the power of judicial review in a given case.

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[88] M.C. Mehta v.Union of India 1996, 1997, M.C.Mehta v. Union of India (1988) 1 SCC 471.
[89] M.C Mehta v.Union of India, (1996) 6 SCC 756.
[90] Vishaka v. State of Rajasthan (1997) 6 SCC 241.
[91] Bradley C. Canon "A Framework for the Analysis of Judicial Activism", published in Supreme Court Activism and Restraint Ed. By Stephen C.Halpern & Charles M. Lamb 68 (Lexington: Massachusetts: Toronto, 1984).

'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."[92] He further clarifies that "Judicial Activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ad hoc-ism nor judicial tyranny. These constitute the broad parameters for testing the propriety and legitimacy of judicial interventions."[93]

As the name suggests, the term concerns itself at addressing the high handedness 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 to define it, the ascertainment of its limits becomes next to impossible since the line between appropriate judicial intervention and judicial overreach is often tricky.[94] However the 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* [95] 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

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[92] J.S. Verma, "The Indian Polity: Separation of Powers" 35 *Indian Advocate 36* (2007).
[93] Ibid.
[94] Pratap Bhanu Mehta, "Judicial Overreach: Its Overwhelming Evidence Cannot be Ignored" 35 *Indian Advocate 79 (2007).*
[95] 369 US 186 (1962).

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 emphasise upon the limit within 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 conglomeration 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 question 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.[96] Misuse of the contempt power to force railway authorities to give reservation in a train is an extreme instance.[97]

In *Aravali Golf Club v. Chandra Hass & Others,*[98] the high court gave directions to the government for the creation of the post of a tractor driver and further directed to regularise 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, declined to give any relief to the respondent-petitioner.[99]

In another instance, in *Mansukhlal Vittal Das Chauhan v. State of Gujarat*[100] 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'.

Thus it can be seen that 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 the recent past dealt with subjects ranging from age and other criteria for nursery admissions, unauthorised 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 hospital, the kind of air Delhiites breathe, begging in public, the use of subways, the nature of buses commuters board, the legality of constructions,

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[96] Supra Note 92 at 37.
[97] Ibid.
[98] (2008) 1 SCC 683.
[99] This was further reiterated and clarified by the Supreme Court in *Hindustan Aeronautics Ltd v. Dan Bahadur Singh & Others.(2007) 6 SCC 207.*
[100] AIR 1997 SC 3400.

identification of buildings to be demolished, size of the speed breakers, overcharging by the TSR.[101]

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?

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.

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[101] Ibid.