



## When Judges Legislate

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(This editorial is based on the article “When judges legislate” which appears in The Hindu on 16th November 2018)

It is being claimed that, in many recent judgments, the Supreme Court has become hyper-activist in making laws. Neither is the broad separation of powers among the three organs of the state maintained nor is the law being preserved.

In *Ram Jawaya v. The State of Punjab* (1955), the court observed: “Our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another.” This implies that there should be a broad separation of powers in the Constitution among the three organs of the state (legislative, executive, judiciary) and that one organ should not encroach into the domain of another. If this happens, the delicate balance in the Constitution will be upset and there will be chaos.

### What is Judicial Activism?

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- The judiciary performs an active role to uphold constitutional values and ethics under the constitutional pattern. For addressing civic dilemmas, the judiciary applies its intellect and creativity to fill the gap between the positive and normative aspects of legislations. For this reason the judicial activism has emerged.
- The term “Judicial Activism” refers the court’s decision, based on the judges personal wisdom that do not go rigidly within the text of the statutory passed by the legislature and the use of judicial power broadly to provide remedies to the wide range of social wrongs for ensuring proper justice.

### Doctrine of separation of Power

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- The Constitution, under various provisions, has clearly drawn the line between Legislature and the Judiciary to maintain their independence in their respective functioning.

- Where Article 121 and 211 forbid the legislature from discussing the conduct of any judge in the discharge of his duties, Articles 122 and 212, on the other hand, prevent the courts from sitting in judgment over the internal proceedings of the legislature.
- Article 105(2) and 194(2) protect the legislators from the interference of the Courts with regards to his/her freedom of speech and freedom to vote.

## Pros of Judicial Activism

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- It provides a system of checks and balances to the other government branches. Judicial Activism is a delicate exercise involving creativity. It brings out required innovation in the form of a solution.
- Judicial Activism provides judges to use their personal wisdom in cases where the law failed to provide a balance.
- Judicial Activism also provides insights into the issues. The reason why this is a good thing is that it shows the instilled trust placed in the justice system and its judgments.
- Many a time public power harms the people, so it becomes necessary for the judiciary to check misuse of public power.
- It provides speedy solutions where the legislature gets stuck in the issue of majority.

## Cons of Judicial Activism

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- Judges can override any existing law. Hence, it clearly violates the line drawn by the constitution.
- The judicial opinions of the judges become standards for ruling other cases.
- Judgment may be influenced by personal or selfish motives. Which can further harm the public at large.
- Repeated interference of courts can erode the faith of the people in the quality, integrity and efficiency of governmental institutions.
- Courts limit the functioning of government, when it exceeds its power and to stop any abuse or misuse of power by government agencies.

## What makes the judiciary to step-in?

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- 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 a scenario, the judiciary steps into the areas usually earmarked for the legislature and executive and the result is the judicial legislation and a government by judiciary.
- 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.

- 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.

### Examples where the judges may have encroached upon the legislature:

- **Arun Gopal v. Union of India (2017):** the Supreme Court fixed timings for bursting Diwali fireworks and prohibited the use of non-green fireworks, although there are no laws to that effect.
- **M.C. Mehta v. Union of India (2018):** the court annulled the statutory Rule 115(21) of the Central Motor Vehicle Rules, 1989, when it directed that no BS-4 vehicle should be sold after March 30, 2020, and that only BS-6 vehicles can be sold after that date.
- **Subhash Kashinath Mahajan v. State of Maharashtra (2018):** the court amended the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, by annulling Section 18 which said that no anticipatory bail will be granted to persons accused under the Act; by requiring a preliminary enquiry; and by prohibiting arrest under the Act except with permission in writing by the appropriate authority.
- **Rajesh Sharma v. The State of Uttar Pradesh (2017):** the court felt that Section 498A of the Indian Penal Code was being misused. So it amended that Section by requiring complaints under that provision to be sent to a Family Welfare Committee constituted by the District Legal Services Authority, although there is no such requirement in Section 498A.
- **National Green Tribunal (NGT):** ordered that no 15-year-old petrol-driven or 10-year-old diesel-driven vehicle will ply in Delhi, and the Supreme Court has directed impounding such vehicles, though neither the NGT nor the Supreme Court are legislative bodies.

### Way Forward

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- Judicial activism is not backed by the Constitution; it is a product devised solely by the judiciaries. When the judiciary steps over the line of the powers given to it, in the name of judicial activism, one can say that the judiciary then begins to nullify the concept of separation of powers specified in the Constitution.
- If judges are free to make laws of their choices, not only would that go against the principle of separation of powers, it could also lead to uncertainty in the law and chaos as every judge will start drafting his own laws according to his whims and fancies.
- Judicial discipline has to be observed to maintain a clear balance.
- Making laws is the function of the legislature. It is the duty of the legislature to fill the gap of laws and it is the duty of executive to implement it in a proper manner. So that only the interpretation remains as a work for the judiciary. Only the fine equilibrium between these organs of Government can sustain the constitutional values.