

A Critical Analysis on Judicial Activism and Overreach

Md. Mostafizur Rahman¹, Roshna Zahan Badhon²
^{1,2} (LL.B. and LL.M. from Northern University Bangladesh)
Corresponding Author: Md. Mostafizur Rahman

Abstract: The judiciary performs an active role to uphold constitutional values and ethics under the constitutional scheme. For confronting civic dilemmas, the judiciary applies its intellect and creativity to fill the hiatus between the positive and normative aspects of legislations. It cannot properly uphold the interest of the citizen, if it is enclosed with legal hindrances and consequently the judicial activism is emerged. But, the embracement with judicial overreach can menace the good governance.

Keywords: Judicial activism, judicial overreaching, judicial restraint, judicial review, public interest litigation, interpretation, judge-made laws, rule of court.

Date of Submission: 24-07-2018

Date of acceptance: 11-08-2018

I. INTRODUCTION

The powers of the State are generally characterized as the legislative power (i.e. making laws), the executive power (i.e. enforcing laws) and the judicial power (i.e. adjudicating the disputes by applying laws). Though the rigid separation of powers is impracticable, there should have cooperation and coordination among the three branches. It is beyond doubt that the role of judiciary transforms the conventional role into more active participatory role to cope with the changing society. The judicial attempts for protecting the rights of the citizen properly and for restraining constitutional transgressions by the others and sometimes, it suffices beyond the traditional boundary by using judicial mind and judicial intellect and hence, it introduces judicial activism. The modernist judicial approach of 'judicial activism' holds its position with the aim of ensuring just and proper justice to all. It is noted that, if judges should use this instrument whimsically, it should be ascertained as judicial overreaching.

II. NOTION OF JUDICIAL ACTIVISM AND OVERREACH

Under the philosophy of trias politica, there should have three organs of the State and these organs should maintain their certain powers under the mechanism of checks and balances. Hence, the judiciary is entrusted with dispute resolutions activities through different modes, by which it uses its intellect and creativity.

2.1. Definition of the Judicial Activism

On general approach, the term "Judicial Activism" refers the court's decision, based on the judge's personal wisdom or political affiliation that do not go rigidly within the text of the statutory passed by legislature and the use of judicial power broadly to provide remedies to the wide range of social wrongs for ensuring proper justice.¹ Paul Mahoney narrated that, "Judicial activism exists where the judges modified the law from what was previously stated to be the existing law which often leads to substituting their own decisions from that of the elected representatives of the people."² Technically, the concept is related broadly to the constitutional interpretation and statutory construction.

The Supreme Court (hereafter referred as "SC") by means of interpretation enlarges the scopes of exercising its power. As directive principles are inserted into the constitution, the SC refers to, besides restraining upon the executive power, direction and guidance.³ The jurisdiction relating judicial interpretation is exercised for sustaining social order, integrating the people, elongating the constitutional rights and confirming the enjoyment of those rights by all people.⁴ The activist judges, on the way of inculcating soul and fluid into

¹ Christopher Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security* (Rowman & Littlefield Publisher Enc 1997)

² Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 Yale Human Rights & Development Law Journal 57

³ Durga Das Basu, *Constitutional Remedies and Writs* (2nd edn, Kamal Law House, 2009) 38

⁴ *P G Institution of Medical Education v k L Narasimham* [1997] 6 SCC 650

the dry skeleton provided by the legislature, create a living entity appropriate and adequate to fulfill the social demands.⁵

2.2. Historical Development of the Concept of Judicial Activism

The concept “judicial activism” is pronounced much more in the scholastic realm of legal and political studies. Its root is founded intrinsically in the English concepts of “equity” and “natural rights”. At the very beginning, the court declared void Virginia Statute for Establishing Religious Freedom 1786 because it violated a 1783’s peace treaty with Great Britain.⁶ The concept can be traced back in USA to the case of *Marbury v Madison*⁷, where Mr. Chief Justice Marshall laid down the foundation of judicial activism besides judicial review. After that, in the modern era, the Arthur Schlesinger introduced the term “Judicial Activism” to the public Schlesinger’s article to characterize several judges as activists.⁸

From the very beginning, the people of Bangladesh have held the judicial authority in very high esteem. Before the liberation war, the Constitution of Pakistan 1962 was silent regarding the matters of judicial review. But, this concept was introduced through the judicial activism in the case of *Jubendra Kisore v East Pakistan*⁹ and afterward in the case of *Mustofa Ansari v Deputy Commissioner*¹⁰, the court struck down a provision in the Chittagong Hill Tracts (Regulation) Rules 1960. After the independence of Bangladesh, the first wind of judicial activism was felt in the case of *A. T. Mridha v State*¹¹ concerning the legality of detention under the Bangladesh Scheduled Offences (Special Tribunals) Order 1972¹², where the Court pronounced that its constitutional supervisory power could not be ousted by a sub-constitutional legislation. After that, there several cases have been relating to the matter of fundamental rights decided on the basis of judicial activism.

2.3 Transformation of Judicial Activism in Judicial Overreach

Just opposite concept of judicial activism is judicial overreach or judicial over-activism, but it is very difficult to determine a median line between these two concepts. When the judiciary crosses over the power by interfering the proper functioning of the legislature or executive organs of the government and by causing a grave breach of the doctrine of separation of powers, the judicial activism becomes judicial adventurism, which is popularly known as judicial overreach. As Mr. Chief Justice J. S. Verma stated that, ‘Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial adhocism or judicial tyranny.’¹³

The supervisory power is not vested with unlimited prerogative to correct all types of hardship and it must be restricted to the cases of grave dereliction of duty and flagrant abuse of fundamental principles of law and justice.¹⁴ Thus, in the name of interpretation of the Constitution and the laws, the judiciary cannot create new laws or amend the existing laws.¹⁵ More specifically, the court’s duty is to interpret the law and not to intervene in policy-making.¹⁶ And, the judiciary must exercise self-restraint to preserve balance of powers among three organs entrusted by the Constitution.¹⁷ For better understanding, the US Supreme Court has laid down a pragmatic test in the case *Baker v Carr*¹⁸ for judicial intervention in the matter with a political hue which determination is the precondition for judicial intervention, that the controversy before the court must have a justifiable cause of action and it should not merely suffer from lack of judicially discoverable and manageable standards to resolve. However, judicial activism should not be used to lead to the Constitutional principles of separation of powers getting eroded.

III. METHODS OF JUDICIAL ACTIVISM

The judiciary occupies a crucial role under the norm of constitutionalism, as it has been given the function to interpret the laws framed by the legislature and directed the executive in failure of execution of laws. Thereby, there is no suspicion that the judiciary deviates from its traditional way to the activist form for

⁵ Mr. Chief Justice P.N. Bhagwati, ‘Judicial Activism in India’ <https://media.law.wisc.edu/m/4mdd4/gargoye_17_1_3.pdf> accessed 14 January 2018

⁶ *Ware v Hylton* 3 US (3 Dall.) 199 (1796)

⁷ 5 US 137 (1803)

⁸ Arthur M. Schlesinger, ‘The Supreme Court: 1947’ (1947) 35 *Fortune* 202, 208

⁹ [1957] 9 DLR 21 (SC)

¹⁰ [1965] 17 DLR (Dacca) 553 (HCD)

¹¹ [1973] 25 DLR 335 (HCD)

¹² President’s Order No.50 of 1972 (BD)

¹³ R Shunmugasundaram, ‘Judicial activism and overreach in India’ (2007) 72 *Amicus Curiae* <<https://core.ac.uk/download/pdf/112282.pdf>> accessed 2 January 2018

¹⁴ Basu (n 3)

¹⁵ Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 92

¹⁶ *Anwar Ali Sarkar v State of West Bengal* [1952] AIR 75 (SC)

¹⁷ *Minor K Priyadarshini v The Director of Elementary* [2005] 3 CTC 449

¹⁸ 369 US 186 (1962)

participating actively with the changing crises of the society. On the legal point of view, the judicial activism is applied to the court system through subsequent ways.

3.1. Judicial Review

The concept of “Judicial Review” refers to a mode of court’s proceeding by which the judges act for eliminating unlawful and unruly decisions or actions by a public official exercising public duties to protect the constitutional rights and to protect the laws of the land, where there is no other efficient remedy to challenge.¹⁹ The court’s power of judicial review neither be legally barred²⁰ nor be subject of amendment and it have “hands off” command to the legislature.²¹

The general grounds, upon which an action is subject to control by judicial review, are illegality (i.e. the decision makers must understand correctly the law and give effect to it), irrationality (i.e. unreasonableness) and procedural impropriety (i.e. inconsistency with the rules of natural justice or violation of statutory rules).²² The court should take under consideration several matters relating to the question of illegality; these are the ultra vires (i.e. beyond the powers), error of law, violation of natural justice and abuse of power.²³

Mr. Justice A. S. Anand stated that, “The judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive do not equally guard the Constitution. For the progress of the administration, however it is imperative that all the three parts of the State function in complete harmony.”²⁴ The judicial scrutiny of parliamentary powers cannot stop especially when breach of other constitutional provisions has been alleged and the court can use its power against any such violations. That’s why the higher judiciary can be recognized as “Savior of the Constitution”.²⁵

On the contemporary context, most of the cases relating to the judicial review, the judges provide directive opinions, which are not necessary part of the court’s decision, going beyond the requirement of the particular case and this is a very traditional form to exercise the judicial activism by the Court.²⁶ It is necessary for the interest of judicial uniformity and judicial discipline that all the inferior Courts must accept as binding the obiter dicta. But, if the obiter dictum is on a question, which did not arise for determination by the Supreme Court, it is considered as an expression of opinion given by the way.²⁷ Synchronously confusion is raised as to the identification among Obiter Dictum, Ratio decidendi (i.e. reasons for decision) and Stare decisis (i.e. stand by things decided). In recent situation, the binding effect of the Obiter Dictum is observed and that renders the judicial activities in questionable position. For example, in *Bangladesh Bar Council v Darul Ihsan Trust and Others*²⁸ case, the Court has provided several guidelines to the private universities as to the admission process and as to the number of the students seeking law degree, though controversy was relating to the legality of the Darul Ihsan University.

3.2. Public Interest Litigation

Though the theory of Public Interest Litigation (hereafter referred as “PIL”) is the result of judicial activism, it raises up as efficient way of the higher judiciary to entertain judicial activism. It was introduced in Bangladesh as an outcome of the case *Kazi Moklesur Rahman v. Bangladesh*²⁹ (hereafter referred as “*Berubari Case*”) in which the concept of locus standi was raised and hereafter, the concept was finally settled in the case *Dr. Mohiuddin Farooque v. Bangladesh & others*³⁰.

Apparently, PIL indicates a legal action for indemnifying common interest or for protecting from civic grievance in which individuals have interest and by which their legal rights are infringed.³¹ As PIL allows any person without being actually aggrieved to activate the judicial method, it should be considered as device by which public participate in judicial review of administrative action.³² Even though the court can take PIL case on sou moto role and can entertain its duties through judicial activism.³³

¹⁹ M. Jashim Ali Chowdhury, *An Introduction to the Constitution of Bangladesh* (Northern University Bangladesh 2010) 476

²⁰ *Union of India v Narashimhalu* [1970] 2 SCR 240

²¹ Shunmugasundaram (n 13)

²² *Tata Cellular v U O I* [1996] AIR 11 (SC)

²³ Basu (n 3) 89

²⁴ Shunmugasundaram (n 13)

²⁵ ibid

²⁶ *Jaiwant Rao and other v State of Rajasthan* [1961]AIR Raj 250

²⁷ *Mohandas Issardas and Others v A N Sattanathan and Others* [1954] 56 Bom L R 1156

²⁸ (2014) Civil Appeal No. 235 (AD)

²⁹ [1974] 26 DLR 44 (AD)

³⁰ [1997] 49 DLR 1(AD)

³¹ Stephen Holmes, ‘Precommitment and the Paradox of Democracy’ in Douglas Greenberg (ed), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press 1993) 195-240

³² Awal Hossain Mollah, ‘Judicial Activism And Human Rights In Bangladesh: A Critique’ (2014) 56 (6) International Journal of Law and Management 475

³³ *State v Deputy Commissioner, Sathkira and Others* [1993] 45 DLR 643 (HCD)

3.3. Original Understanding and Constitutional Interpretation

It is no doubt that today the judicial activism is shaped as a boulevard for the judiciary to maintain its function as fortification of justice.³⁴ To act as the interpreter of the constitution, the judges enfold candor different from their ideological approach.³⁵ Thus, multiple justification systems of the constitutional interpretation are introduced as more democratic. The judge may show their judicial intellect to interpret that might go against the contexts or contents of the legislature, though judicial words have no self-enforcing powers.³⁶ For interpreting the statutes, the judges have forced by objectives and by discernible sources.³⁷ On the basis of jurisprudential view, the methods of judicial interpretation are not straightforward. The judges always endeavor to find out the intent of the legislature and must proceed to fill hiatus of the legislation, even though it may be introduced a new judicial view.³⁸ Particularly, if the court depends solely on literalism mode of interpretation, it will lose the border context of the statute.³⁹

As Bangladesh is a common law country, the courts have merged with the doctrine of purposive approach (i.e. purposive construction and interpretation). Here, the basted power of judicial review is the source of purposive construction. If the plain construction fails to uphold the purposes of the legislature, the court is in the position to contribute for fulfilling the lacunas.⁴⁰ Nevertheless, the judiciary cannot construct the new laws by virtue of judicial interpretation and its function is *jus dicere* (i.e. to explain the law), not *jus dare* (i.e. to declare the law).⁴¹

3.4. Accessing International Statutes to Ensure Constitutional Rights

International statutes in constitutional interpretation signify that how constitutional interpretation is influenced by international norms, customs and laws. International conventions and norms consistent with the harmony and with the spirit of fundamental rights can be read into it for interpreting in order to promote the object to constitutional guarantees⁴² and the advancement of the interest of justice.⁴³ For instance, in the case of *Professor Nurul Islam v Bangladesh*⁴⁴, the court had relied upon the World Trade Organization resolution to explain the rights to life and in support of its stand taken against the advertisements of tobacco in Bangladesh. Furthermore, in *Vishaka v State of Rajasthan*⁴⁵ case, the Court set forth new regulations for enforcing the Convention on the Elimination of All Forms of Discrimination against Women⁴⁶ (hereafter referred as “CEDAW”), to which the India was a signatory member and hence, narrated that sexual harassment violated the right of gender equality and the right to life and liberty under the Constitution.

3.5. Supervisory Power

The roles of higher judiciary have many facets such as protection of fundamental rights, scrutiny of laws, monitoring discretionary powers, providing equal justice for all, giving judicial remedies, exercising supervisory power, exercising of advisory jurisdiction and so on. The apex court can intervene in the functioning of the subordinate courts in several circumstances, such as want of jurisdiction, failure to exercise jurisdiction, violation of procedure, the disregard of principles of natural justice, findings based on lack of materials and orders resulting in manifest injustice.⁴⁷

IV. CONTEMPORARY SCENARIO OF THE JUDICIAL ACTIVISM AND OVERREACH

In the recent years, the judiciary has pronounced many landmark verdicts concerning unlawful imprisonment, environmental matters, health related problems, rights of children and women, minority affairs and issues of human rights by interpreting the procedural rules and various statutes for a better regime of communal justice of what is known as judicial activism. These should be ensured through the following means:

³⁴ Rebecca L. Brown, ‘Activism Is Not a Four-Letter Word’ [2002] 73 University of Colorado Law Review 1257

³⁵ Frank B. Cross, ‘The scientific study of judicial activism’ [2006] 91 Minnesota Law Review 1752

³⁶ Frank B. Cross, ‘Strategic Institutional Effects on Supreme Court Decision making’ (2001) 95 Northwestern University Law Review 1437

³⁷ Nicholas S. Zeppos, ‘Judicial Candor and Statutory Interpretation’ (1989) 78 Georgetown Law Journal 353

³⁸ Hilaire B. Varnet, *Constitutional and Administrative Law* (4thedn, Cavendish Publisher Ltd 2002)

³⁹ Jack Beermann, ‘An Inductive Understanding of Separation of Powers’ [2011] 63 Administrative Law Review 467, 497

⁴⁰ *Abdus Sattar v Arag Ltd* [1964] 16 DLR 335 (HCD)

⁴¹ P.St .J. Langan, *Maxwell on the Interpretation of Statutes* (12th edn, Bombay: LexisNexis 2003)

⁴² Basu (n 3) 47

⁴³ *Dhakeswari Mills v Commissioner Of Income Tax* [1955] 1 SCR 941

⁴⁴ [2000]52 DLR 413 (HCD)

⁴⁵ [1997] 6 SCC 241

⁴⁶ [1997] AIR 3011 (SC)

⁴⁷ Md. Awal Hossain Mollah, ‘Judiciary and good governance in Bangladesh’ [2008] 15 South Asian Survey 245, 258

4.1. Resolution of Disputes:

The dispute resolution is the primary duty of the judiciary and is served through twelve means, i.e. judicial stability, judicial interpretation, majoritarianism and autonomy (i.e. interfering with policy decisions or providing solutions to the government), judicial reasoning (i.e. analyzing the pronouncement regarding procedural grounds and sustentative grounds), threshold activism (i.e. whether observation depends on rules of locus, delays, justifiability and so on), judicial remit (i.e. enlarging the scopes of judicial review), rhetoric (i.e. having persuasive effect), obiter dicta (i.e. views beyond the specific question), reliance on comparative sources, judicial voices, extent of decision, legal background (i.e. determine the statutes whether unambiguous or vague or deficient).⁴⁸

The judiciary is reliance that the power relating the interpretation upholds the public order by stretching the constitutional rights and their implementation⁴⁹, not on strict juristic sense⁵⁰ and keeping in the mind the technical issues and issues of policy.⁵¹ Question relates to the constitutionality of the law, the court deals with the constitutionality and the person aggrieved⁵² and provides the observation only in concrete cases.⁵³ Thus, the prime function of the judiciary is to construe the objective of the framer through the concept of construction and Justice Dawson considered this as 'anything at all' due to the absence of parliamentary law making process.⁵⁴ The apex judges give notices and monitor the manner of performing duties of the executive. Here, the judicial activism is not as unguided missile.⁵⁵ Interestingly, the judge is not in law making position, but technically the process of resolving the disputes makes law.⁵⁶ Indisputably, the judicial activism offers the judges to go beyond the formalism and to hold a rational approach for ensuring proper justice.⁵⁷

4.2. Judge-Made Laws

Under the "Directory Theory" the Judge's function is not merely applying the existing law rather than faces in some circumstances, where such law is not applied previously.⁵⁸ But, the reality is that judges are continually applying the existing statutes to new factual situations and thus, creating new laws. According to Lord Radcliffe, 'There was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does.'⁵⁹

The development of the judicial system can be categorized into two ways, such as, strict sense (i.e. coherence between the changing socioeconomic relations and the corresponding unchanged legal regulation) and the broad sense (i.e. fetching the already regulated and unchanged legal norms). Consequently, judicial advancement through construction is called as analogia legis and iuris.⁶⁰ On performing the judicial function, when judges go over through the historical, social and legal context, it should be considered as activism and it should become law themselves.⁶¹ For the proper application of human rights, the judiciary can provide guidelines, which should be considered as law until the enactment of the new law by the parliament,⁶² and additionally, they may apply the rule of natural justice by applying judicial craftsmanship.⁶³ On that way, judicial activism stands in the mesne of juridical transgression and judicial passivity.⁶⁴ Technically, there is no strict separation of powers and the court's duty not to eternize the wrong rather than ascertain indispensable way to protect public interest.⁶⁵ In this context, judges should be wary of passing judicial remedies and of doing changes and they should deal with solely legal issues rather than social policies.⁶⁶

⁴⁸Rekha Kumari Singh, 'An analytical and critical study on judicial activism Vis- À -Vis judicial overreach with respect to legislative function of the Indian parliament' (DPhil theses, Veer Narmad South Gujarat University 2010)

⁴⁹*Mafatlala Industries Ltd v Union of India* [1997] 5 SCC 53

⁵⁰*Fazal Din v Lahore Improvement Trust* [1969]21 DLR 225 (SC)

⁵¹*Tata Iron and Steel Company v. Union of India* [1999] AIR Cal. 56

⁵²*East Pakistan v Sirajul Haque* [1967] 22 DLR 284 (SC) and *Madhubhai Gandhi v India* [1961] AIR 21 (SC)

⁵³*Kudrat-e-Elahi v Bangladesh* [1992] 44 DLR 319 (AD) and *Moudod Ahmed v Md. Anwar Hossain (dead) and Others* [2008] 60 DLR (AD)

⁵⁴ R S French, 'Judicial Activists – Mythical Monsters' (2008) 12 Southern Cross University Law Review 59, 64

⁵⁵Mr. Justice Surendra Kumar Sinha, 'Contribution of the Judiciary of Bangladesh in Strengthening Rule of Law and Democracy'(Distinguished Public Lecture at Gujarat National Law University, 5 October 2015) <http://www.supremecourt.gov.bd/resources/contents/Speech_by_HCJ_SK_Sinha_GNLU.pdf> accessed 1 May 2018

⁵⁶ Kirby and Michael, "'Judicial Activism'": A Riposte to the Counter-Reformation' (2005) 11 Otago Law Review 1

⁵⁷Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011)

⁵⁸*Willis v Baddeley* [1892] 2 QB 324

⁵⁹ Lord Radcliffe, *Not in Feather Beds* (University of Chicago Press 1968)

⁶⁰Antal Visegrady, 'Judge-Made Law and the Effective Legal System' [2015] 1 Fiat Iustitia 213, 215

⁶¹ French (n 54)

⁶²*Visakha v State of Rajasthan* [1997] 6 SCC 241

⁶³*Union of India v Cynamide India* [1987] 2 SCC 720

⁶⁴Hoque (n 57) 262

⁶⁵Chowdhury (n 19) 421

⁶⁶*C v DPP* [1995] 2 All ER 43

4.3. Actor in Constitutional Dialogue

Under the concept of 'constitutional dialogue', the scholars take part in contest to either sustain or circumvent the majoritarian difficulties with the strength of judicial review.⁶⁷ Stratagem of constitutional dialogue is not used only by lawgivers, rather than every form of decision makers, such as, legislators, judges, regulators and across traditional constitutional branches.⁶⁸

By the appraisal of judicial decision, sequel can be traced that it will be the final word on specific point or it will not be deemed as direct participant on constitutional dialogue.⁶⁹ Consequently, it will not be pointed as activist, if the verdict is accepted by the people and in case of vice versa, it will be contemplated as activism.⁷⁰ There are four factors to evaluate the judicial craftsmanship such as reaction of the legislature, administrative or executive response reaction by the judiciary and lastly, voxpopuli (i.e. examined on the basis of public reaction).⁷¹

4.4. Judiciary as a Protector of the Core Constitutional Value

Judiciary has been not only taken dynamic part on the issue of civic rights, but also obstructed the ruin of the constitution. With the norms of the custodian of constitution, the judiciary acts for public justice and security to discharge the constitutional obligations⁷² and hence, it affects institutional shape and powers of the branches and levels of government.⁷³ The duties of judges not only prevent the contravention of the constitution, but also provide necessary direction and guidance to ensure proper constitutionality.⁷⁴

4.5. Substantive Due Process

Substantive due process, which is different from procedural due process, ensures the related and unrelated procedural rights. Acts of the governmental bodies contrary to the communal norms are not considered as proper use of power.⁷⁵ If it is inferred that the political personnel does not act rationally, the court envisages the socioeconomic supportive aspects.⁷⁶ In a broader perspective, a fair trial in a fair tribunal is a crucial requirement of due process⁷⁷ and this fairness includes a fair and impartial adjudicator.⁷⁸ On that way, exorcisms of judicial aphorism have maintained their fidelity.⁷⁹

V. IMPACTS OF THE JUDICIAL ACTIVISM

At present, it is observed that the judges have shown their true color for ensuring proper justice by applying judicial creativity and consequently and inchmeal judicial activism has touched almost every aspects of life. The impacts of the judicial activism can be described in following several heads.

5.1. Judicial Creativity

In recent years, the judiciary has been denounced for its aptitude to surpass the boundaries of other constitutional bodies.⁸⁰ The judges have applied the judicial creativities as judicial mariners⁸¹ to form the laws by departing from previous decisions or impose the extant principles in new complexion⁸², because they are not merely imitative.⁸³ For solving controversy, the judges use literal interpretation and the sequel is seemed as unjustified and unfairness, then they take support of judicial activism and introduce a different dimension of

⁶⁷ P.W. Hogg and A. A. Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 (1) Osgoode Hall Law Journal 75

⁶⁸ Anne Meuwese and Marnix Snel, 'Constitutional Dialogue: An Overview' (2013) 9 (2) Utrecht Law Review 123, 127

⁶⁹ Singh (n 48)

⁷⁰ Micheal C. Dorf and F. Sabel, 'A Constitution of Democratic Experimentalism' [1998] 98 (2) Columbia Law Review 266

⁷¹ Singh (n48)

⁷² Md. Idrisur Rahman v. Government of Bangladesh (2005) Civil Appeal No.145 (AD)

⁷³ B Galligan, 'Judicial Activism in Australia' in Holland KM (ed), *Judicial Activism in Comparative Perspective* (Macmillan 1991)

⁷⁴ Basu (n 3) 87

⁷⁵ *Calder v Bull* 3 US (3 Dall) 386 (1798)

⁷⁶ Chowdhury (n 19) 182

⁷⁷ *Caperton v AT Massey Coal Company* 349 US 133 (1955)

⁷⁸ Margaret Tarkington, 'A Free Speech Right to Impugn Judicial Integrity in Court Proceedings' (2010) 51 (2) Boston College Law Review 363

⁷⁹ Mr. Justice John Paul Stevens (Ret.), 'Kelo, Popularity, and Substantive Due Process' (2012) 63 (5) Alabama Law Review 941, 953

⁸⁰ S. Ranjan, 'Judicial Activism—Is It Justified?' <<http://docs.manupatra.in/newslines/articles/Upload/4BBA6619-936F-436A-BDF3-ADB893D38B6A.pdf>> accessed 1 May 2018

⁸¹ Jamaluddin, Siti Zaharah Binti, Gan Ching Chuan, and Mohammad Abu Taher, 'Strategies in the prevention or reduction of Elder Abuse in Bangladesh and Malaysia' (2015) 172 Procedia-Social and Behavioral Sciences Journal 42

⁸² Lord Wright, 'The Study of Law' [1938] 54 Law Quarterly Review 185

⁸³ Bhagwati (n 5)

laws.⁸⁴ Latterly, it is observed that the judiciary has taken aid and applied the nonbinding dispensations to resolve some environmental issues⁸⁵, criminal matters⁸⁶ and so on, which are contrary to the domestic laws.

5.2. Filling the Legislative Gaps

The concept of judicial activity is upraised as a new instrument for the judiciary, since the neoteric society is progressive and the legislative body fails to foresee the upcoming problems and it may be reluctant or unable to deliver laws.⁸⁷ Judges can give directions to fulfill the statutory lacunas and these will be effective till the proper steps are taken by the legislator.⁸⁸ For example, judiciary has solved several environmental cases, where there is no specific law or the existing laws fail to provide proper redress⁸⁹ and it has also recommended several directions to the proper authority.⁹⁰

5.3. Enthusiasm of Individual Actors

There are many factors and parties play active roles for judicial activism, but this collective venture's basement is framed by the judiciary.⁹¹ The Apex Court is deemed as guardian of the constitution and this role remains in two forms for maintaining constitutionalism (i.e. the constitutional as formal and the political as informal). As a matter of constitutional law, the role of the court is shaded by the facts relating statecraft and the informal role of the constitution within the political arena, which are characterized as reciprocal relationships.⁹²

5.4. Public Confidence in the Judiciary

The public reliance and faith are the ideal advantages and potential resistances to the judiciary for maintaining prompt and proper justice.⁹³ The judiciary is the last resort to the public at general to maintain tranquility and it delivers mandate with the explanation of legal queries and consequently, ameliorates the society. Besides this, conduct contrary to the public confidence would be detrimental to the efficacious judicial process.⁹⁴ Thereby, public confidence has a great importance for making the judiciary truly effective and functional.

5.5. Collapse the Responsible Government

Undeniably, the constitutional structure has provided enough opportunity for judicial activism. When the State's organs cannot maintain their responsibilities, entrusted by the constitution, it causes collapse of the good governance which is prerequisite for democratic constitutionalism and hence, the justification for the judicial activism comes from the crisis. In this connection, seeking assistance compels the judiciary giving political or policy making judgments.⁹⁵ Judicial activism signifies that the judiciary, being aware of existing socio-economic realities, voluntarily implements social goals and makes government more responsible, accountable and efficient. For instance, the judiciary has been issued ruling to check against the abuse of due process of law.⁹⁶

Inevitably, judicial activism copes the judiciary with the communal changes, but this undefined powers has gradually turned in judicial overreach.

VI. PERILS OF THE JUDICIAL OVERREACH AND ITS PROBABLE SOLUTIONS

The concept of judicial activism is the polar opposite of judicial overreach, but these two terms narrate the ideology and dictation behind judicial decision.

6.1. Violation of the Doctrine of Separation of Powers

The State's powers should be entrusted among three branches (i.e. legislature, judiciary and executive) with proper checks and balances mechanism.⁹⁷ The court solely depends on textual base of laws⁹⁸, even if text fails to

⁸⁴Jamaluddin, Siti Zaharah Binti, Gan Ching Chuan, and Mohammad Abu Taher, 'Strategies in the prevention or reduction of Elder Abuse in Bangladesh and Malaysia' (2015) 172 *Procedia-Social and Behavioral Sciences Journal* 42, 44

⁸⁵*Anika Ali v Rezwatul Ehsan* [2012] 17 MLR 49(AD) and *Professor Nurul Islam v Bangladesh* [2000] 52 DLR 413 (HCD)

⁸⁶*Tayazuddin and another v State* [2001] 21 BLD 503 (HCD)

⁸⁷Ranjan (n 80)

⁸⁸*Abdul Quader Mollah v Chief Prosecutor* (2013) Criminal Review Petition Nos.17-18 (AD)

⁸⁹ Md. Al Amin, 'Application of Judicial Activism in Protecting the Environment: An Analysis' (2016) 21 *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 35

⁹⁰*Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others* (2006) Writ Petition No. 3916 Md. Saiful Karim, Okechukwu Benjamin Vincents and Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' [2012] 7 (1) *Asian Journal of Comparative Law* 1, 23

⁹¹Upendra Baxi, 'The Avatars of Indian Judicial Activism : Explorations in the Geographies of (in) Justice' in S.K.Verma and Kusum (eds), *Fifty Years of Supreme Court of India – Its Grasp and Reach* (OUP Press New Delhi 2000)

⁹² James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers's Intent* (UBC Press 2005)

⁹³'Evolution & Growth of Judicial Activism in India' <http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf>accessed 3 May 2017

⁹⁴*Md. Idrisur Rahman v Government of Bangladesh and Others* (2005) Civil Appeal No. 145 (AD)

⁹⁵ T.R. Adhyarujina, *Judicial Activism and Constitutional Democracy in India* (NM Tripathi Private Limited 1992)

⁹⁶*State v Deputy Commissioner, Sathkira and Others* [1993] 45 DLR 643 (HCD)

⁹⁷ Charles de Secondat, Baron de Montesquieu, *The spirit of the laws* (Cambridge University Press 1784)

provide sufficient relief and the court does not interfere the function of the other organs.⁹⁹ Judicial activism created the scope for judge-made laws and that is clearly abuse of the constitutional power. It is imminently illicit, when the judiciary takes step for formulating laws with little or no perceptible origin in the words or design of the Constitution.¹⁰⁰ Eventually, the parliament is entrusted for making laws solely¹⁰¹ and the judiciary does not encroach the power of the legislator.¹⁰² Moreover, court may invalidate legislation but not constitutional amendment.¹⁰³ Most importantly, the judge's decision is affected by the several social and political factors¹⁰⁴ that render it in questionable state.

6.2. Rule of Court

Dicey's concept "La Principe de Legality" (i.e. rule of law)¹⁰⁵ has distinct features, such as supremacy of the law, equality before the law and individual constitution is the result of the ordinary law of the land.¹⁰⁶ Here, the rule of court indicates the judge's ruling that is over the law and that is clearly a sharp blow over the separation of powers. Judicial activism is an active method for execution of the rule of law¹⁰⁷ and when the Court is swayed or when it overreaches itself, it should be considered as judicial populism.¹⁰⁸ It should be kept in mind that, "Judicial activism should neither be judicial ad hocism nor judicial tyranny."¹⁰⁹ Judges do not create law but merely ascertain its true meaning and it should motivate turmoil, if they show propensity to make the laws.¹¹⁰ It is deemed as naked penetration of the parliamentary function.¹¹¹ There must be reciprocal respect and adjustment among the branches of the State.¹¹² The apex court is not benevolent authority beyond the arena of procedural irregularity¹¹³ and it has no discretionary authority to disdain statutory instructions.¹¹⁴ Indeed, it is the sacred obligation of the judiciary to abstain from overactive approach.¹¹⁵

6.4. Lack of Accountability

It is a general tendency that the person with great power performs his dominance so long as obstruct by certain boundary.¹¹⁶ The extended jurisdiction of the judiciary sparks flame in judicial mind that might be caused abuse of power. Accountability and transparency are crucially important for democratic regime, for that reason the judiciary also should be accountable and transparent. But, unfortunately the constitution fails to bind the judiciary as accountable even to the sovereign people¹¹⁷ and gradually it damages the checks and balances mechanism. Hypothetically, judicial activism is fallen with question of legality.

6.5. Probable Solutions of Controlling Judicial Overreach

Judicial activism is like a fresh wind of democratic system of the government. But, it should be maintained with proper filtering mechanism, without this, it should cause tumultuous situation. There should have proper guidance to control judicial overreach for ensuring effective balance of powers among the branches of the State.

6.5.1. Judicial Restrain

Judge functions to resolve the legal issue compliance with the original intention of law-maker and the judicial precedent and in this connection, judicial restraint (i.e. strict constructionist) is a concept that confines the judges within the constitutional power. Even though, the constitution does not make the judiciary as superior

⁹⁸ Jack M. Beermann, 'An Inductive Understanding of Separation of Powers' (2011) 63 (3) Administrative Law Review 467

⁹⁹ Holly Martin, 'Legislating Judicial Review: An Infringement on Separation of Powers' (2013) 17 (4) N. Y. U. Journal of Legislation & Public Policy 1097

¹⁰⁰ *Bowers v Hardwick* 478 US 186 (1986)

¹⁰¹ Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 596

¹⁰² *All India J A v Union of India* [1992] 1 SCC 119

¹⁰³ *Golak Nath v State of Punjab* [1967] AIR 1643 (SC)

¹⁰⁴ Manoj Mate, 'The Rise of Judicial Government in the Supreme Court of India' (2005) 33 (1) Boston University International Law Journal 169

¹⁰⁵ Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan and Company 1885)

¹⁰⁶ Chowdhury (n 19) 144-145

¹⁰⁷ Abhinav Mishra, 'Law and Liberty: A Tug of War' (2015) 1 (1) Indian Journal of Law & Liberty 1

¹⁰⁸ S. P. Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 Washington University Journal of Law & Policy 29

¹⁰⁹ J.S. Verma, 'The Indian Polity: Separation of powers' [2007] 35 Indian Advocate 32

¹¹⁰ Barnett (n 38)

¹¹¹ *Magor and St Mellons Rural District Council v Newport Corporation* [1951] 2 All ER 839

¹¹² *State of Rajasthan v Prakash Chand* [1998] AIR 1344 (SC)

¹¹³ *H U D A v Roochira* (1997) 1 UJSC 368

¹¹⁴ *Income Tax Officer v M. K. Mohammed Kunhi* [1969] 1 SCR 65

¹¹⁵ *State of Kerala v A. Lakshmi Kutty* [1986] 4 SCC 632

¹¹⁶ Charles de Secondat, Baron de Montesquieu, *The spirit of the laws* (Cambridge University Press 1784)

¹¹⁷ Divyanshu Bhandari, 'Judicial Accountability And the Independence of The Indian Judiciary' (2014) 2 (7) International Journal of Liberal Arts and Social Science 144

over other organs and there should have balance among reforms, developments and implantation.¹¹⁸ The judges had been exercised judicial restraint keeping in mind the doctrine of separation of powers¹¹⁹ and prevented themselves from issuing rule in compliance with the administrative instruction¹²⁰ and for want of political inquiry.¹²¹

As the concept of judicial activism infers grandiose thought, it is extremely perplexing to draw a stria between appropriate judicial intervention and judicial overreach.¹²² Only where justifiable causes of action, having judicially discoverable and manageable standards, are observed, the court should intervene on it.¹²³ Though it is seemed the judge's aims and functions are quite reverse¹²⁴, the judges cannot arrogate the powers of the executive or the legislature.¹²⁵ The Court functions under certain self-imposed limitations as a matter of prudence and policy¹²⁶ and hence, self-denial indicates not to do the act, which is condemned previously.¹²⁷

6.5.2. Applying Cohn and Kremnitzer Model

By indicating three functions of the judiciary (i.e. dispute resolution, participation in the public sphere and upholding certain core values),¹²⁸ Cohn and Kremnitzer have suggested a methodology for the construction of a straight parameter between the judicial activism and overreach.¹²⁹ They provide seventeen factors in this regard, such as judicial stability, interpretation, majoritarianism and autonomy, judicial reasoning, threshold activism, judicial remit, rhetoric, obiter dicta, comparative sources, judicial voices, extent of decision, legal background, legislative reaction, administrative reaction, judicial reaction, public reaction and value-content.¹³⁰

VII. CONCLUSION

Making balance among the State's branches is the precondition for maintaining constitutionalism. Under the common law adversarial jurisprudence, the judges are deemed as non-aligned adjudicator and they serve for promoting values and dignity. The judiciary should be a sui generis organ with judicial dispute resolving and political law making functions and should work for the fulfillment of the statutory dents for upholding public longing without overlapping the power of others. Factually, the judicial activism has a very effective approach to almost every difficulty in the present time, but it is never desirable dominion of the judiciary. Moreover, the exhaust of constitutional principles of the separation of powers is not welcomed. Therefore, this double-edged sword should be used with caution and discernment tactics.

¹¹⁸Vipin Kumar, 'The Role of Judicial Activism in the Implementation and Promotion of Constitutional Laws and Influence of Judicial Over Activism' (2014) 19 (2) IOSR Journal Of Humanities And Social Science (IOSR-JHSS) 20

¹¹⁹Anwar Ali Sarkar v State of West Bengal [1952] AIR 75 (SC)

¹²⁰Dr. Mohiuddin Farooque v Bangladesh [1997] 49 DLR 1(AD)

¹²¹State of Rajasthan v Union of India [1994] AIR 1918 (SC)

¹²²Pratap Bhanu Mehta, 'Judicial Overreach: Its Overwhelming Evidence Cannot be Ignored' [2007] 35 Indian Advocate 79

¹²³Baker v. Carr 369 US 186 (1962)

¹²⁴Barnett (n 38)

¹²⁵Indian Drugs & Pharmaceuticals Ltd v Workmen [2007] 1 SCC 408

¹²⁶Additional Secretary to the Government of India and others v Smt. AlkaSubhashGadia and Anothers [1992] 1 SCC Supl. 496

¹²⁷Arthur M. Schlesinger Jr., 'The Supreme Court: 1947' *Fortune* (New York City, January 1947) 202, 208

¹²⁸Madhav Khosla, 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate' [2009] 32 Hastings International and Comparative Law Review 55

¹²⁹Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' [2005] 18 (2) Canadian Journal of Law & Jurisprudence 333

¹³⁰John Owen Haley and Toshiko Takenaka, *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (Edward Elgar Publishing Ltd 2014)