

When Judges Rewrite the Constitution: Evidence from Indian High Courts

October 2023

In this paper, we study the fast expanding phenomenon of judicial activism. Focused on the Indian judiciary, we show how judges may reinterpret the constitution to wrest control of judge appointments from the executive and legislature. By making their own rules, courts asserted their independence from the executive and legislative branches in the appointment process. Drawing from about 10 million judicial cases in constitutional courts of India, we show that this “re-interpretation” of the constitution by the Supreme Court of India transmitted to the High Courts, increasing the independence of the judiciary. Our findings highlight judicial activism, which has been the subject of much recent debate, can increase judicial independence and has far-reaching implications on decision quality and the formation of new jurisprudence.

JEL Codes:

Keywords: rule of law, judicial activism, courts.

I. Introduction

Judicial activism—courts taking a proactive stance on legal matters and influencing policy—appears rampant in many parts of the world. In 2007, Pakistan's Supreme Court invoked its "suo moto authority" to address the issue of "missing persons" – individuals detained by Pakistani security agencies without trial or due process in Pakistan, eventually leading to many of these detainees to be released by the security agencies. In India, the Supreme Court took cognizance of workplace sexual harassment, and compelled the legislature to enact the Protection against Sexual Harassment of Women at Workplace Act in 2013. Meanwhile, in Israel, the Supreme Court in 2018 intervened, on its own accord, to block the government's decision to deport African asylum seekers, prioritizing the rights of asylum seekers over the government's policy decision to expel them. These instances exemplify judicial activism over a diverse range of issues that these respective courts act on their own accord, bypassing the need for formal petitions by individual litigants and showcasing their activist role in matters of policy and protection of civil liberties.

The phenomenon of such activism by the court has been met with strong praise and equally vociferous criticism. On one hand, judicial activism is hailed as a mechanism for safeguarding constitutional rights, promoting civil liberties, and ensuring checks and balances within a democratic framework. On the other hand, it draws vehement criticism for potentially overstepping boundaries, encroaching on legislative domains, and sparking contentious debates over the proper role of courts in a democratic society. A fundamental question arises from this debate. What is the impact of this judicial activism on courts themselves? Does it enhance judicial independence of the judiciary? How does it impact the quality of judicial decisions? These questions are of paramount importance as they shed light on the role of courts as enforcers of the rule of law, guardians of the separation of powers, and the bedrock of democratic governance.