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Executive decisions are not for judges

The Supreme Court ban on the sale of liquor is an example of judicial overreach. Such policies are unambiguously in the domain of the executive

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The Supreme Court, ruling on a public interest petition about road safety, has banned the sale of liquor at retail outlets, as also in hotels, restaurants and bars, that are within 500m of any national or state highway. The implications and consequences of this decision have unfolded in the fortnight since. There is much collateral damage for governments, tourism and livelihoods.

For state governments, there is a massive loss in revenue. The auction fees raised from licences to sell liquor will contract sharply. Revenue from taxes on alcohol will also diminish. The problem is accentuated by the fact that at least one-half, possibly two-thirds, of retail outlets, bars, restaurants and hotels are located within a range of 500m of national or state highways. Rough estimates suggest that state governments could lose as much as Rs50,000 crore per annum in revenue.

Tourism will be hurt badly. Existing regulations stipulate that hotels in the four-star and five-star categories, or above, must have a licensed bar; many of them will now lose their premier status with a star-downgrade. It will dampen if not stifle tourism, partly because of reduced ratings for hotels and partly because foreign tourists might opt for alternative destinations in countries that do not have such restrictions. Domestic tourism, too, could be affected and diverted.

Employment and livelihoods are bound to be a casualty. The closure of liquor-retail stores will take away jobs from their employees. The inevitable downturn in business for hotels, restaurants and bars will directly reduce the jobs they provide and indirectly reduce jobs in enterprises that form part of their supply chains. The tourism sector provides employment—direct and indirect—to large numbers of people. There will be a significant reduction in such jobs. The multiplier effects of the contraction in employment will be considerable at the macro-level, particularly as the services sector is the primary source of job creation, and one million people could lose their jobs.

Clearly, the economic costs of the court decision could be substantial. This is widely recognized. The tourism sector and the hospitality industry are up in arms. State governments are issuing notifications that many roads in and around their cities are no longer state highways. The government of India is considering a presidential reference to the Supreme Court under Article 143 of the Constitution.

The problem is the dangers posed by drunk driving to road safety. There are two points that deserve mention before concluding that this is the most appropriate solution, which it is not. Data compiled by the National Crime Records Bureau show that of the total road accidents in 2014, over-speeding accounted for 48%, reckless driving for 42%, poor weather conditions for 5%, mechanical defects for 2.5% and drunk-driving for 2.5%. More than 40% of the drunk driving victims died, but the fatality proportion was not much lower, at around 33%, among victims of overspeeding and reckless-driving. And, even if the Supreme Court decision is implemented perfectly—unlikely because of circumvention or corruption—anyone can drive 500m to buy liquor and then return to the highway.

The only effective and sustainable solution to the dangers posed by drunk-driving is strict enforcement and punishment that becomes a deterrent. For this purpose, the law can be strengthened further. In fact, the Union cabinet has recently approved amendments to the Motor Vehicles Act, which raise the fine for drunken driving to Rs10,000, and if such driving results in death, it would be treated as culpable homicide under Section 299 of the Indian Penal Code, punishable with imprisonment of up to 10 years. Even stronger penal action is necessary. The fines can be escalated and driving licences can be suspended for longer durations, particularly in repeat offences.

There is a more fundamental question. Is this a matter for the Supreme Court to decide? My answer is no. It is an administrative matter where the decision rests with state governments. It is not just about the appropriate authority for such decisions. The problem with Supreme Court decisions is their binding nature, much like law, which cannot be changed unless the concerned bench reviews its decision or a constitutional bench sits and decides.

The Constitution of India sets out a separation of powers between institutions of the state—executive, legislature and judiciary—to ensure the checks and balances so essential in a political democracy. Any amendment in the Constitution, any decision about rights and obligations, or any passage of laws, is the exclusive domain of the legislature. All policies and administration which are based on the needs and priorities of the state, are the task and prerogative of the executive—except for some actions, such as imposing taxes or allocating expenditure, where approval of the legislature is specified in the Constitution. Protecting the fundamental rights of citizens, and ensuring that existing laws are followed by the government, for which the administration is accountable, is not only the obligation but the domain of the judiciary. Of the three, if any one institution of the state attempts to perform a function that essentially belongs to another institution of the state, under the Constitution, this can be described as overreach.

This essay is about judicial overreach. Ashok Desai, the learned counsel and former attorney general, argues that it can take four possible forms: the terms of Articles of the Constitution can in effect be changed by a Supreme Court decision; the judiciary can introduce or enforce policies which are the domain of the executive; the judiciary can lay down regulations, in effect laws, which are the domain of the legislature; and court decisions can impose a fiscal burden on the state, in the form of expenditure incurred or revenue foregone, which is the domain of the executive and the legislature.

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The judiciary has the right to check the overreach of the executive and the legislature, but there is no such check on the judiciary

In my view, the recent Supreme Court ban on the sale of liquor is a clear example of judicial overreach for two reasons. Such policies are unambiguously in the domain of the executive. The decision imposes a fiscal burden on state governments, in the form of revenue foregone, which is at the expense of some priority expenditure. The adverse economic consequences for governments, tourism and employment are also cause for serious concern as they will affect the well-being of citizens.

There are several examples of such overreach. I can do no better than quote from a public lecture by former Chief Justice J.S. Verma, also cited later by the Supreme Court: "Judiciary has intervened to question a 'mysterious car' racing down Tughlaq Road, allotment of a particular bungalow to a judge, specific bungalows for the judge's pool, monkeys capering in colonies, stray cattle in streets, clearing public conveniences, levying congestion charges in peak hours at airports, under the threat to use contempt power to enforce compliance with its orders. Misuse of contempt power to force railway authorities to give reservation in a train is an extreme instance."

The judiciary has also gone far beyond its role of interpretation of the Constitution. Article 124 reads: "Every judge of the Supreme Court shall be appointed by the President after consultation with such judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose, provided that in the case of an appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted." Three Supreme Court judgements have, in effect, rewritten Article 124. It now means, in practice, that every judge of the Supreme Court is appointed by the President solely on the basis of the recommendation initiated and accepted by a collegium consisting of the Chief Justice and four senior-most judges of the Supreme Court. The original provision left room for the exercise of preference, prejudice or nepotism by the government. The new practice, de facto, establishes this as a right of the judiciary with the same exercise of preference, prejudice or nepotism by the collegium. There is a clear need for checks and balances, with accountability, in this process.

It must be said that in independent India, the Supreme Court is the institution that has protected and preserved the fundamental rights of citizens in a most unequal society. For this, much credit is due. At the same time, it must be recognized that the Supreme Court has encroached on the jurisdictional space of the executive and the legislature, which has increased with the passage of time. Hence, judicial overreach has grown, particularly in terms of policymaking and judicial legislation. This is worrisome.

In this context, there are two asymmetries worth noting. First, the judiciary has the constitutional right to check the overreach of the executive and the legislature, but there is no such check on the judiciary or its accountability. Second, the judiciary does not always check the underperformance of the executive—for example, it has failed to check government inaction against vigilante groups taking the law into their hands—which can be described as judicial under-reach.

An independent judiciary is of critical importance in a political democracy, for it provides checks and balances vis-à-vis the executive and the legislature. But there must be some institutional mechanisms that check judicial overreach or judicial under-reach to make the judiciary accountable, particularly to citizens. The answer might lie partly in self-regulation. Almost four centuries ago, Francis Bacon put it perfectly in his *Essays Of Judicature* (1625): "Judges ought to remember that their office is *jus dicere* and not *jus dare*—to interpret law, and not make law or give law."

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