Annex B

Examples from other Jurisdictions

India

The *Godavarman* Forestry case

This case began as a single petition to stop the illegal felling of timber in the Nilgiri hills.

However, the Supreme Court proceeded to order the complete suspension of tree felling across the country and to shut down all sawmills and mining activities in forested areas.

The Supreme Court did not stop there and proceeded to overhaul the entire Indian forest policy. It invoked the concept of a "*continuing mandamus*", allowing it to continuously review the Government's forest policies and tweak it as it deemed fit. Wood-based industries were paralyzed.

Among the Supreme Court's innovations was the establishment of guidelines for reforestation by states, including compensation formulas for the felling of trees and directions on how to use the collected funds. In addition, the Supreme Court even constituted a "High Power Committee" to oversee the implementation of its orders.

The continual involvement of the Supreme Court in forestry policy has invited more than 1000 interlocutory applications to the court over a 20 year period.

Straying into executive and legislative functions in the name of judicial activism

> "*We are repeatedly coming across (instances) where judges are unjustifiably trying to perform executive or legislative functions. In our opinion, this is clearly unconstitutional.* ***In the name of judicial activism, judges cannot cross their limits and try to take over functions which belong to other organs of state****…*
>
> *Recently, the Courts have apparently, if not clearly, strayed into the executive domain or in matters of policy. For instance, the* ***orders passed by the High Court in recent times dealt with subjects ranging from nursery admissions, unauthorised schools, criteria for free seats in schools, supply of drinking water in schools, number of free beds in hospitals on public land, requirements for establishing a world class burns in the hospital, the kind of air Delhites breathe, begging in public, the use of sub-ways, the nature of buses we board, the legality of constructions in Delhi, identifying the buildings to be demolished, the size of speedbreakers on Delhi roads, auto-rickshaw over-charging, growing frequency of road accidents and enhancing of fines etc.*** *In our opinion these were matters pertaining exclusively to the executive or legislative domain. If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it….*"
>
> \- Justices A K Mathur & Markandey Katju,
> *Divisional Manager, Aravali Folg vs Chander Hass & Anr* (2008) 1SCC683

Australia

Judicial Intervention in Immigration

The Australian Government has long been saddled by litigation over immigration matters. There is a high volume of judicial review applications which drain Government resources before the Court.

In addition, major plans and policies have been struck down.

- In 2011, the Government signed a deal with the Malaysian Government dubbed the "Malaysian Solution". It was proposed that Australia would swap 800 asylum seekers held in detention centres for 4000 refugees waiting for resettlement in Malaysia. The High Court ruled that this proposal was illegal.

- In 2014, the Government introduced an annual cap on the number of protection visas that could be granted to asylum seekers who arrived by boat. The High Court ruled that this policy was illegal.

Courts are not in a position to determine political matters

"*Politically, the nature of the refugee determination system, like many other aspects of the migration portfolio, is controversial… **[I]t is precisely because of its controversial nature, and the competing objectives and values which it involves, that it is appropriate for the Parliament, which represents the will of the Australian people, to determine the shape of the refugee determination system…***

The courts, charged with responsibility for the rule of law, are clearly not in a position to weigh the relative influence of these values in the refugee determination system… The task of assigning priorities to the numerous competing values inherent in the refugee determination system properly falls to the Parliament…

There is clear evidence that some non-citizens engage [in judicial review] as a means of prolonging their stay in Australia. It is hard not to reach this conclusion in view of the fact that approximately 30 percent of all applicants for judicial withdraw prior to hearing, and the Government successfully defends 85 percent of those applications which do proceed to hearing…

Applications for judicial review of migration matters exceeded 1200 in 1999-2000, at a public cost of some $12.7 million in litigation alone."

- Philip Ruddock, then Minister for Immigration, *Refugee Claims and Australian Migration Law: A Ministerial Perspective (2000)*

United Kingdom

Law's Expanding Empire

"***The special areas which were once thought to be outside the purview of the courts, such as foreign policy, the conduct of overseas military operations and the other prerogative powers of the state, have one by one yielded to the power of the judges…***

In the last three decades, however, there has been a noticeable change of judicial mood. The Courts … have claimed a wider supervisory authority over other organs of state. They have inched their way towards a notion of fundamental law overriding ordinary processes of political decision-making, and these things have inevitably carried them into the realms of legislative and ministerial policy…

*But allowing judges to circumvent parliamentary legislation or review the merits of policy decisions for which ministers are answerable to parliament, raises quite different issues. It confers vast discretionary powers on a body of people who are not constitutionally accountable to anyone for what they do. It also undermines the single biggest advantage of the political process, which is to accommodate the divergent interests and opinions of citizen*s…

It is true, politics do not always perform that function very well but judges will never be able to perform it. Litigation can rarely mediate differences. It's a zero sum game. The winner carries off the prize, the loser pays. Litigation is not a consultative or participatory process, it is an appeal to law…

- Lord Jonathan Sumption,
Reith Lectures (2019)

Law Fills In When Politics are Gridlocked

"…Experience suggests that judges charged with making essentially political decisions are no more likely than politicians to make enlightened ones.

…There is also, perhaps, a wider issue, namely, whether it is wise to make law in this way. It is true that partisan divisions and institutional blockages in Congress have made controversial legislative change difficult to achieve in the United States. This inevitably encourages those who look for a judicial resolution of major social issues. ***But the chief function of any political system is to accommodate differences of interest and opinion among citizens. Resolving these differences by judicial decision contributes nothing to that end. On the contrary, characterising something as a constitutional right removes the issue from the arena of political debate and transfers it to the judges****… This has distorted American politics by turning Presidential elections into a contest for the power to appoint politically dependable justices to the Supreme Court."*

- Lord Jonathan Sumption,
Trials of the State: Law and the Decline of Politics (2019)