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5th Year, BA; LL.B. (Hons.).**“THE JUDICIALACTIVISM AND ITS OVER-REACH IN INDIA”****ABSTRACT**

The present democracy is witnessing a major shift in terms of the basic structure of the Constitution of India and the doctrine of separation of powers. The Indian Constitution has surpassed the test of time, however, due to various issues emerging in a fast-developing country, the argument between the legislature, executive and judiciary is gradually increasing. Among three Organs of the Government, Judiciary can be considered as the most decisive institution which draws its powers from the constitution of India to serve as a watch dog for the well-functioning of our democracy. Such an important Organ needs to be active or show its activism whenever needed in the absence of responsible functioning of other organs. It was commented that judiciary must draw its own boundaries and not to take decisions that fall within the domain of executive, highlighting the increasing friction between the judiciary and executive over a perceived overreach by the courts. Right from the Gopalan Case of 1950s to the recent Environment friendly judicial activism verdicts, the judiciary has played an active role in remembering the responsibilities of the Legislature and the executive. It is true there are instances where judicial activism turned into judicial overreach encroaching the spheres of other Organs. The judiciary has high time to examine its path of activism to be progressive and well convinced and not to touch the border of overreach. This paper intends to throw light on different times when the Judiciary has been criticized for taking a leap over its own Jurisdiction, which seeks to bring greater clarity on

the concept of judicial learning from the perspective of the three organs. Without a description of complex matters relating to judicial interpretation and judicial activism, it attempts to analyse and estimate the judiciary's take on such claims made about it by the two organs.

KEYWORDS: *Democracy, Indian Constitution, Gopalan Case, Judicial Overreach, Judicial Activism*

INTRODUCTION

“Judges must exercise judicial restraint and must not encroach into the domain of the executive or legislative”¹.

We are compelled to make these comments because we are repeatedly coming across cases where judges are trying to perform executive and legislative functions unjustifiably and improperly. In our opinion with respect to these observations, this is clearly unconstitutional where in the name of judicial activism, judges cannot cross their boundaries and try to handle functions which belong to another organ of the State and these were matters pertaining exclusively to the executive or legislative domain. If there is a law, the judges can certainly enforce it, but the judges cannot create a law and seek to enforce it. The conflict between the executive and judiciary is a long-time back controversy which is existing since the Constitution came into force and the political establishment of function sharing between the two wings of the Union is reflected in the Constitution of India. The thrust of power sometimes creates tensions when the executive starts assuming the power of the judiciary, then the government becomes autocratic. The executive is the branch of the government that formulates and implements policies. The judiciary has been empowered to investigate such functions. The separation of power exists between all the branch of the Government which is exercised by the method of '**Check and Balance**'. This means that any repressive action of the administrative action is subject to judicial review. The National Judicial Appointment Committee has been a great example that shows the conflict of powers between the executive and the judiciary. While ruling over the question of the appointment of the judges, the SC rejected it because it was a foray into the independence of the judiciary providing primacy to the executive.

¹Divisional manager, Aravali Golf Club and Anr vs. Chander Hass and Anr, 2007 (14) SCALE 1.

In India, it is the Constitution which is supreme that empowers legislature to make laws and judiciary to interpret them in the event of disputes and litigation. The architects of the Constitution envisaged the judiciary as a counter-major institution which would uphold it in the case of deviations. The judiciary has not been passive in this role. For example, in order to increase access, it has been willing to consider even a postcard mailed to it as material enough to act. But apart from ruling on constitutional issues, judicial restraint is necessary if a harmonious balance between the various branches of government is to be preserved. The balance can be disturbed when the broad-based nature of a decision encroaches on the domain of the legislature or executive. Verdicts such as the recent one, where on January 12, the Supreme Court prohibited the implementation of the three controversial farm laws passed recently, and ordered the constitution to expert's committee to negotiate between the farmers' bodies and the Government of India. Instead of discussing the constitutionality of the three laws, the court is trying to steer the two sides towards a political settlement, which is changing the domain of government. It upsets the balance of power and triggers friction between the various branches of the government. However, it is necessary to point out that other branches of government are not guilty in this regard. The executive's failures and lack of accountability have often led people to approach the judiciary to enforce existing laws. Similarly, the legislature has often been unresponsive to the changes taking place in society. To illustrate, the first step to provide formal protection against sexual harassment at the workplace was the outcome of judiciary stepping into a vacuum left by the legislature. If democracy is to function smoothly, other branches of government should also raise their game while the judiciary exhibits restraint, keeping in mind that its job is to interpret laws not make them.

TWO FORMS OF OVERREACH

- **Overreach into the Legislative domain**

As the separation of powers is permanent and evolving over time, so are the instances of stepping into the shoes of each organ by the Judiciary. The relationship between the Legislature and the Judiciary has been transforming from the past six decades. The Indian Constitution has been documented to limit the functions of the pillars and in order to uphold the rule of law for which "Independence of Judiciary" is extremely important². However, the term "independence" has been interpreted in many ways by Democrats and critics to come to

² K.G. Balakrishnan: "Executive to blame for delayed Justice", The Tribune, Apr .10, 2007, pp.10

any firm ground with its interpretation. It is important to note that the doctrine of Separation of powers separates the 'functions' of each organ and not the powers as neither has any organ been vested with absolute or unchanged powers nor does any law straightforwardly prescribe a one set structure due to the everchanging times. In the past, the case of judicial overreach came into spotlight when the Supreme Court of India gave an order in relation to Part III of the constitution, restrictions on the legislature on using its power to amend laws with respect to fundamental rights enshrined in the Constitution³. Another example was that when a judicial conflict existed between the legislature and the judiciary⁴, where the judiciary did not let the legislature exercise its privileges or immunities when it came to the defection of members of the parliament. In this case, when a writ of habeas corpus was accepted by the judges, it was a serious issue of contempt of the House, when the legislature found that the court enlarging on bail of Keshav Singh, which was found to be overreaching i.e., null and void, the legislature also took control of the judiciary by taking them into custody. This was a controversial issue that brought conflict in terms of its privileges and it also brings in the question of whether the judiciary can conduct such a review by exercising its immunity on the resolution passed by the House against its own member.

One of the famous cases that brought the judiciary and the Legislature against each other was the conduct of the House which was related to the appointment of a minister of the government which created a major conflict between them. The High court showed its discontent on such appointment as the proposal kept forward by the concerned minister looked more resourceful than honest and was seen as an attempt to pretend or mislead by way of back-door appointment which could result in 'favouritism's'. Although it is also stated that its function was to determine whether there had been a misuse of authority rather than studying the conscience of the Minister. Many times, Judicial overreach has also been seen in the context of Article 21, the right to life and personal liberty. For example, in the A.K Gopalan case, the court passed an order which expanded the scope of the term 'due process of law' to a process that was fair, just and reasonable. However, if looked into another case, which called for the requirement of substantive due process that in the previous case did not hold true or correct but by way of interpretation was held appropriate by the court⁵. Similarly, in the case of **L. Chandra Kumar vs. Union of India**⁶, the court ordered that "the power of

³ Golaknath vs. State of Punjab, AIR 1967 SC 1643

⁴ Keshav Singh vs. Speaker, Legislative Assembly AIR 1965 All 349, 1965 CriLJ 170

⁵ Maneka Gandhi vs. Union of India 1978 AIR 597, 1978 SCR (2) 621

⁶ (1997) 3 SCC 261 301 pr. 78

Judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme court under Article 32 of the Constitution is an Integral part of its basic structure.”

- **Overreach into the Executive domain**

The Indian Judiciary, being a major organ of the state has been said to have played a more activist role in comparison to its U.S counterparts with the intention of transforming the Indian Society into a modern one, by way of enforcement of modern principles and ideas in the constitution through court verdicts. However, in the early times, the Supreme Court was highly conservative and not activist. In a case of sexual harassment at the workplace, the court found the utmost need to formulate guidelines or norms that were consistent with the provisions in the Convention on Basic Human Rights included in the **Constitution and the elimination of all forms of Discrimination Against Women (CEDAW)** (ratified by India) to be regulated in all work-related areas. In another case, the Court laid down certain procedures and safeguards to be followed in cases of adoption of abandoned children by foreign or Indian parents⁷. In yet another case, the court sought to lay down the detailed requirements necessary for complying with, in all cases pertaining to arrest and detention till legal provisions were made on the issue as preventive measures⁸. Another landmark decision was given in the case All India Judges Association vs. Union of India, in which the court decided on ordering the government to make rules within a specified time limit to raise the age of retirement for Judicial officers up to 60 years in order to bring uniformity in such designations for both Civil and Criminal sides.

JUDICIAL REVIEW

The Constitution of India provides for judicial review under Articles 32 (Supreme Court) and 226 (High Court) and the Supreme Court has clarified that judicial review is a fundamental feature of the constitution. Therefore, the power of judicial review by the Courts is not subject to revision and is thereby taken out of the area of power of Parliament to amend or repeal in any way effectively. The judiciary has declared the legislature a "hands-off" command. Judicial review is considered to be the revision of the decree or conviction of an inferior court by a superior court. Unlike judicial review of judicial functions, judicial review of executive or legislative functions is controversial. The orders passed by lower courts which are either being set aside, amended or modified, are greater in number than reviews relating to executive orders or legislative actions. However, criticisms of the judicial review of

⁷ Laxmikant Pandey vs. Union of India (1987) 1SCR 383.

⁸ D.K Basu vs. State of West Bengal (1997) 1 SCC 416,435-436 pr. 35

executive and legislative functions are stronger and more vociferous. In our constitutional scheme, the judiciary alone is entrusted with the power and duty to test only the constitutional validity of legislative provisions and the validity of administrative actions. The superior courts have the rights to declare a statute ultra vires the constitution and to nullify an executive action as unconstitutional. These powers of judicial review have not made the judiciary superior to the other wings of the constitutional framework, but to ensure a system of checks and balances between the legislature and the executive on the one hand, and on the other, the judiciary. The mechanism has been designed to act in such a way that the unconstitutional actions of one of the wings are corrected by the other, and vice versa. It is not the purpose of judicial review to criticise legislative or executive actions, as the opposition is expected to carry out this function in a democratic polity. In contrast, the role of the judiciary is to review the executive and legislative functions and to declare whether those functions are in accordance with the orders of the Constitution of India.

- **Separation of judiciary from the executive**

In the parliamentary form of government, one needs to understand the term ‘Separation of powers’ as it is the seedling of the separation of the judiciary from the executive and the legislature as well. The term “separation of power” or “triangular politics” was first introduced in the 18th century by Charles Louis de Secondat, baron de La Brède et de Montesquieu in his book “Spirit of Laws”. In his book, he discussed the jurisprudential functions of the political authority of the state which includes the legislature, executive and the judiciary. Therefore, the term separation of power refers to their distinctiveness in terms of the interrelationship and power of the judiciary and the executive. The two wings of government never interfere with each other in terms of power. However, the functions are shared by both domains. The drafters of the Constitution did not place the term separation of power in the Indian Constitution as they believed it to be an inherent feature of the Constitution. The judiciary, being an independent body, has been given the power to stop the arbitrary work of the executive. The independent nature of the judiciary from both wings of the government has given it extensive powers to cross-check the action of the executive. Jurists believe that the separation of power is enshrined in the Constitution of India as a basic structural principle. However, the sharing of the function has not been mentioned in the constitution, as well as it does not fall under the doctrine of separation of powers.

In the case of **Kartar Singh vs. State of Punjab**, Justice Ramaswamy stated that “It is the fundamental principle of the constitution that the legal sovereign power has been distributed

to the legislature to make laws, executive to enforce such laws and the judiciary to interpret such laws within the limits prescribed by the Constitution". Similarly, in another case, **Golak Nath vs. State of Punjab**, Justice Subbarao, stated that "The Constitution brings various constitutional bodies into existence, i.e., the Union, state and the Union Territories". It makes three major devices of power, i.e., Legislature, Executive and Judiciary. It finely demarcates their jurisdiction and expects them to exercise their respective powers without going beyond their limits and they should do their function within the spheres allotted to them.

JUDICIAL ACTIVISM

The expression "judicial activism" is often used in contrast to another expression "judicial restraint" and it is a dynamic process of judicial approach in a changing society. Judicial Activism refers to the process in which the judiciary steps into the shoes of the legislature and comes up with new rules and regulations, which the legislature should have done earlier. According to Black' Law Dictionary judicial activism is a judicial philosophy which inspires judges to move away from the traditional precedents in favour of progressive and new social policies". The Indian judiciary has been constitutionally vested with the power of review to keep the Executive and Legislature within constitutional boundaries and the Judiciary can strike down any law that is beyond Parliament's legislative competence or is violate of the Constitution. Similarly, it can cancel any executive action if it has any patent illegality or arbitrariness. While Articles 13, 21, 32, 226 and 227 encompass this power, Article 142 extends a unique, extraordinary power to our Supreme Court to do 'absolute justice' in any matter before it. Today's court are not remaining passive, with the negative attitude of merely breaking down a law or preventing something from being done. The new attitude is towards positive affirmative actions which issue orders and decrees, directing remedial actions. The legislature and the executive have failed miserably in their cherished duties towards the general public in the estimation of an ordinary Indian citizen. The executive and the legislators are made accountable for their actions and their intention towards the people generates high expectations from the public and attracts sharp criticism whenever their actions do not follow the expected lines. The common citizen feels that the administration has become so indifferent and non-performing that they have no other option except to approach the judiciary to redress their grievances. It is under this situation that the judiciary has adopted an activist approach. Judicial activism has flourished in India and has gained wide legitimacy with the Indian public. However, it is an activist approach by the judiciary which

is bound to create friction and tension with the other organs of the state and such tension is natural and to some extent is desirable also.

Judicial activism earned a humane face with the liberalising of access to justice in India and granting of relief to disadvantaged groups and the have-nots through public interest litigation (PIL). A postal letter or even a postcard addressed to the court is accepted for the purpose of initiating prerogative writs, technicalities being disregarded in the courts and the Supreme Court relaxed the traditional concept of locus by allowing public-spirited citizens to bring public causes to the court. Thus, the number of PIL actions has increased since 1977 and the growth of PIL from post 1977 is mainly attributed to the incidents which took place between 1975 and 1977 during the emergency rule. One can see the differences between the judicial approach before 1977 and post emergency rule in India and this change of approach was in response to the changing times and aspirations of the people. Several cases of fundamental human rights violations were reported during the emergency regime, but still the approach of the courts was conservative. In the case of **ADM Jabalpur vs Shukla**⁹, the Supreme Court held that a detainee under preventive detention did not have the common law right of securing his release from the courts from an illegal and arbitrary preventive detention order, even if it was passed without the authority of law. The reason given by the court was that during the Emergency the fundamental rights guaranteed under the Constitution were suspended. There was a drastic change in the judicial approach after the emergency rule.

HISTORY OF JUDICIAL ACTIVISM IN INDIA

As can be the case in the United States of America and the United Kingdom, the ideological confrontation based on the genuine concern for the welfare of the people arose between the executive and the legislature on the one hand and the judiciary on another. A conservative executive and a progressive judiciary, or a progressive Parliament and at the same point of time a conservative judiciary coexisting, form the basis of judicial activism or judicial overreach, as opposed to executive excesses or executive enthusiasm beyond the limits of the law. The development of the principle of judicial activism in India can be traced back to the late 1960s or early 1970s during the time when Mrs Indira Gandhi was the Prime Minister of India and Mohan Kumara Mangalam an eminent lawyer and legal luminary, was the Union Minister. When the late Mrs Indira Gandhi attempted to introduce progressive socialistic measures in order to implement her favourite slogan “Garibi Hatao” (remove poverty) by abolishing Privy Purses and privileges given to the kings and princes of the princely states of

⁹ (1976) 2 SCC 521

pre-independent India, and nationalizing the 14 major banks in a more meaningful manner so as to serve the cause of the poorer sections of the society, a conservative judiciary did not take it kindly and struck down the relevant legislation as unconstitutional. The judgment of the Supreme Court of India in the cases of abolition of Privy Purse and nationalisation of the bank cases was considered as a judicial overreach by Mrs Indira Gandhi, and the reaction was at once strong and unequivocal. It is believed that on the advice of Mr Kumara Mangalam, the orthodox and most senior judges of the Supreme Court who participated in the majority judgment in the above cases were passed for appointment to the post of Chief Justice of India. The dissenting judge, Mr A N Ray, who was fourth in the line of seniority, was appointed, and resulted in the resignation of the three senior judges. This marked the starting point of the doctrine of judicial activism that was actually caused by a deadlock between the executive and the judiciary.

EARLY CASES OF JUDICIAL ACTIVISM

The following Supreme Court cases provide a useful insight into the growth and development of judicial activism in independent India which are as follows:

- In the Privy Purse case i.e. : **Madhav Rao Jivaji Rao Scindia vs Union of India¹⁰, 1970**, the broad question was whether the President rightly exercised his power in identifying the princes. In this case, the court ruled that based on Article 53 of the constitution, the executive power of the union vested in the President should be exercised “in accordance with law” and the purpose of that power was to help in the destruction of the Constitution, not to destroy the Constitution. An order merely “de-recognizing” a ruler without providing an integral part of the constitutional scheme for the continuation of the institution of his rule– was therefore plainly illegal.
- In the case of **R C Cooper vs Union of India¹¹,1970**, the legislative competence of Parliament to enact the Banking Companies (Acquisition and Transfer of Undertakings) Act, known as the Bank Nationalisation Act, was in question. The court struck down the Act primarily on the grounds of unfairness, explaining that the restriction imposed on the banks to resume “non-banking business” was effectively for banks to carry on any business made impossible in a commercial sense, to carry on any business at all.

¹⁰ AIR 1971 SC 530

¹¹ AIR 1970 SC 564

- In the case of **Golaknath vs State of Punjab**¹²,1971, the Supreme Court while dealing with the constitutional validity of the 17th Amendment to the constitution evolved the concept of “prospective overruling” and held that the Parliament had no power to amend Part III of the constitution, or take away, or violates any of the fundamental rights.
- In the fundamental rights case, which was seen in the famous case of **Keshavananda Bharti vs State of Kerala**¹³, 1973, the Supreme Court gave a decision that can be considered as an important milestone in the Indian constitutional jurisprudence. While dealing this question to the extent of the amending power conferred by Article 368 of the constitution, the court evolved the theory of “basic structure.” A bench of 13 judges, held by a majority of 7:6, had the authority that Parliament had broad powers to amend the Constitution extending to all the Articles of the Constitution, but this power cannot not be used in an unlimited way to eliminate, abrogate or destroy the “basic structure” or the “basic framework” of the constitution.
- In **VC Shukla vs Delhi Admin case**¹⁴,1980, the court passed a law establishing special courts for dealing with offences committed by persons holding high public office while dealing with the legislative competence of the state, held such courts to be valid and it also held that the court could strike down an administrative act if bias or mala fides was proved. In this case, the court clarified that the principle of “basic structure” would only apply to constitutional amendments and not to an ordinary law passed by the Parliament or the state legislature.
- In the judges transfer case namely, in **S P Gupta vs Union of India**¹⁵,1983, the court while dealing with the question of the meaning of the word “consultation” in Article 124(2) states that in the matter of the appointment of judges, the executive is supreme and is not bound by the views expressed by the Chief Justice of India or the other judges of the SC. However, this view has been overruled in 1993 in **S C Advocates-on-Record Association vs Union of India** to ensure judicial supremacy in the appointment of judges.

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JUDICIAL ACTIVISM AND ENVIRONMENTAL JURISPRUDENCE

The steady growth of the principles and doctrines that have enriched environmental jurisprudence owe their existence to PIL cases and the judiciary as well as activist perspectives. In the Oleum gas leak case, the Supreme Court formulated the doctrine of

¹² 1967 AIR 1643

¹³ AIR 1973 SC 1461

¹⁴ 1980 AIR 962

¹⁵ AIR 1982 SC 149

absolute liability for damages caused by the hazardous and inherently dangerous industries. It also directed that the implication extended the jurisdiction of the Supreme Court under Article 32. Subsequently, in the case of the Rural Litigation Kendra case, the court has been propounding principles such as “sustainable development”, the “polluter pays” principle, and also adopting some other principles from international instruments such as the Stockholm Declaration, Rio Declaration, Kyoto Protocol, Biodiversity Convention, the various United Nations Environmental Programmes, etc. In another case which was the Narmada Bachao Andolan case, the court has ensured that development does not take its toll on the employment, shelter and the homes of people by way of building of dams. It has directed the State Governments to rehabilitate the displaced people before going ahead. The courts have performed for the welfare of the public, especially in the areas of custodial deaths, prisoners’ rights, abolition of bonded labour, labourer’s rights, fixing absolute liability on hazardous industries, condition of mental homes, regulating pollution, enlarging the scope of “rights to life”, etc.

THE ANALYSIS

According to Article 145 the power held by the judiciary, which is, legislative in nature, is to make rules and regulations for regulating its practice and procedures. In similarity to executive functions, the Judiciary has the power to appoint officers and servants of the High Court as under Article 46¹⁶ of the constitution. Through Articles 32 and 226, the constitution gives the judiciary the power of judicial review. Although the aspect of “due process” has been avoided, fundamental rights such as liberty and property have been subjected to reasonable regulation by the Legislature¹⁷. In one case, the court held against the Speaker M.P. Srinivasan was given notice to appear in court questioning his decision, although the speaker refused the same to claim his power under Article 212 of the Constitution, which granted him immunity against being questioned by the court of law in the exercise of his powers. The Supreme Court in a case stated that just because Article 309 provides the legislature and the parliament with the power to prescribe the service conditions of the judiciary, it does not restrict the Judiciary from having its own say on the matter as it would be against the spirit of the Constitution to prohibit the court of law on the said power where it was held that “such a consequence would be against one of the seminal mandates of the

¹⁶ Comparative Law; Separation of powers in India, American Bar Association Journal, Vol 42, No. 6, June 1956, pp. 553-555, 594-595

¹⁷ Gopalan vs. State of Madras (1950) S.C.R 88, Also see Deshpande, vs. Judicial review of legislation Eastern Book Co., Lucknow, 1977, p.38

constitution, namely to maintain the independence of the Judiciary.” Further, through Article 142, the Court acquires the power to pass any order as it is required to do full justice in any cause or cases and such order shall be enforceable in the entire territory of India. This power has been invoked by the courts for effective enforcement of fundamental rights and for securing their effective enforcement adopted methods which may result in overreaching its own boundaries.

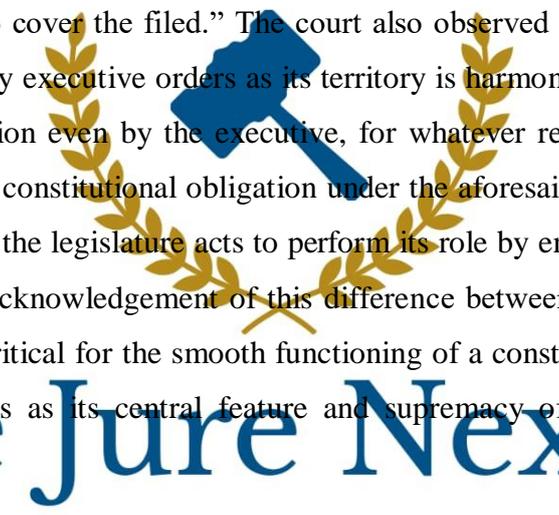
In matters relating to privileges, the powers conferred by Article 194 (3) gave the authority to the legislature in exercising its privileges and as the privileges defined are on par with those of the House of Commons, they could be put into effect in the same manner. However, Article 211 also curbed the powers of the legislature. It was also observed that Article 212 (2) provides that the court cannot inquire into any proceeding of the legislature and were given power to only exercise it with regards to any “irregularity” of any law passed by it and proceedings in the House, but nothing more than that. However, conflict arises in such cases when the court conducts judicial review in cases due to any non-explicit or complete mention in the Indian Constitution. However, the above examples compel one to think that the legislature is the only judge of its privileges considering its broad scope as per the constitution. The Supremacy of the legislature can also be seen from instances where the certain minor provisions of transitory nature can be amended by the parliament, including those that relate to fundamental rights. However, through the power of judicial review, which is a part of the Doctrine of basic structure, the constitution curtails that supremacy by being the organ of checks and balance.

Traditionally, if observed, the court does not give orders to either the executive or the legislature by forming laws, or wanting the executive to follow its discretion in a particular manner¹⁸. Judicial activism has been in the headlines for most of the times by critics on holding the Judiciary accountable at every step they take towards giving detailed judgments that may have two implications. One, that through the means of such judgment, the Court is executing its function of providing justice to the aggrieved and another that provides such justice which brings activism, also enables the judges to avoid overburdening themselves with review petitions, reducing the number of cases brought before the court and bring the system under check. It is contended by the policy makers that whenever the Executive strives to act in view of Public interest or for the purposes of welfare of its citizens, the aggrieved

¹⁸ State of Himachal Pradesh vs. A Parent of a student of medical college, Shimla (1985) 3 SCC 169, 174-175pr. 4; and Asif Hameed vs. State of Jammu & Kashmir (1989) Supp.2 SCC 364, 375 pr. 21

parties instead of cooperating with it, use the courts to prevent the policy from being implemented which could rather serve good for them in the long run.

The Supreme Court is generally barring itself for interim legislation in areas not under any act or executive directives. In the **Visakha case**, the court gave directions on the same stating that the guidelines shall remain unless suitable legislations are made to replace them. The safeguards formulated by the Judiciary, which are regarded as an overreach into the executive domain, are rather against the misuse of powers by the local authorities. In an imminent case¹⁹, the court held that “it is now a well settled practice that has taken firm roots in our constitutional Jurisprudence. This exercise is essential to fill the void in the absence of appropriate legislation to cover the field.” The court also observed that “it is the executive's duty to fill the vacuum by executive orders as its territory is harmonized with the legislature, and where there is inaction even by the executive, for whatever reason, the Judiciary must step in, in exercise of its constitutional obligation under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field”. The acknowledgement of this difference between “judicial activism” and “judicial overreach” is critical for the smooth functioning of a constitutional democracy with the separation of powers as its central feature and supremacy of the constitution as the foundation of its edifice.



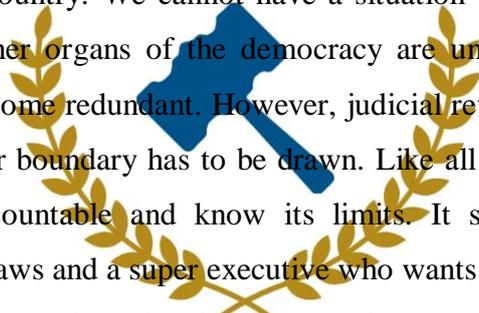
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CONCLUSION

The judiciary's powers in light of both constitutional powers and activism, are being questioned unrestrained in the modern democracy. The impact that is being created by such remarks can be an impact formed by two major although inexorable problems. One, being the non-absolute and undefined powers of the three pillars. Secondly, the problem of judicial interpretations which has been scaling the decisions of Judiciary to different levels. As a result of such decisions in the judiciary, every decision is made by questioning every law made on or by it, whether it is beyond the present time or the requirement of the Constitution. This is a result of intolerance on the part of the policy makers as well as the lawmakers. As a result of the impact of such ambiguity on the term 'judicial independence', politicians have curbed the independence of the judiciary. It has resulted in resolutions being proposed by the legislature to remove the collegium system of appointment of judges, instead appointing a National Judicial Appointments Committee to take up the responsibility of the Chief justice

¹⁹ Vineet Narain vs. Union of India (1998) 1 SCC 226, 265 Pr. 51

of the Country. The judiciary, however, seems helpless on the aspect of judicial activism as it seems to deny its intrusion in the executive domain claiming that there seems to be a lack of 'governance' on part of the government, which is resulting in activism. This seems to be a conflict that has been expanding due to lack in administration or proper transparency by the executive and legislature respectively or in other words, the erosion of the principle of Separation of Powers with changing times. However, some infiltration by the court is unavoidable even when the "domains" overlap each other's functions. There are indications that the judiciary is overreaching and intruding more and more in the exclusive space of the legislature and the executive, thereby creating unhealthy inequality in the delicate balance among institutions in the country. We cannot have a situation where the country is run by judicial decrees, where other organs of the democracy are unable to take decisions with condense and gradually become redundant. However, judicial review is legitimate domain of judiciary but then a limit or boundary has to be drawn. Like all institutions in a democracy, the judiciary must be accountable and know its limits. It should not become a super parliament that frames the laws and a super executive who wants to enforce them. The quality and speed of the mainstream i.e.; the judicial system can be improved by a comprehensive and integrative approach and also by focussing on improving judicial infrastructure and reducing indiscipline.



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