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'GOVERNMENTALIZATION OF THE JUDICIARY' - THE CONCEPTS OF JUDICIAL ACTIVISM AND OVERREACH EXPLORED IN THE BACKDROP OF DOCTRINE OF SEPERATION OF POWERS

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The three fundamental organs of the Indian democratic state namely, the executive, the legislature and the judiciary, each play an important role in the functioning of the state. The legislature makes laws while the executive implements and the judiciary interprets them to solve disputes. Despite the separation of powers, the three branches work together in harmony, supporting each other when needed, so as to maintain stability within the state and ensure its growth. The Indian system can therefore, said to be a co-operative model rather than a competitive one.¹ But, the past few decades have witnessed a rise in the number of instances where the judiciary has stepped into the shoes of the other two branches to perform certain law and policy making functions. This has come to be referred to as 'governance by the judiciary' or the 'govenmentalization of the judiciary' and has drawn a lot of attention to become a hot topic of discussion today.² This paper will majorly analyze the impact of such a role of the judiciary on the doctrine of separation of powers in the Indian context.

The Constitution of India does not rigidly lay down the separation of powers amongst the three organs, but clearly demarcates their functions so as to avoid the encroachment of one branch over the other. At the same time, it also creates an overlap amongst the three to ensure an internal

¹DhrutiLunker, '*Judicial Activism Or Judicial Overreach- Where Are We Headed Towards?*' (2020) II HNLU Student Bar Journal.

²While some argue that such interference of the judiciary is required for the overall benefit of the nation, others align themselves with the argument that the overstepping of boundaries by the judiciary is an unhealthy and unfair practice in a democratic state.

system of checks and balances through which the state can maintain its stability.³One such example is judicial review. The Constitution confers upon the judiciary, the power of judicial review⁴ to restrict the legislative and executive bodies from creating and implementing arbitrary laws and to protect the rights of individuals as guaranteed under the Constitution. Article 142 of the Constitution empowers the Supreme Court to pass any law or decree to achieve complete justice⁵ and Article 141 makes such a law binding on all other courts in the country⁶. With such provisions in place, how is the doctrine of separation of powers still to be maintained? What kind of judicial interventions will then be considered legitimate and within the scope of the constitution? These are crucial questions that need to be answered.

The Indian judiciary has started to take on a much more active role by interfering in legislative and executive fields by directing the government to make new laws and policies, giving them suggestions on how to do so and sometimes even making these laws and policies themselves.⁷This shift from a positivist attitude to an activist approach has expanded its role of judicial review into something that is now called as judicial activism. The judiciary has also become very creative in this transition. The major consequence of this creativity is the invention of Public Interest Litigation (PIL),⁸ which proved to be very effective in a number of cases.

The Supreme Court in the case of *Visakha v State of Rajasthan*⁹ found the need to establish guidelines to address the pressing issue of sexual harassment at workplace and had also directed the legislature to enact a law for regulating the same. The point that shall not be missed here is

³R Shunmugasundaram, '*Judicial Activism And Overreach In India*' [2007] Amicus Curiae.

⁴a process by which the judiciary can evaluate and approve or reject, a particular legislation or order with respect to its constitutionality

⁵The Constitution of India, Article 142

⁶The Constitution of India, Article 141

⁷B. Nagarathnam Reddy, '*Judicial Activism vs Judicial Overreach In India*' (2018) 7 Gopal Journal for Research Analysis.

⁸The idea behind was to create an opportunity for the socially and economically weaker sections of the society to approach the court without much difficulty when their fundamental rights were breached and thereby provide a better justice system.

⁹*Visakha v State of Rajasthan* [1997], AIR 1997 SC 3011

that the judgement passed in this case was given in absence of any laws in the particular field, and a great threat to the fundamental rights of a number of people.¹⁰ Similar was the situation in *Navtej Singh Johar v Union of India*¹¹, *M.C. Mehta v Union of India*¹² and a lot of other judgements. The actions of the judiciary were due to the failure of the other two organs to perform their duties. It was therefore an act to maintain the balance in the state, which is the true essence of the separation of powers in India. Therefore, judicial activism of this kind is justified and legitimate to the extent where it helps growth of the community and when the decision is purely made for the greater public good.¹³

Judicial activism starts taking the form of judicial adventurism or overreach when the judiciary meddles with law and policy making functions when there is no vacuum in the law related to the subject-matter in discussion.¹⁴ For example, the judgement passed by the Court in *Shyam Narayan Chouksey v Union of India*¹⁵ was absolutely irrational and uncalled for. There was categorically no need for the court to go out of its way and create a law that mandated the playing of the National Anthem in cinema halls. The Madras High Court in 2018 extensively deliberated on whether or not Aadhaar should be linked to social media accounts.¹⁶ The court in this case was far from discussing a question of law, rather it explored into a policy question which had a wide-ranging impact. Such decisions clearly fall under the executive domain and the judiciary had no right or expertise to intervene in them and hence cannot be legitimized, even under Article 142.

¹⁰Despite such a situation the legislature had not enacted any such laws for more than 10 years after the decision in this case, which further justifies the need for such judgement.

¹¹*Navtej Singh Johar v. Union of India* [2018] Writ Petition (Criminal) No. 76 OF 2016

¹²*M.C. Mehta v Union of India* [1987] AIR 1987 SC 1086

¹³PratapBhanu Mehta, 'The Rise Of Judicial Sovereignty' (2007) 18 Journal of Democracy.

¹⁴Dr.NishithaJaswal and Dr.Lakhwinder Singh, 'Judicial Activism In India' [2017] Bharati Law Review.

¹⁵*Shyam Narayan Chouksey v Union of India* [2018] Writ Petition (Civil) No. 855 OF 2016

¹⁶Gurshabad Grover, 'A Judicial Overreach Into Matters Of Regulation' *The Hindu* (2019).

The moment the judiciary begins to see itself as the sovereign authority who can't be overruled by the other organs and starts to function with such an attitude, its actions no longer fall within the scope of legitimate judicial review or activism. The judiciary must strictly use its powers to safeguard the rights of the citizens or to fill in the gaps that are existent in the society due to the ineffectiveness of the other two branches, and shall not use their power as a weapon to put them down. It shall not mistake its powers of judicial review as a tool to make it the supreme authority.¹⁷ Needless to say, the judiciary has crossed this line in many cases including the ones mentioned above. This indicates a definite overreach and unjustified encroachment of governmental functions.

The judiciary's duty is to interpret the law while keeping in mind the legislative intent and with such a structure in place the overlap of functions between the organs, especially of the judiciary over the other two branches becomes inevitable.¹⁸ This does not mean the judiciary can interfere with the legislative and executive functions at their whims and fancies and act as a despot. Its role should be within the scope and limits of judicial review. The unexplained interference of the judiciary undermines the role of the other two branches and thereby creates an imbalance in the functioning of the state as a whole.¹⁹ As a result, the parliament to assert their authority, over the last few decades, has started making new laws in order to overturn decisions by the judiciary which conflicted with their opinions and powers.²⁰ It now seems like a power struggle with legislature and executive on one side and the judiciary on the other.

One can hardly find an instance in the past decade where the court has denied taking up a case because it is out of its domain or purview. The PILs by creating a wider platform for the

¹⁷Like mentioned in page 1 para no 2 of this paper, the provision of judicial review was created to establish a system of checks and balances in the Indian democratic state in an attempt to keep the powers of all three organs under control and not to give supreme status to the judiciary.

¹⁸Utkarsh Anand, "Little Bit Of Judicial Overreach Is Bound To Happen As Judges Have To Interpret Laws" *The Indian Express* (2019).

¹⁹The parliament government will feel threatened or agitated about their powers being encroached and this might lead to a bitter war between them.

²⁰MJ Antony, 'Ducking Judgements' *Business Standard* (2013).

disadvantaged public has also expanded the scope of the judiciary beyond its limits giving it a chance to monitor and micromanage every aspect of the country's governance without a second thought.²¹ When the judiciary enters into the field of law and policy making without any prior knowledge, its decisions tend to negatively impact the society in more dangerous ways than we can think of.

One of the major reasons for such judicial overreach is the lack of accountability of the judiciary.²² The actions of the legislature and executive can be checked by the judiciary but the actions of the judiciary are not for review. This flaw has led to the judiciary's belief that their power is superior to everyone else and they can use it however they want to. This has resulted in a more executive minded approach of the judiciary. This overuse of power is a clear abuse of the doctrine of separation of powers and against the principle of democracy and co-existence. To address the problem of judicial overreach, the three branches must together lay down a set of rules regarding judiciary's scope in the executive and legislative fields and also the decisions of the judiciary should be subject to review of the Supreme Court itself. Even though this may sound futile on paper, in practice the judges will be more mindful of their decisions if they are aware that they can be held accountable. The scope of the PILs should also be narrowed down to issues dealing with crucial issues of law or injustice.

Judicial activism is the need of the hour because it aims to safeguard fundamental rights of citizens by taking up law and policy making functions when the other two branches have been lacked in their duties, so as to ensure stability in the society. It makes it possible to achieve fair governance and better delivery of justice to the poor and marginalized sections of the society as well.²³ But, judicial overreach and abuse of the powers of judicial review, on the other hand is

²¹Anuj Bhuwania, '*PILs Give Power to The Judiciary In The Name Of The People*' (*The Wire*, 2016) <<https://thewire.in/books/pil-anuj-bhuwania-courting-the-people>> accessed 8 November 2020.

²²S P Sathe, '*Judicial Activism: The Indian Experience*' (2001) 6 Wash U JL & Pol'y 29

²³Anil Kumar Dubey, '*Legislative Role Of The Judiciary In India: A Critical Appraisal*' [2019] ILI Law Review.

harmful and dangerous not only to the doctrine of separation of powers but also the Indian democracy as a whole. If proper measures are not taken up in the coming few years, this imbalance and struggle amongst the three branches will reach its peaks and will tear the democracy into pieces.

