

OVERREACH OF JUDICIAL ACTIVISM WITH SPECIAL REFERENCE TO DOCTRINE OF SEPARATION OF POWER

¹Shreyans Ritolia

B.A.LL. B 10th Semester, Law College Dehradun, Faculty of Uttaranchal University,
Dehradun, Uttarakhand

²Vaibhav Uniyal

Associate Professor in Law, Law College Dehradun, Faculty of Uttaranchal University,
Dehradun, Uttarakhand

³Shamrendra Vikram

B.A.LL. B 2nd Semester, Law College Dehradun, Faculty of Uttaranchal University,
Dehradun, Uttarakhand

Abstract: Judicial Overreach by the judiciary has always been into question as it violates the doctrine of separation of power. Many jurists argue that judicial overreach has benefited the country but some retaliate and argues that judicial overreach is an attack on the Doctrine of Separation of Power. However, courts in a catena of judgment have ruled that judges have lawmaking power and whenever a situation arises of doing complete justice court cannot be a silent spectator. In the 2G Spectrum case or in BCCI case courts went on to perform the act of executive. In the case of Vishaka v. State of Rajasthan, the court issued the guidelines regarding sexual harassment of women at workplace. The authors seek to examine the act of judiciary in the instances when it crosses the thin line of separation of power created by the founding fathers.

Index Terms- *Judicial overreach, Judicial Review, Separation of Power*

IF JUDICIAL REVIEW MEANS ANYTHING, IT IS THAT JUDICIAL RESTRAINT DOESN'T ALLOW EVERYTHING

I. INTRODUCTION

The third organ of the state i.e. Judiciary has the role for interpreting the laws and the rest two organs of the state i.e. Legislature and executive's role is to legislate the laws and to implement it. Over the years these organs have failed to fulfill their responsibilities and to promote the public interest. The founding fathers and mothers have very well defined the role of every organ of the state. There are two sources of law. Firstly, the law comes into existence when the legislature passes it and secondly, the judge made law. Interestingly, the apex court under Article 141 is the court of record and any judgment passed by the apex court will be treated as a law of the state, if the state has not passed any legislation then under Article 141 of the constitution the apex court has the power to define its own jurisdiction and to do complete justice can pass any order and that will be law of the state. The founding fathers have given extraordinary powers to the Supreme Court of India to do complete justice and this why the Indian Supreme Court is the strongest apex body of any country in the world. **In the case of Naresh Shridhar Mirajkar v. the State of Maharashtra [1]** the apex court held that "in the absence of any provision in the constitution the supreme court is the court of record has jurisdiction in every matter and if there is any doubt, the supreme court has the power to determine it". Further, the Apex court under Article 142(1) has inherent power to do complete justice. In the case of the **Supreme Court Bar Association v. Union of India [2]**, the apex court held that "Indeed the supreme court is not a court of restricted jurisdiction of only dispute settling. The Supreme Court has always been a lawmaker and its role has always been a lawmaker and its role travel beyond merely dispute-settling". The observation in the above-mentioned case is the example where the court neglects the doctrine of separation of power. The founding father has conferred wide powers on the courts by Articles 32, 141, 142, 144, 226, 227 of the Constitution. Of these, Article 32 is itself a fundamental right and not the part of the articles dealing with the Supreme Court. Article 32 was held by the framers as the "heart and the soul of the Constitution". While reading Article 13 and 19 it can be inferred that judiciary has been given primacy over legislative power which militates against the concept of strict power. It is to be noted that the founding fathers have deliberately denied the power of judicial review to the judiciary. It can be said the power of the judicial review is the gift to the judiciary itself. Today, the Indian judiciary has become what Justice Huges once said about the American Judiciary; "Constitution is what the judges say". There are instances when the legislature has drastically failed in legislating the laws and when the case come before the court, the court to do complete justice under Article 142 plays the part of the legislature and makes law. His Lordship Chief Justice Ahmedi observes "In recent times, we have noticed instances of one wing of government avoiding a decision on a politically sensitive issue by passing it on to another wing, the latter not being competent to make that decision. This tendency has manifested itself at the Central as well as the State levels, h cases where the sensitive issue is not pushed into the lap of another institution, it remains unattended and unresolved making the people restive

and forcing them to take it to the courts. We have also witnessed other manifestations of this lack of faith in democracy by the elected representatives themselves when they stall or prevent effective discussion in Parliament. This is a cause for concern as it is totally undemocratic. It has the effect of eroding people's faith in democracy"[3]

II. JUDICIAL REVIEW IN INDIA

There are three types of Judicial Review i.e. Judicial review of administrative action b. Judicial review of legislative action & c. Review of judicial decisions. The court has the power to review any action of the three organs if the action violates the fundamental rights enshrined in the constitution. The Court did not announce any law unconstitutional in the present system of judicial review of India and USA, until unless someone brings that law in the court with the sole purpose of challenging the validity of it. In the case of *Mohd Ishaque v State* [4], Justice M Desi stated that "even if a law automatically becomes void under Article 13 if it violates, abridges or abrogates any fundamental right of the citizens, still it is the obligation of the judiciary body to declare that the particular law has been deemed unconstitutional" and therefore void by the virtue of Judicial Review granted to the Judiciary body by the Constitution of India. It further strengthens the roots of judicial review in our Constitution.

The principal of Modern Democracy demands that if an aggrieved party challenges the validity of any legislative act, then that validity should be checked objectively. Following this, in the case of "*G Nageshwar v APSRT Corporation* [5], the Supreme Court laid down that "the court has plenary power to look into the validity of a legislative act and to ensure it is not against the ideologies of The Constitution of India. Furthermore, the court held that the judiciary body has total power to scrutinize if the legislature takes any overstep in any field, directly or through the instrumentality of the state." This again justifies the ground of Judicial review, as it indirectly states that the Judiciary body is the Guardian of the Constitution, therefore, it is its obligation to protect the ideologies of our forefathers preserved in our Constitution. But if one was to further understand the ideology behind the Process of juridical Review, it feels like that it itself is against the spirit of the constitution. The biggest irony is that Judicial Review is done to safeguard the ideologies of the constitution while it itself acts against it. The democracy of India is very well designed. The powers are divided under the legislative, executive and the Judiciary, and one should not overlap its boundary and start doing the work of others as this will only lead to chaos. Judicial Review later changes into Judicial Activism and that too later changes into Judicial Overreach. For instance, in the case of *Vishaka v. State of Rajasthan* [6], the court faced with a new problem as the petitioner approached the court with an issue which was not covered in any law. The result was the court gave out guidelines called the Vishaka Guidelines. When Judiciary other than reviewing the law, start to actively participate and give out guidance to be followed it is termed as Judicial Activism and it is against the spirit of Constitution as to make guidelines is the work of the legislature and not the judiciary.

III. INTRODUCTION TO JUDICIAL ACTIVISM IN INDIA

According to *Collins English Dictionary* activism is "a policy of taking direct and often militant action to achieve an end, esp. a political or social one". *Webster's New Twentieth Century Dictionary* defines activism as "the doctrine or policy of being active or doing things with the decision". Another dictionary meaning is "policy of vigorous action". In the light of these meanings, judicial activism would denote a judiciary in which judges discharge their functions in a vigorous and decisive manner to achieve an end. What is that end? Dispensing justice with a view to righting wrongs or fashioning remedies where none exist. According to Black's law Dictionary judicial activism is a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial activism means that instead of judicial restraint, the apex court and other lower courts, become activists and compel the authority to act. The courts can also direct the Government, its policies and the administration. One can see the practice of judicial activism in the form of PILs. Judicial Activism means the action of the court that overlaps the power of judicial review. It means that the supreme court, the high court, and the lower courts become activist and compels authorities and even sometimes government in the matter of policy-making and administration. To Justify this the court says that judicial activism is a direct product of the failure of the executive and legislature to act up to the mark, the mark which is even set by the Judiciary themselves. Blacks law's dictionary defines "Judicial Activism" as a "philosophy of judicial decision making whereby judges allow their personal views about public policy among other factors, to guide their decisions." if a layman was to interpret this, the basic ideology he or she will form is that judicial activism is nothing but the honorable judges getting biased and overlapping the power given to them by the constitution and imposing laws based on their "personal views" about public policy. Detractors of judicial activism charge that it usurps the power of the elected branches of government or appointed agencies, damaging the rule of law and democracy. This is interpreted as the judiciary acting as a legislative and imposing her law is an act which damages the rule of law and democracy. The forefathers who drafted the constitution already set up a legislative body for the formulation of laws, yet the judiciary oversteps the power given to them by the constitution and this act itself is against the ideology of the creators of the constitution. In simple and plain words judicial Activism according to the judiciary is the act of usage of judicial power to articulate and enforce laws for the benefits of the society. According to Justice J.S Verma, *Judicial Activism is the "active process of implementation of the rule of law, essential for the preservation of fundamental democracy."*

IV. INSTANCES OF JUDICIAL ACTIVISM IN INDIA

There are many instances where the court did act as an activist. In the famous *Keshavanad Bharti v. State of Kerela* [7], the Supreme Court has held that parliament can amend the constitution but it cannot amend the basic structure of the constitution. The court introduced the new doctrine i.e. Doctrine of Basic Structure which till now doesn't have the exhaustive definition. In the

Delhi sealing case, 2G Scam Case, BCCI Case the Supreme Court has played the role of the executive and went on to do the appointments and had a supervisory role in the investigation held in these cases.

Like everything Judicial Activism also has many facets, some work for the benefit of the society other work against the spirit of the Constitution and the ideologies of our forefathers. Many Jurisprudence also believed that Judicial Activism is a fine example of what justice at all level of a society truly means, while other debated that it is overstepping the boundaries prescribed by the forefathers in our constitution. The Constitution powers the legislative to form laws for the society because they are elected by the citizens and the citizens keep a check on the legislative body by election but what happens when the judiciary starts to do the work of the legislative? How keeps a check on them because they can impose any law they see fit as they are the independent body of democracy.

V. VIOLATION OF DOCTRINE OF SEPARATION OF POWER

It has been contended that the doctrine of separation of powers has not been recognized in its rigid sense. The role of the judiciary is to act as a guardian of the constitution and to keep a check on the other two organs, whether they are functioning within the constitutional limits. The main idea underlying while separating the powers of the three organs of the state was organs should exercise only one type of function. Founding fathers of the constitution have intentionally separated powers exercised by the three organs of the state i.e. the legislature, executive and judiciary. It was unanticipated by the frames of the Indian constitution the transformation this doctrine of separation of power will undergo. It has been witnessed in the catena of judicial pronouncement that judiciary on several occasions has crossed the line of separation which resulted in judicial overreach and judicial activism. Though, in various occasions judiciary has imposed restraint in itself to act as a legislature.

In Jharkhand case or in the famous BCCI case or in several others cases, judiciary ended up in doing the judicial activism or judicial overreach This is why it is important to discuss regarding the exact scope and nature of the powers of two vital organs of the State - the Legislature and the Judiciary. It is impossible to discuss without examining the doctrine of Separation of Power, which is the only weapon to delineate the extent to which the above-mentioned organs of the state can exercise their power. The Supreme Court and High Court while adjudicating, at various instances had violated the lines vis-à-vis separation of powers which is not so rigidly enshrined in the Constitution of India. This unauthorized exercise of power has created tension between the three organs of the state. The makers of the constitution have never anticipated the transformation which the doctrine will undergo and will change the definition of the doctrine of separation of power.

In the case of *State (Govt, of NCT of Delhi) v Prem Raj [8]* “the Supreme Court took a serious note of this disturbing exercise when the High Court commuted the sentences by transgressing its limits. The court observed: “The power of commutation exclusively vests with the appropriate government. The appropriate government means the Central government in cases where the sentence or order relates to a matter to which the executive power of the Union extends, and the state government in other cases. Thus, the order of the High Court is set aside.”

In *Syed T.A. Naqshbandi v State of J&K [9]*, the Supreme Court observed: “Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the court exercising powers of judicial review unlike the case of an appellate court would neither be permissible nor conducive to the interest of either the officer concerned or the system and institutions. Grievances must be sufficiently substantiated to have a firm or concrete basis on properly established facts and further proved to be well justified in law, for being countenanced by the court in the exercise of its powers of judicial review. Unless the exercise of powers is shown to violate any other provision of the Constitution of India or any of the statutory rules, the same cannot be challenged by making it a justiciable issue before the court”.

VI. JUDICIAL OVERREACH – A CRITICISM

There is no specific provision in the constitution for judicial activism, it has been solely devised by the court. To do public good and justice when the judiciary steps over the line of the powers conferred upon it in the name of judicial activism are a judicial overreach. The judiciary begins to nullify the concept of separation of powers enshrined in the Constitution. In *J.P. Bansal v State of Rajasthan [10]*, the Supreme Court observed: “It is true that this court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute. It endangers continued public interest in the impartiality of the judiciary, which is essential to the continuance of rule of law, of judges, under guise of interpretation, provide their own preferred amendments to status which experience of their operation has shown to have had consequence that members of the court before whom the matters come to consider to be injurious to public interest. Where the words are clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or to take upon itself the task of amending or altering the statutory provisions. In that situation, the judge should not proclaim that they are playing the role of lawmaker merely.

VII. CONCLUSION

Powers under article 142 should be used as a supplement and to supplant the substantive law. Where legislation is already being in force the court should restrain themselves in making the law. In various decisions, the courts have imposed self-restraint upon themselves. While deciding the case the courts should not ignore the substantive provision of law and should also refrain itself to act as a legislature. The courts while adjudication should also keep in mind the doctrine of separation as it may create in various instance an unsettled tension between the three organs of the state.

REFERENCES

- [1] AIR 1967 SC 1
- [2] MANU SC 0291 1998
- [3] A.M. AHMADI, JUDICIAL ACTIVISM: AGGRESSIVE ROLE WILL BE TEMPORARY ZAKIR HUSSAIN MEMORIAL LECTURE, PUBLISHED IN THE TIMES OF INDIA, 27 FEBRUARY 1996
- [4] AIR. 1963 PAT. 229 59
- [5] AIR 1959 SC 308
- [6] AIR 1997 SC. 3011
- [7] (1973) 4 SCC 225
- [8] (2003) 7 SCL121
- [9] (2003) 9 SCC592
- [10] AIR 1967 SC 1910

