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Judicial Overreach in India: The Current Scenario

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ABSTRACT

The lawmakers have written the Indian Constitution in such a manner that they may operate like persons while not overlapping with the tasks of other parts, hence respecting Montesquieu's notion of separation of powers. The concept of "Judicial Overreach" refers to the belief that the higher judiciary's current role, functions, and attitudes do not correspond to what was intended by the concept of separation of powers in the constitution, which established separate domains for the Executive, Legislature, and Judiciary. It is widely accepted that this trend has harmed the key institutions of government, since the tendency to encroach on each other's domains impedes the healthy growth of all institutions, and therefore good governance and the strengthening of democracy. Therefore, the only legitimate way for judicial intervention is called judicial review. Only by examining the functions assigned to the various departments of government can a fine line be established between proper and inappropriate judicial action. Purely political and policy issues that do not involve the resolution of a basic legal issue are hence outside the purview of the court. The ability of the superior judiciary to issue a writ of mandamus or other appropriate instruction to the relevant public authority requiring fulfillment of its legal responsibility is the remedy in the case of governmental inactions or institutional breakdowns. However, there is a significant contrast between such public authority ordering performance and the judiciary taking up such a role on its own. The former is proper judicial involvement, not the latter.

I. INTRODUCTION

The former Prime Minister of India, Manmohan Singh had alleged that the Supreme Court is often guilty of judicial overreach by assuming the important executive or legislative functions. So the question arises that whether the edifice of the Indian legislature is being destroyed whenever Judiciary steps out of its bounds.² The Constitution of India has separated the

¹ Author is a Ph.D Scholar at National Law Institute University, Bhopal, India.

² KM, A., "Step by step, brick by brick, the edifice of India's legislature is being destroyed by judiciary", Livelaw.in. (2018) <https://www.livelaw.in/step-step-brick-brick-edifice-indias-legislature-destroyed-judiciary-finance-minister/> [Accessed 8 December 2021].

structure to permit them to act like people while not overlapping with the duties of alternative branches that aimed at supporting the concept of separation of powers as envisaged by Montesquieu.

The term “Judicial Overreach” is attributed to the idea that the higher judiciary's current role, functions, and attitudes do not correspond to what was intended in the concept of separation of powers in the constitution establishing the separate domains of the Executive, Legislature, and Judiciary. There is indeed a notion that this trend has created deterioration in the essential institutions of governance, as the inclination to intrude on each other's domains obstructs the healthy growth of all institutions and hence good governance and the strengthening of democracy.

It is contrary to the design and philosophy of the Constitution if the court assumes the mantle of the executive and legislative. On several occasions, the judiciary has urged the government to fulfill its constitutional and legal duties. While judicial action in situations involving labor policy might be viewed as a proactive, judicial intervention in cases involving fiscal policies, political decisions can be classified as judicial overreach. Frequent interventions have a negative impact on the working of the Constitution.

According to former CJI J.S. Verma, “*the judiciary should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ‘ad hocism’ nor judicial tyranny.*”³.

The contrast between “judicial activism” and “judicial overreach” must be acknowledged for the proper functioning of constitutional democracy. As a result, this discourse is separated into two parts: the first discusses the constitutional provisions establishing the Judiciary's function while the second addresses the practice of the Judiciary. As the latter can only be discerned by referring to specific incidents and topics that are now preoccupying an individual's attention.

II. CONSTITUTIONAL POSITION

The Constitution, via numerous provisions, has outlined the curbs for both the Legislature and the Judiciary so that they can retain their independence in their respective functioning. Article 50 clearly states that the State should take necessary steps to separate the judiciary from the executive whereas Articles 121 and 211 forbid the legislature from discussing the conduct of

³Shunmugasundaram R, “*Judicial activism and overreach in India*”, Core.ac.uk (2007), <https://core.ac.uk/download/pdf/112282.pdf> (Accessed on Dec 8, 2021).

any judge in the discharge of his duties. Articles 122 and 212 on the other hand preclude the courts from sitting in judgment over the internal proceedings of the legislature. Article 105 (2) and 194(2) protect the legislators from the interference of the Courts with regards to his/her freedom of speech and freedom to vote. Thus, in principle, there is enough room for each side to preserve its independence. However, any kind of activism, whether by the court or the legislature, raises the question of what happens when one side violates the separation envisioned in the Constitution. The Constitution appears to be quiet on this, leaving it to the lawmakers and courts to ensure that they stay within their limitations.

III. JUDICIAL INTERVENTION IN LEGISLATIVE/EXECUTIVE ARENA

In recent years, the court has exercised its authority vis-à-vis parliamentarians, frequently in instances requiring tests of ruling parties' strength in legislatures. When the contending claimants for the Chief Ministership of Uttar Pradesh – Jagadambika Pal and Kalyan Singh – engaged in ugly drama, and the then Governor Romesh Bhandari played a partisan role, the Supreme Court intervened and directed the Speaker to conduct the Composite Floor Test in the State Assembly.⁴ The following are some notable examples of judicial overreach:

(A) Imposition of Patriotism.

The Supreme Court in its decision in the matter of *Shyam Narayan Chouksey v. Union of India*⁵, in 2016 ordered that everyone in the hall stand to show respect for the National Anthem. It also ordered that all entry and exit doors must remain closed before the playing or singing of the National Anthem in the cinema hall so that no one causes a disturbance. While the national anthem is playing, the national flag should be shown on the screen. As a result of the ruling, the judiciary overreached in the following ways:

Neglected the Bijoe Emmanuel Case⁶ – The court made no mention of the historic decision in the Bijoe Emmanuel case in its order. In this instance, three students were dismissed from school for failing to perform the national anthem. Their faith forbade them from participating in any rites other than praying to Jehovah. The court concluded that there is no legal requirement for anybody to sing the national anthem.

Ignored the Uphaar Tragedy Case⁷ – The Supreme Court ignored its own prior decision in

⁴ Karnataka Floor Test: When SC Intervention Made Jagdambika Pal 'One-Day' Wonder in 1997, News18, May 19th, 2018, <https://www.news18.com/news/politics/karnataka-floor-test-when-sc-intervention-made-jagdambika-pal-one-day-wonder-in-1997-1752467.html> (accessed on 21st November, 2021)

⁵ MANU/SC/1729/2016

⁶ Bijoe Emmanuel and Ors. v. State of Kerala and Ors., AIR (1987) SC 748.

⁷ Sushil Ansal and Ors. v. State Through CBI and Ors., MANU/SC/0190/2014.

the Uphaar disaster case, in which the court ruled that the doors to a cinema should never be closed from the outside.

The court's mandate would have difficulties, as it goes far beyond the Prevention of Insults to National Honour Act of 1971, which states that no movie or performance of any kind may include the National Anthem. As a consequence, a bench chaired by former CJI Dipak Mishra changed its prior ruling, saying that it is up to theater owners' discretion.⁸

(B) Proactive Censorship in case of Jolly LLB 2⁹

Bombay High Court ordered four scenes from the movie Jolly LLB 2 to be cut. The film had been certified by the Central Board for Film Certification (CBFC) The reason given by the Court was that the movie was defamatory to the lawyer's profession. It also directed the CBFC to re-certify the film. A case of Judicial Overreach-

Unnecessary Interference – The CBFC has the authority to censor films and recommend edits from which an appeal lies to an Appellate Tribunal. The Cinematograph Act gives courts no authority to certify, alter, or deny certification of films.

Violation of Article 19(2) – The Bombay High Court's demanding edits in the movie Jolly LLB2 was passed without any authority because the order of the court has seemed as a restriction on freedom of speech under Article 19(2) of the Constitution which clearly mandates that only a law can impose reasonable restrictions.

The committee was Illegal – The Bombay High Court's decision to form a committee was unconstitutional and lacked authority. The determination of contempt based on one single trailer contradicts various Supreme Court decisions that made that position clear films must be judged in their entirety.

(C) Liquor Ban¹⁰

In a Public Interest Litigation relating to road safety, the Supreme Court outlawed the sale of liquor at retail outlets, hotels, restaurants, and bars located within 500m of any national or state highway. A case of Judicial Overreach-

Unnecessary Intervention – These directives are viewed as violating the spirit of our Constitution's separation of powers, as the enforcement of the Directive Principle of State must

⁸Rajgopal, K., 2018, <https://www.thehindu.com/news/national/sc-modifies-order-says-national-anthem-not-mandatory/article22403095.ece> (last visited Dec 9, 2021).

⁹ Ajay Kumar v. Union of India and Ors., PIL No.11 of 2017.

¹⁰State of Tamil Nadu Rep. By Its Secretary Home, Prohibition & Excise Dept. & Ors., AIR (2017) SC 262.

be left to the government.

Use of Art. 142 was not appropriate – This was not an appropriate instance to exercise the court's exceptional powers under Article 142 of the Indian Constitution since the subject required executive expertise and accountability.

Lack of Proof¹¹ – There was no scientific evidence shown to the court that prohibiting the selling of liquor on highways would lower the number of fatalities. It should be mentioned that the total proportion of fatalities caused by drunk driving was just 4.2 percent in 2015.

(D) The cancellation of telecom licenses in 2G case¹²

The Supreme Court has invalidated 122 telecommunications licenses as well as spectrum granted to eight telecom entities. The allocation system was found to be flawed by Court. It ordered the government to use auctions to distribute national resources rather than bids for public sector licensing or spectrum. A case of Judicial Overreach-

Overlooked the Legislative and Executive Roles – Economic policy decisions in a country are exclusively among the functions of the legislative and executive departments, and the court in this instance overreached its power, badly damaging the economy.

Ignored the Implications – The industry owed around Rs 5 lakh crore. Telenor, Etisalat, and Sistema have all withdrawn from the market. The merger of Vodafone and Idea became unavoidable.

(E) Lodha Committee report on the Board of Control for Cricket in India¹³

The Supreme Court established the Lodha Panel in response to claims of corruption, match-fixing, and betting scandals in Indian cricket. The proposals were developed to implement reforms and reform the elite structure of the BCCI that governed Indian cricket at the national and state levels. A case of Judicial overreach-

Lodha committee had no authority – The BCCI does not accept government funds and is not controlled by the central or state governments. As a result, the Lodha committee lacks the power to make recommendations. The court may have ordered that the BCCI operate in compliance with the terms of the Societies Act.

Not the Courts job to run Sports bodies – It is not the court's responsibility to administer a

¹¹ MORTH, (2015), https://morth.nic.in/sites/default/files/Road_Accidents_in_India_2015.pdf (last visited Dec 9, 2021).

¹² Subramanian Swamy v. A. Raja, (2012) 11 SCR 873.

¹³ Report of the Supreme Court Committee on Reforms in Cricket, Volume 1 < http://www.gujaratcricketassociation.com/file-manager/lodha/Lodha_Committee_Report.pdf>last accessed on 21st August, 2018

sports organization or to dictate how it should be conducted. Institutional autonomy must be respected. It is in the best interests of sports for entities that investigate actions in these disciplines to have autonomy. External meddling and violations of their autonomy are not conducive to their advancement of sports.

Flawed Recommendations – With the one-vote-per-state norm, the court has overlooked India's cricket heritage, which dates back over a century and includes teams from Railways and Services competing in the Ranji Trophy. They now hold the position of associate members, with no voting powers. Teams such as Bombay, Baroda, Saurashtra, and others will now be wiped out due to the rigorous requirement of geographical territorial criteria.

(F) Blanket Ban on Crackers ¹⁴

In *Arjun Gopal v. Union of India*, it was noted that throughout the winter, air quality standards in Delhi ranged from poor to severe which poses a risk of sickness. The court directed to suspend all such permits that authorize the wholesale and retail sale of fireworks inside the area of the NCR. The suspension is in effect until further orders of this Court are issued. Until additional directives are issued, no such permits will be given or renewed.

Unnecessary Interference - The Supreme Court's decision was partly motivated by poor air quality; nonetheless, it should be noted that policy and its implementation are best left to the legislature and administration. In an ideal world, the courts should only step in when there is negligence because governments are already working to minimize pollution, the Supreme Court's involvement is seen as a concerning overreach.

Prior Experience- Prohibition on stubble burning, which was ordered in 2019¹⁵, has been unsuccessful. Only alternate techniques, such as making stubble itself a remunerative product, have helped to minimize burning. Significantly larger variables, such as automobile pollution, industry, and unpaved roads, contribute significantly to Delhi's poor air quality. As a result, concentrating just on fireworks appears to be excessive.

Fallouts- An outright ban on the sale of fireworks in India will lead to an increase in black market sales at inflated prices. Instead of a prohibition, a persuasion strategy should be used to encourage people to stop buying and using fireworks.

(G) Overreach During Pandemic ¹⁶

The Supreme Court took suo moto cognizance of the alarming situation and the breakdown of

¹⁴ Arjun Gopal v Union of India 2016 SCC Online SC 1382

¹⁵ M.C. Mehta v. UOI & ORS., WP (C) NO.13029 OF 1985

¹⁶ Suo Motu Writ Petition (Civil) No.3 of 2021

healthcare infrastructure in different parts of the country, such as oxygen supply problems, a lack of a unified policy regarding the supply of COVID inoculations, and other logistical challenges, and issued a notice to the Centre seeking an immediate response to handle the situation. It was noted that the Allahabad high court had also decided that the five cities of Uttar Pradesh must be placed under lockdown.¹⁷

The opposition- It is considered that courts are becoming more lenient in permitting public interest litigations. Critics argue that it blurs the boundaries between the judiciary and the government and that these petitions move the courts into areas that are obviously outside their original authority.

IV. JUDICIAL RESTRAINT: NEED OF THE HOUR:

The Supreme Court has often emphasized the need for judicial restraint in maintaining the delicate balance of power among the several limbs of a democracy. Justice Markandey Katju in *Minor Priyadarshini's case*¹⁸ has also cautioned against judicial overreach by stating that Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the state. It accomplishes this in two ways: First, it recognizes the equality of the other two branches with the judiciary; Second, it tends to protect the independence of the judiciary.

V. LACK OF ACCOUNTABILITY

The judiciary's embrace of such an all-powerful mindset does not bode well for a functioning democracy. This is emphasized by the fact that the court, unlike the legislative and the administration, is not responsible to the people. When there is social, economic, or political injustice – or a violation of the requirements of the law and the constitution - the acts of the executive are subject to judicial scrutiny. When the legislature passes laws that go outside the confines of the constitution or acts arbitrarily against its basic structure, the highest court probes and corrects. When the judiciary commits excesses, only a bigger Bench or a constitutional amendment may interfere. Even today, the sole method of removing judges provided by the constitution is impeachment, which is a monumental task that should not be underestimated. Because of this lack of accountability, the judiciary must tread carefully and exercise caution. It undermines the spirit of the constitution, as democracy is based on the division of powers among the organs. It causes a schism between the legislative and judicial systems. As a result of these judgments, the message to the public is one of legislative inactivity. Judicial activism

¹⁷Aggarwal, S.N., “Judicial overreach in times of Covid-19” The Indian Express, May 18, 2021

¹⁸ (2005 (3) CTC 449)

serves to build people's trust in the courts, the act of overreach undermines it. It looks to be an act of 'unelected tyranny' in a democracy where elected representatives rule. It erodes people's faith in public institutions, which is bad for democracy. It is a waste of judicial time, which could otherwise be used to hear other important cases of public concern standing before the court.

VI. WHAT IS THE SOLUTION?

Mr. Dipankar P Gupta, the former Solicitor General of India, remarked that “there is a serious danger that the activity of the courts may worsen the activism of the authorities.”¹⁹ Inconvenient choices are being referred to the courts by the government. Extensive use of judicial authority in administrative matters may, in the long term, diminish judicial powers. This is not a pleasant situation. Rather than replacing administrative orders with judicial orders, the court's role should be to push the authorities to act and issue appropriate executive orders. They must be instructed on how to carry out their responsibilities correctly and then ordered to do so. They must answer to the court for this. The Supreme Court recently noted in *Indian Drugs & Pharmaceuticals Ltd v Workmen*²⁰ that, “the Supreme Court cannot arrogate to itself the powers of the executive or legislature. The Indian Constitution provides for a comprehensive separation of powers, and the court, too, must be aware of its limitations.”

As a result, it is reasonable to claim that a legitimate judicial intervention is one that plainly fits within the allowed scope of judicial review. Only by examining the functions assigned to the various departments of government can a fine line be established between proper and inappropriate judicial intervention. In borderline circumstances, the requirement for judicial intervention is determined by a legal question at the heart of the disagreement. Purely political and policy issues that do not involve the resolution of a basic legal issue are hence outside the purview of the court. The ability of the superior judiciary to issue a writ of mandamus or other equivalent instruction to the concerned public authority requiring fulfillment of its legal responsibility is the remedy in the case of governmental inactions or institutional breakdowns. However, there is a significant contrast between mandating performance by such a public body and the judiciary taking up such a role on its own. The former, not the latter, is a lawful judicial intervention.

¹⁹Hanging in the balance, Hindustan Times, June 13, 2007, <https://www.hindustantimes.com/india/hanging-in-the-balance/story-WudnJaH1Ksfc3xsjbKgE4J.html> (last visited Dec 9, 2021)

²⁰(2007) 1 SCC 408