
JUDICIAL OVERREACH AND RULE OF LAW

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ABSTRACT

In our Indian constitution there is a demarcation of powers between the three bodies i.e., Legislature, executive and the judiciary. The legislature makes the law, executive implements it, and the judiciary keeps a check on these on these laws and make sure there in accordance with our constitution. But there are always instances in our legal system where there is an absence of adequate laws in certain areas. That is when the judiciary steps in and performs the task of the executive and legislature. If the judiciary acts without restraint, then it would be judicial supremacy rather than judiciary's independence. Because of judicial overreach, the boundaries of the three organs are not being respected as there is no proper balance of powers which causes a conflict between them. This goes against the very concept of separation of powers and the rule of law that form the basis of the Constitutional Scheme and Indian Democracy. This article aims to explore how Judicial Overreach manifests in practice in the pretext of judicial activism and subverts the Rule of Law in India.

INTRODUCTION

In Indian democracy, each of the three pillars have been assigned their functions i.e., legislature makes laws, the executive implements these laws, and the judiciary interprets and keeps checks on the laws being passed. As such, Independent Judiciary is an essential feature under the rule of law in India. One of the primary roles of the judiciary is to make sure that the other two organs i.e., the legislature and the executive are making and executing the law without any arbitrariness or unreasonableness in the laws passed. But there are always instances in our legal system where there is absence of adequate laws in certain areas. That is when the judiciary steps in and performs the task of the executive and legislature to ensure the rights of the people in the society in the form of an activist role which is known as judicial activism. At certain times, the judiciary overstep their boundaries and exercise Judicial Overreach in the guise of Judicial Activism. This article aims to explore how such acts of Judicial Overreach manifests in practice and subverts the Rule of Law in India.

JUDICIAL ACTIVISM AND RULE OF LAW:

The Indian Constitutional scheme includes a robust form of separation of powers, thereby upholding the independence of the three organs while also maintaining the mechanism of Checks and Balances by way of judicial review, in order to uphold the Rule of Law and maintain the Supremacy of the Constitution. Despite not being expressly stated, India's Constitution envisions a system of governance based on separation of powers although not in a strict sense¹. An important aspect of the doctrine of separation of powers is that there should be an independence of judiciary so that adequate justice is delivered by the courts. Judicial Activism is a manifestation of the Decisional Independence of Judiciary to make appropriate judgements when the situation demands it and thus, comes under the ambit of rule of law. Furthermore, ensuring that everyone is treated equally and the rights of the people in the society is maintained is a primary aspect of the Rule of Law. Judicial Activism becomes relevant to the rule of Law from the perspective of maintaining the Human Rights of people as well.

But even if the presence of Independent Judiciary is one of the primary aspects of Rule of Law, excessive independence along with lack of adequate checks and balances on the Judiciary strikes at the root of the Rule of Law. In India, though Judicial Activism is recognized under the ambit of Rule of Law, there have been instances when such acts of Judicial Activism overly

¹ Rai Sahib Ram Jawaya Kapur v. The State of Punjab

infringe into the domains of the Legislature and Executive and evolve into 'Judicial Overreach.' If the judiciary acts without restraint, then it would be judicial supremacy rather than judiciary's independence. As a consequence of judicial overreach, the boundaries of the three organs are not being respected as there is no proper balance of powers which causes a conflict between them. This goes against the very concept of separation of powers and the rule of law that form the basis of the Constitutional Scheme and Indian Democracy. As Justice J S Verma, former Chief Justice of India once said, "Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial 'ad hocism' nor judicial tyranny." Judicial activism is under rule of law which must be implemented according to theory. But in reality, this is more of judicial overreach masquerading as judicial activism.

There have been certain instances of Judicial Overreach such as the Jolly LLB 2 case where in spite of the fact that under Cinematograph Act, 1952, the Board of Film Certification has the authority to censor films, the court interjected itself unnecessarily and ordered the filmmakers to cut certain scenes on the recommendation of the three-member committee constituted by it which is a clear case of judicial overreach. Another notable case was the 2G telecom case² where the supreme court canceled 122 licenses allotted to 8 companies. The legislative and executive branches of government are solely responsible for a country's economic decisions, and the court in this case overreached its authority, negatively impacting the economy. As a result of such Overreach, the public can have the perception that the legislature is not adequately performing its duties or in situations where the Judiciary arbitrarily exceeds their limits, the trust of the people on Judiciary can be tarnished.

IMPLEMENTATION:

In our democracy, the control over the treasury and implementation mechanisms rests with the legislature and executive and the Judiciary does not have any control over them. So, there are multiple instances when the court orders are not being implemented in reality which also raises the question of how Judicial Overreach manifests itself in practice. Now whenever in a case of judicial activism or judicial overreach, the executive and legislature are bound to follow and implement the orders since it is the judiciary who has the power to adjudicate on what is right or wrong. Even if they want to question the actions of the judiciary, they do not possess the ability to do so by themselves. Whenever there are arbitrary or unreasonable actions on the part

² Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1

of the executive or the legislature, it is the judiciary who is the adjudicating body who maintains the checks and balances over the actions of the other two organs.

But if the judiciary in itself is crossing its boundaries by encroaching upon the powers conferred to executive and legislature, there is no one to question the judiciary and the executive and legislature are bound to follow its directions or approach the courts challenging them. When the judiciary exceeds their limits and makes decisions through Judicial Overreach, these decisions also become precedents unless they are overruled by a larger bench. So, any subsequent cases on the same matter which come before the lower courts will be bound by these decisions and the judgements in those cases will be an expression of the Judicial Overreach exercised by the Judiciary in the first place. So, we can deduce that the Judicial Overreach exercised by the Higher Judiciary in one case will get implemented in the following cases through this way as well.

LACK OF ACCOUNTABILITY:

One of the primary reasons for these instances of Judicial Overreach might be because of the lack of accountability and adequate restraints on the judiciary's powers in reality. "Accountability of judiciary is as essential as its independence and that there are not many checks and balances on the power and conduct of Indian Judiciary". So, the laws and actions of the Legislature and Executive can be reviewed and struck down by the Judiciary when they are arbitrary or against the principles of the Constitution which serves as an effective restriction on these Institutions from abusing their power and acting arbitrarily. But on the contrary, when there is an arbitrary or excessive judgement given by the Judiciary or in the instances where the Judiciary oversteps its bounds, the primary recourses available are Appellate Review of the judgement, Impeachment of the Judges under Article 124(4) and Article 218, or a Constitutional Amendment intervening the judgement. In cases of Appellate Review, when the decision has been affirmed by the Highest Bench in the Supreme Court, the decision can be challenged only through a Review Petition, Curative Petition or a Presidential Pardon depending on the situation. But these recourses are allowed to be exercised very rarely in reality and thus, effectively does not impose any restraints on the Judiciary.

Impeachment of Judges under Article 124(4) and Article 218 allows for removal of judges based on the grounds of 'proved misbehaviour' or 'incapacity' but these grounds have not been defined in the Constitution. There has been no instance of Judicial Overreach being categorized

as ‘misbehaviour’ under the ambit of Article 124(4) and Article 218. But even if Judicial Overreach was considered to be covered under these Articles, ‘Impeachment of Judges’ is an extremely tedious process where the proceedings should be initiated in any house of the Parliament followed by an Inquiry Committee investigating the issue and finally, requires the majority votes and assent of both houses of the Parliament and the President. There have been multiple instances where the impeachment proceedings have been initiated against High Court Judges such as Justice P.D. Dinakaran, former Chief Justice of Sikkim High Court, Justice Soumitra Sen, a former judge of the Calcutta High Court and so on. But they have been futile as the judges resign from their positions before the impeachment motion is passed before the Lok Sabha and Rajya Sabha. There has never been an impeachment of a Supreme Court or High Court Judge in India till date. This indicates how in reality, the mechanism of impeachment of judges does not serve as an effective restraint on Judges engaging in Judicial Overreach or abusing their power.

Even in the case where the Legislature or the Executive creates a law or issues administrative directions which circumvents the order of the Courts, the judiciary has the ability to mandate compliance with the judgement passed on the subject matter. For example, in AV Nachane case³, the situation can be perceived as a stand-off between the Supreme Court on one side, and the Parliament and Life Insurance Corporation on the other side. The court⁴ ruled that the LIC Rules which had retrospective application and practically circumvent the prior Supreme Court judgements, was unconstitutional. This shows how the Judiciary can declare a law or an administrative order as unconstitutional and ensure compliance with the judicial precepts, which will also be applicable in cases where the precedents exhibit Judicial Overreach as well.

At the grass-root level, the Judiciary are also made up of people with their own ideologies, self-interest and moral values which might influence their decisions at times. This also gives a rationale on how the Judiciary unintentionally breach their limits to enforce their ideologies and exercise Judicial Overreach in the garb of Judicial Activism as seen in the National Anthem Case⁵ where the Supreme Court ruled that the national anthem must mandatorily be played before films in theatres along with other guidelines. After the case of Supreme Court Advocates on Record Association v. Union of India⁶, Supreme Court has essentially taken over the power

³ AV Nachane v. UOI

⁴ Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules 1981

⁵ Shyam Narayan Chouksey vs. Union of India (2018) 2 SCC 574

⁶ Writ Petition (civil) 1303 of 1987

of appointment of judiciary in the higher courts which is also another reason for the lack of accountability of judiciary.

From this, it is clear that there are no adequate mechanisms which check the powers of the judiciary in reality. Even in cases of Judicial Overreach, the only practical remedy available to the Legislature and Executive is to utilize the appellate review but it is still in the hands of the Higher Judiciary to decide whether the Overreach has occurred or not. This factor is more crucial because the line dividing Judicial Activism and Judicial Overreach is a very thin one and becomes blurred at most times. So, when the Judiciary encroach upon the domains of the Legislature and Executive, the onus is again on the Judiciary to decide whether such an encroachment has happened or not, this essentially means that when Judicial Overreach occurs, the Judiciary themselves are the ones infringing their limits while also being tasked with adjudicating whether they have crossed such limits, which clearly implies that there is a lack of an adequate mechanism which can hold them responsible in these cases.

CONCLUSION:

Therefore, in this dilemma of exercising Judicial Activism while also being constantly mindful of not practicing Judicial Overreach, the practice of judicial responsibility and restraint assumes highest importance to maintain this delicate balance between the three pillars of the democratic government – the Legislature, Executive and Judiciary, especially since there are no realistic constitutional referees to review the judiciary's actions. It is paradoxical that the courts have tried to justify this infringement of the doctrine of separation of powers on the ground of protecting constitutionalism and upholding the rule of law. It is arguable that this all-encompassing ambit of the power of judicial review in India will have adverse implications for the Indian constitutional scheme. For instance, the routine judicial usurpation of legislative or executive functions might make the other two government wings less rather than more responsive. It is also doubtful if the courts have been able to achieve those objectives which the legislature or the executive is more suitable and/or capable to pursue. The only consolation is that the higher judiciary is not totally unaware of these concerns. Unless such restraint is actively practiced by the Judiciary at all times, the exercise of Judicial Overreach cannot be prevented in reality and this can subvert the Doctrine of Separation of Powers, Rule of Law and the entire Constitutional Scheme of India. The distinction between "judicial activism" and "judicial overreach" must be recognized for a constitutional democracy to work properly, with

the separation of powers as its core feature and the supremacy of the constitution as its foundation.