



**JUDICIAL INCURSION INTO LEGISLATIVE AND EXECUTIVE DOMAIN**

**Edited By:**

1) **Saumya Tripathi**

(Editor)

[Saumya.judicateme@gmail.com](mailto:Saumya.judicateme@gmail.com)

+91 9044382618

**Publisher Details:**

1) Saumya Tripathi

+91 9044382618

Address: Lucknow

Email Address: [Saumya.judicateme@gmail.com](mailto:Saumya.judicateme@gmail.com)

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## **JUDICIAL INCURSION INTO LEGISLATIVE AND EXECUTIVE DOMAIN**

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*By, Jinisha Shah  
From, Praveen Gandhi College of Law*

### **ABSTRACT**

The research paper attempts to draw the attention of the readers towards the increasing role of the judiciary in India thereby resulting in judicial incursion into the legislative and executive domain. The ground of research is based on doctrine of separation powers and judicial review extending to judicial activism.

### **1. Introduction**

The establishment of any democratic government rests on the three pillars- the legislature, the executive, and the judiciary. These are known as the three organs of the government. While the legislature is vested with the power to enact laws, the executive is responsible for the implementation of the

law and the judiciary is responsible for the interpretation and enforcement of these laws. In the Indian polity also, the powers and functions have been scrupulously distributed among these three organs of the government. The powers and functions of three organs of the government machinery have been meticulously laid down and defined in the Constitution of India, which is the supreme law of the land. The constitution thus, provides for the separation of powers between these organs of the government. According to the theory of separation of powers, in a democratic state, these three powers and functions must be kept separate and exercised by different organs of the government machinery. But there are times when there is a delinquency on the part of the legislature and executive and a vacuum is created in the working of the government. As a result of which the third organ of the government i.e. the judiciary, oversteps and assumes anomalous powers under the pretence of judicial review as embodied in the Indian Constitution. Thus, arousing a debatable question of separation of powers and

judicial incursion into the executive and legislative domain.

### 1.1. Separation of Powers

The name most associated with the doctrine of separation of power is the French scholar Montesquieu. He coined the term 'trias politica' or 'separation of powers' and gave a classic exposition of the idea of separation of powers in his book 'Spirit of Laws'.<sup>1</sup> According to him if the power is in the hand of only one organ in the government it would end up being a tyranny. In the words of Montesquieu "There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing laws, that of executing public resolutions, and of trying the causes of individuals."<sup>2</sup> Thus he propounded that the power should be vested in three distinct organs i.e. the legislature, the executive and the judiciary.

### 1.2. Separation of Powers and the Indian Constitution

The debate about 'separation of powers' in India dates as long back as the Constitution itself. It was extensively debated by the Constituent Assembly. The doctrine of separation of powers was brought up by Prof. K. T. Shah in the Constituent Assembly as an amendment to the draft constitution in form of a new Article i.e. Art. 40-A which read as "There shall be complete separation of powers as between the principal organs of the State, viz, the Legislative, the Executive, and the Judicial".<sup>3</sup> However, the amendment was not moved. The doctrine of separation of powers, thus, has not been explicitly stated or embraced by the Constitution itself but the functions of the three organs of the government have been sufficiently differentiated so as to avoid the usurpation of function of one organ by another which can be seen with incorporation of Articles 50 (Directive Principles of State Policy), 121 and 211 (the legislatures cannot discuss the conduct of a judge of the High Court or Supreme Court. They can do so only in matters of impeachment), 122 and 221 (the courts cannot inquire the validity of

<sup>1</sup> Warnock, Separation of Powers-An Overview (2019), <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>.

<sup>2</sup> Indian Constitution and Separation of Powers, Law Teacher, <https://www.lawteacher.net/free-law-essays/constitutional-law/indian-constitution-and-separation-of-powers-constitutional-law-essay.php>.

<sup>3</sup> Constituent Assembly Debates On 10 December 1948, <https://indiankanoon.org/doc/1954671/>.

proceedings of the legislature), 361 (the President and Governors enjoy immunity from court proceedings)<sup>4</sup>

Due to the parliamentary system of governance in India, even though there is separation of functions among the three organs of government but there's a lot of overlapping of powers among them.<sup>5</sup> The legislative and executive are closely connected with each other wherein the executive is responsible to the legislature for its actions and derives its powers from the legislature. Judiciary having the power of judicial review over legislative and executive actions and declaring any law passed by the Parliament as void if it violates any provision of the constitution. The executive exercising the power of the judiciary in case of appointing the judges of the High Courts and the Supreme Court. Thus, all three organs act as a check and balance to each other in order to prevent the abuse of power by any of the three organs and work in coordination and cooperation.

The debate about the doctrine of separation of powers continued through landmark judicial pronouncements by the Supreme Court of India. The first major judgement by the judiciary in relation to this was in *Ram Jawaya v. The State of Punjab*<sup>6</sup>, wherein the Supreme Court held that “the Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity, but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can be said that the Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.” The judgement given in *Kesavananda Bharti Case*<sup>7</sup> is the most important in this context, wherein the Supreme Court held that “the doctrine of separation of powers was included in the basic structure of the constitution and thus any amendments which gave control of one organ over another would be unconstitutional, leaving

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<sup>4</sup> Separation of Powers in Constitution of India, GKToday (2016), <https://www.gktoday.in/gk/separation-of-powers-in-constitution-of-india/>.

<sup>5</sup> Indian Constitution and Separation of Powers, Law Teacher, <https://www.lawteacher.net/free-law-essays/constitutional-law/indian-constitution-and-separation-of-powers-constitutional-law-essay.php>.

<sup>6</sup> Rai Sahib Ram Javaya Kapur and Ors. v. The State of Punjab, AIR 1955 SC 549.

<sup>7</sup> Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., AIR 1973 SC 1461.

the Executive, the Legislature and the Judiciary completely independent. In the subsequent case of *Indira Gandhi v. Raj Narain*<sup>8</sup>, the Supreme Court asserted and upheld the doctrine of separation of powers ruling in Kesavananda Bharti Case.

## 2. Judicial incursion into the Legislative and Executive Domain

As mentioned above, it is evident that the Indian Constitution does not regard separation of powers in its strict sense as embodied in the doctrine, but rather it is perceived as non-conferment of unfettered powers into a single body of men and to motivate the system of checks and balances.<sup>9</sup> However the question arises, the three organs though not rigidly separate whether they can usurp their powers and encroach into the domain of another organ on the pretext of failure or inaction of the other organ under the Constitution.

Though this issue has been theoretically addressed by the Supreme Court in *Asif Hameed v. The State of Jammu & Kashmir*<sup>10</sup> but has not been implemented practically which is evident from the

increasing judicial encroachment into the legislative and the executive domain. In the said case the Court held that Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. Legislative and executive organs, the two facets of the people's will, have all the powers including that of finance. The Judiciary has no power over the sword or the purse. Nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limits.

### 2.1. Expanding role of the Judiciary

The way in which our constitution has tried to strike a balance between parliamentary sovereignty and a written constitution with the provision of Judicial Review embodied under Art. 13, is a unique achievement of

<sup>8</sup> *Indira Nehru Gandhi v. Shri Raj Narian & Anr*, AIR 1975 SC 2299.

<sup>9</sup> Doctrine of Separation of Powers, Legal Service India - Law, Lawyers and Legal Resources,

<http://www.legalserviceindia.com/legal/article-35-doctrine-of-separation-of-powers.html>.

<sup>10</sup> *Asif Hameed & Ors. Etc. Etc vs State of Jammu & Kashmir & Ors. Etc.*, AIR 1989 SC 1899.

the framers of the Constitution.<sup>11</sup> But the prime point of concern arises whether the judiciary is conferred with the constitutional mandate to overstep its jurisdiction while discharging its functions, that is to say, whether the judiciary is justifiable in interfering into the legislative and executive domain if just demands so or the doctrine of separation of power puts fetters on it.

To answer the above concern, it is important to know the status accorded to the judiciary by the constitution. The judiciary is considered to be an independent body by the constitution. Judiciary is considered to be guardian of the constitution thereby ensuring the other organs of the government do not exceed their powers and functions under the constitutional framework. Clarifying the concept of “Independence of Judiciary”, A.K. Ayyar, one of the framers of the constitution, observed that “Judicial Independence is not to be raised to a level of a dogma so as to

enable the judiciary to function as a kind of super legislature or super executive”.<sup>12</sup>

It is true that, the role of judiciary with the changing times has marked a significant shift from its traditional role to that of a more participatory role. Apart from its traditional role to resolve disputes, it discharges various within the constitutional ambit such as being the final interpreter of the constitution, issuing of writs, protector of the fundamental rights of the citizens, etc.

In recent times, there has been an enormous expansion of judicial power due to which the judiciary has managed to occupy a prominent position within the nation’s politics.<sup>13</sup> This changing role of the judiciary from moderate to activist has led to the emergence of ‘Judicial Activism’ which derives its roots from judicial review. Judicial activism has been defined by the Black’s Dictionary as “judicial philosophy which motivates the judges to depart from strict adherence to judicial philosophy in favour of new and progressive social

<sup>11</sup> Recent Judicial Trends on Separation of Powers, [https://shodhganga.inflib-net.ac.in/bitstream/10603/71955/13/13\\_chapter%205.pdf](https://shodhganga.inflib-net.ac.in/bitstream/10603/71955/13/13_chapter%205.pdf).

<sup>12</sup> Arghya Sengupta, When India decided how to appoint judges, independence did not imply insulation from oversight (2019),

<https://scroll.in/article/922597/when-india-decided-how-to-appoint-judges-independence-did-not-imply-insulation-from-oversight>.

<sup>13</sup> Judicial Activism vis- a-vis Judicial Outreach, [https://shodhganga.inflib-net.ac.in/bitstream/10603/32340/11/12\\_chapter6.pdf](https://shodhganga.inflib-net.ac.in/bitstream/10603/32340/11/12_chapter6.pdf).

policies which are not always consistent with the restraint expected of the appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent an intrusion into the legislative and executive domains". The seeds of judicial activism were sown in India in the landmark case of *Kesavananda Bharti v. Union of India*<sup>14</sup> whereby the Supreme Court for the first time rejected the stance that the Parliament was supreme. Moreover, the Apex court also formulated the doctrine of basic structure which formed an impenetrable structure against all despotic and whimsical actions of executive or for that matter of the legislature. Thus, in the process of ensuring maximum freedom to the citizens and encouraging the legislature and executive to work for public good and welfare, there have been instances where the judiciary has overstepped its jurisdiction and has acted whimsically without having the regard to the spirit of the constitution and thereby encroaching in the domain of the other organs of the government. This excessive judicial interference in the guise of 'judicial activism' has given rise to a new philosophy known as 'Judicial Outreach'. In *Asif Hameed v. State of Jammu &*

*Kashmir*<sup>15</sup>, Kuldip Singh J., observed that "The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint"

### 3. Conclusion

From the above discussion it can be duly noted that, the changing role of the judiciary from traditional to a more participatory one has brought both support and criticism. This participatory role of judiciary has been progressively accepted in cases of PILs, protecting the rights of the citizens, declaring the constitutional validity of a law but has been criticised for overstepping its jurisdictions and prodding into the legislative and executive domain.

The maxim that "the king can do no wrong" or absolute immunity of the government is not recognized by the Indian legal system. Thus, independence and impartiality of the judiciary are the two important pillars for the proper discharge of judicial functions, for which it is empowered with 'judicial review'. The exercise of the power of judicial review by the courts is not

<sup>14</sup> *Supra* note 7.

<sup>15</sup> *Asif Hameed & Ors. Etc. Etc vs State of Jammu & Kashmir & Ors. Etc., AIR 1989 SC 1899.*

unrestricted but subject to certain limitations. However, with changing times, there has been an enormous expansion of judicial power which has given rise to judicial activism. Judicial Activism connotes the assertive role played by the judiciary to force the other organs to discharge their functions properly. It acts as a reinforcing strength of the judiciary and affirms the faith of the public in the rule of law.

The judiciary does not generally interfere with the policy matters of the executive unless the policy is either against the Constitution or some statute or is actuated by mala fides. The danger lies when the judiciary creates multiplicity of rights which in turn can lead to counterproductive and judicial outreach. For instance, in *Union of India v. Sh. Harish Chandra Singh Rawat*<sup>16</sup>, *Chandrakant Kavlekar v. Union of India*<sup>17</sup>, *G. Parmeshwara v. Union of India*<sup>18</sup>, and *Shiv Sena v. Union of India*<sup>19</sup>, Supreme Court went on and ordered the date and time of conducting the floor test in the states of Uttarakhand, Goa, Karnataka and Maharashtra respectively, which is totally the executive's i.e. the governor's

prerogative. Courts cannot 'create rights' where none exists nor can they go on making orders which are incapable of enforcement or violate other laws or settled legal principles.

However judicial activism may be a welcome measure in a short run for maintaining the rule of law and allowing one organ to strengthen the administration of the country when the other organs are not performing. If it is practiced for a long time it may dilute the theory of separation of power and the doctrine of checks and balances. Also, one must bear in mind that the actual governance of the country is certainly in the hands of the executive which is accountable to parliament. Neither the executive nor the judiciary should exceed their legitimate functions, only then the two organs of the State can function harmoniously.

The recent shift in the balance of power towards the judiciary and the judicial incursion into executive and public domain may be due to these possible reasons- near collapse of responsible government to discharge its functions, pressure on judiciary to step forward in case of violation

<sup>16</sup> *Union of India v. Sh. Harish Chandra Singh Rawat*, (2016) SCC Online SC 442.

<sup>17</sup> *Chandrakant Kavlekar v. Union of India*, (2017) 3 SCC 758.

<sup>18</sup> *G. Parmeshwara v. Union of India*, (2018) 16 SCC 46.

<sup>19</sup> *Shiv Sena v. Union of India*, (2019) SCC OnLine SC 1501.



of fundamental rights of citizens by the state, filling up the legislative lacuna for instance formulating guidelines for prevention of sexual harassment due to the absence of appropriate law and the most important reason is public confidence in judiciary. However, there should be no occasion for one organ of the state to usurp powers of the other organ so as to lead to constitutional crisis. Self-restraint is the key to the whole issue.

The author agrees with TT Krishnamachari, when he states that “An independent judiciary should not become an Imperium in Imperio, operating as sort of superior body to the general body of politics”<sup>20</sup>



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<sup>20</sup> Arghya Sengupta, When India decided how to appoint judges, independence did not imply insulation from oversight (2019),

<https://scroll.in/article/922597/when-india-decided-how-to-appoint-judges-independence-did-not-imply-insulation-from-oversight>.

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