

LEGISLATIVE ROLE OF JUDICIARY IN INDIA: A CRITICAL APPRAISAL

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Abstract

The judiciary protects the Constitution and the rights of the citizens from arbitrary actions of the legislature and executive. It is the judiciary that gives a meaning to existing provision of a statute by interpreting it in order to resolve the problem in a case at hand where the concerned law has become irrelevant or is insufficient to meet the needs of the time. It has frequently been remarked that the judiciary has overstepped its limit and ventured into the domain of other organs of the government. Various aspects of the issue have critically been analyzed in this research paper.

- I. Introduction**
- II. Separation of Powers in India**
- III. Function of Judiciary**
- IV. Power of Judicial Review**
- V. Judicial Activism**
- VI. Judicial Overreach**
- VII. Concluding Observation and Suggestion.**

I.INTRODUCTION

In the Democratic System of Government, various functions of the government are performed by its three different organs - legislature, executive and judiciary. The legislature makes law. The executive, practically known as government, implements law, maintains law and order and makes policies. The judiciary settles dispute in accordance with law and interprets the law. The Doctrine of Separation of Powers was evolved to avoid concentration of powers in one organ of the government that brings arbitrariness resulting in anarchy. This doctrine envisages that one organ of the government should not perform the functions of other organs and should not interfere with jurisdiction of other organs.

With the emergence of the concept of Welfare State, the functions of the executive increased unprecedentedly and certain power of the legislature was delegated to it so that it can

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successfully discharge its responsibility. By exercising delegated power, delegated legislation in the form of rules, regulations, notifications, by laws *etc.* are made by it in order to fulfill the multi facet responsibility delegated to it. The executive also performs judicial function while deciding departmental matters which is known as its quasi-judicial function. Hence, the Doctrine of Separation of Powers is not applicable in its strict sense in the age of Welfare State. Today, it is relevant only as a mechanism of checks and balances in the functioning of government.

II. SEPARATION OF POWERS IN INDIA

In Indian constitutional scheme, the powers and functions of various organs of government have been sufficiently demarcated. The legislative powers have been conferred on Union Legislature (Parliament) and State legislatures under articles 245 and 246 of the Constitution of India. The executive powers of the Union and States are vested in the President and the Governor of the State under articles 53 and 154 respectively. The provisions relating to Union and State judiciary have been made in Chapter IV of Part V and Chapter V of Part VI of the Constitution. No organ of government is authorized to exercise any power or jurisdiction not assigned to it by the Constitution.

Clearly, the Constitution of India envisages a system of governance based on the Doctrine of Separation of Powers even though the Constitution does not expressly mention about it. This doctrine has not been adopted in its classical and strict sense, but, an attempt has been made to insulate each one of the organs against their powers being trespassed upon by the other organs. This attempt is reflected from various following provisions of the Constitution. Articles 121 and 211 restrict discussion in Parliament and State legislature with respect to the conduct of any judge of the Supreme Court or of a High Court in discharge of his duties. Equally, by articles 122 and 212, the courts are prohibited to inquire into the validity of proceedings of Parliament and State legislature on the ground of any alleged irregularity of procedure. The President and the Governors are granted immunity from being answerable to any court for the exercise and performance of the powers and duties of their offices under article 361. The President and the Governors act on the aid and advice of the Council of Ministers under articles 74 (1) and 163 (1),

and the courts are barred from inquiring the question relating to the advice tendered by ministers under article 74 (2) and 163 (2).

The position of the Doctrine of Separation of Powers under Indian Constitution has been observed in *Rai Sahib Ram Jawaya Kapur v. State Punjab* as under:¹

The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but, the functions of the different parts or branches of the government have sufficiently differentiated and consequently, it can very well be said that our Constitution does not contemplate assumption, by one organ or part of State, of functions that essentially belongs to another.

The Separation of Powers has been recognized as one of the basic features of the Indian Constitution in *Kesavananda Bharati v. State of Kerala*² and the same has also been observed in *State of West Bengal v. Committee for Protection of Democratic Rights* as follows:³

“It is trite that in the constitutional scheme adopted in India, besides supremacy of the Constitution, the separation of the powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution.”

III. FUNCTION OF THE JUDICIARY

The judiciary performs two functions – first, it settles disputes presented before it in accordance with law of the land and second, it interprets the law involved in the case under consideration. In interpreting a statute or a constitutional provision according to the words used by the legislature, a judge makes a law by giving a meaning to the words of the legislature. He breathes life into such words and creates or shapes a body of law that is suitable for the case at hand. He decides the specific colour and contents of the words used by the legislature. Thus, judiciary performs legislative role while interpreting a law. This role of the judiciary is a crucial one, as the finite generality of a law do not and cannot anticipate the vagaries of life. Unlikely a law, as formulated and enacted by the legislature, it is that law which would be able to reach

¹AIR 1955 SC 549 at 556 para 12.

² AIR 1973 SC 1451.

³ AIR 2010 SC 1476 at 1487 para 26.

every corner and crevice of the situation for that it is meant to apply to, or to rectify and remedy the mischief for that it is meant.

Judicial law making rests solely on the creative interpretation of the foundational text such as the Constitution and statutes. The judiciary does not have any power to create laws independent of the foundational texts. Thus, the legislative role of the judiciary is circumscribed.

The legislative role of judiciary is most crucial while interpreting a constitutional provision, because a Constitution is drafted with an eye to the future and its function is to provide a continuing frame-work for the legitimate exercise of the governmental power. Its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over the time to meet new social, political and historical realities often unimagined by its framers. ⁴In this regards, it was observed in *M. Nagpal v. Union of India* as under:⁵

The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently, to be adapted to the various crises of human affairs. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized, but remains flexible enough to meet the newly emerging problems and challenges.

IV. POWER OF JUDICIAL REVIEW

The Constitution is regarded as supreme law of the land, as it sets out principles for the governance of country and guarantees its citizens certain Fundamental Rights essential for their development and welfare. The supremacy of the Constitution is maintained by the judiciary through Judicial Review. The Judicial Review is such a power of the judiciary through which it scrutinizes legislative and executive acts and declares them *ultra-vires* the Constitution if they

⁴Former Chief Justice of Canada, John D. Richard, *Federalism in Canada*, International Seminar for United States Lawyers, November 12 and 13, 2004, available at: http://www.fca-caf.gc.ca/fca-caf_eng/speeches-discours_eng/speech-discours-12nov2004_eng.html (visited on July 31, 2019)

⁵ AIR 2007 SC 71 at 81 para 19.

are in contravention of the constitutional provisions. The concept of Judicial Review was introduced in American constitutional jurisprudence in 1803 through the celebrated decision of *Marbury v. Madison*⁶. Chief Justice Marshall held in this case that it is emphatically the power and duty of the judiciary to say what the law is and asserted that the Federal Court has the power to refuse to give effect to Congressional legislation if it is inconsistent with the Court's interpretation of the Constitution. The Supreme Court of India has repeatedly affirmed the power of Judicial Review in various cases⁷.

The Indian Constitution expressly provides the power of Judicial Review through the provisions of articles 13, 32, 226, 141, 142 and 144. Article 13 (2) empowers the high courts and the Supreme Court to declare any law made by the State void if it takes away or abridges the rights conferred by Part III of the Constitution, *i.e.*, the Fundamental Rights.

Article 32, titled as Right to Constitutional Remedy, guarantees the right to move the Supreme Court for the enforcement of the Fundamental Right. This right to move the Supreme Court is also a Fundamental Right, as article 32 itself is placed in Part III. The Supreme Court insightfully identified article 32 as the constitutional provision that provides for the enforcement of Fundamental Rights in areas with legislative vacuum. It not only held that Fundamental Rights are limitations upon the State power, but also held that the right to constitutional remedy is itself a Fundamental Right enshrined in article 32, and in case of infringement of a Fundamental Right, aggrieved party can directly approach the Supreme Court for remedy. On the ground of this observation, the Court, in *Vishaka v. State of Rajasthan*⁸, held that in view of the above and in the absence of enacted law to provide for effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly at work places, we lay down the guidelines and norms specified hereinafter for due observance until a legislation is enacted. Further, providing reinforcement to article 32 jurisprudence, in *Vineet Narain v. Union of India*⁹, the Court noted that the issuance of guidelines and directions in exercise of the powers under article 32 read with article 142 has become an integral part of our

⁶ 5 U.S. 137 (1803).

⁷ *Indira Nehru Gandhi v. Raj Narayan* (AIR 1975 SC 2299), *S.P. Sampath Kumavr v. Union of India* (AIR 1987 SC 386), *Subhash Sharma v. Union of India* (AIR 1991 SC 631) *etc.*

⁸ AIR 1997 SC 3011 at 3015 para 16.

⁹ (1998) 1 SCC 226 at 266-267 para 53.

constitutional jurisprudence. It also pointed out that such an exercise of powers was absolutely necessary to fill the void in area with legislative vacuum. In the words of the Court:¹⁰

..., it is the duty of the executive to fill the vacuum by executive orders because its field is co-terminus with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

Through article 32 read with article 142, the Supreme Court has done a great service to the nation on many occasions¹¹. Similarly, the high courts have been conferred on powers under article 226 to grant remedy for the enforcement of Fundamental Rights.

Under article 141, the law declared by the Supreme Court shall be binding on the courts within the territory of India. The founding fathers, by incorporation of this article, empowered the Supreme Court to declare the law of the land. Expounding on this article, the Court in *Nand Kishore v. State of Punjab*¹² held that the Court is not merely the interpreter of the law as existing, but much beyond that. As a wing of the State, the Court is, by itself, a source of law. The law is what the Court says it is. All civil and judicial authorities in the territory of India are bound to act in aid of the Supreme Court under article 144.

Under article 142, the power has been conferred on the Supreme Court to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. The Supreme Court has vitally contributed to the development of article 142 jurisprudence. Describing the scope of powers under article 142, the Court, in *Kalyan Chandra Sarkar v. Rajesh Ranjan*, noted as follows:¹³“Article 142 is an important constitutional power granted to this Court to protect the citizens. In a given situation when laws are found to be inadequate for the purpose of grant of relief, the Court can exercise its jurisdiction under Article 142.”Hence, the power under article 142 is vested in the Supreme Court to prevent any obstruction in the stream of justice.

¹⁰*Id* at 266 para 52.

¹¹*Supreme Court Advocates on record Association v. Union of India*, AIR 1994 SC 268, *Dayaram v. Sudhir Batham*, (2012) 1 SCC 333 *etc.*

¹² (1995) 6 SCC 614 at 622 para 17.

¹³ AIR 2005 SC 972 at 978 para 33.

The power of Judicial Review can be regarded as a key historical development that has influenced the role of the judiciary. In a relatively short history of sixty-eight years of Indian constitutionalism (till writing of this paper), the power of Judicial Review has been evolved so as to ensure fairness in legislative and executive actions, protect the constitutionally guaranteed Fundamental Rights of citizens and rule on questions of legislative competence between the Centre and the States.

V. JUDICIAL ACTIVISM

Due to activist approach of judges, a new facet of Judicial Review emerged during course of time to be known as Judicial Activism that envisages changes in interpretation of constitutional and statutory provisions in consonance with the dynamics and uncertainties of human affairs and relations. The broad contours of Judicial Activism is visible in Black's Law Dictionary that defines it as a judicial philosophy which motivates judges to depart from strict adherence to precedents in favor of progressive policies which are not always consistent with the restraint expected to be exercised by appellate judges.

In the Indian context, Judicial Activism is regarded as the active interpretation of any existing provision with the view of enhancing the utility of legislation for social betterment in accordance with the Constitution. The Judicial Activism may be taken to mean the approach of the judiciary to probe into inner functioning of other organs of the government. It is, no doubt, the outcome of inactiveness on the part of other organs-the legislature and executive. The activist approach of the Supreme Court became discernible after the Emergency was revoked in 1977. It is the activist approach due to which innumerable rights crucial for the welfare of the citizens have been inferred from article 21 of the Constitution of India dealing with protection of life and personal liberty. It is notable in the following area:

(1) Bonded Labour –*Bandhua Mukti Morchav. Union of India*¹⁴, *People's Union for Democratic Rights v. Union of India*¹⁵, *Neerja Chaudhary v. State of M.P.*¹⁶, etc., are the cases decided on the issue in welfare of the bonded labourer.

¹⁴ AIR 1984 SC 802.

(2) Child Welfare – The judgements in *M.C. Mehta v. State of Tamil Nadu*¹⁷, *Lakshmi Kant Pandey v. Union of India*¹⁸, *Sheela Barse v. Union of India*¹⁹, etc., have been delivered in the welfare of child.

(3) Woman Welfare – The Supreme Court issued several directions in *Vishakav. State of Rajasthan*²⁰ for prevention of sexual harassment of working woman and also in relation to trial of rape case in *Bodhisattwa Gautamv. Subhra Chakraborty*²¹. In *Gaurav Jain v. Union of India*²², several directions were issued for rescue and rehabilitation of child prostitutes and children of fallen women.

(4) Care Homes – Directions were issued in *Vikram Deo Singh Tomer v. State of Bihar*²³ for the improvement of care homes.

(5) Human Dignity – Right to live with human dignity was recognized in *Fancis Coralie v. Administration Delhi*²⁴ and reiterated in *Bandhua Mukti Morchav. Union of India*²⁵, *Chameli Singh v. State of UP.*²⁶, etc.

(6) Protection of Prisoners – In *Joginder Kumar v. State of U.P.*²⁷ right against illegal arrest, in *Postsangbam Nigol v. General Officer Commanding*²⁸ right Against police torture, in *People's Union for Civil Liberties v. Union of India*²⁹ right against fake encounter, in *Kishore Singh v. State of Rajasthan*³⁰ right against inhuman treatment, in *D.K. Basu v. State of West Bengal*³¹ right of compensation for death in police custody, etc., have been recognised for protection of prisoners.

¹⁵ AIR 1982 SC 1473

¹⁶ AIR 1982 SC 1099.

¹⁷ AIR 1999 SC 41.

¹⁸ AIR 1984 SC 469.

¹⁹ AIR 1986 SC 1773

²⁰ AIR 1997 SC 3011.

²¹ AIR 1996 SC 922.

²² AIR 1997 SC 3021.

²³ AIR 1988 SC 1782.

²⁴ AIR 1981 SC 746.

²⁵ AIR 1984 SC 802.

²⁶ AIR 1996 SC 1051.

²⁷ AIR 1994 SC 1349.

²⁸ AIR 1997 SC 3435.

²⁹ AIR 1997 SC 1203.

³⁰ AIR 1981 SC 625.

³¹ AIR 1997 SC 610.

(7) Protection of Environment – Right to live in pollution free environment was recognized in *Subhash Kumar v. State of Bihar*³² and directions were issued for the protection of environment in *M.C. Mehta v. Union of India*,³³ *Indian Council for Enviro-Legal Action v. Union of India*³⁴, *M.C. Mehta v. Kamal Nath*³⁵, etc.

(8) Enforcement of Public Duty – The Supreme Court has issued several directions in *Vineet Narain v. Union of India*³⁶ so as to compel the law enforcing agencies to perform their duties.

(9) Privacy – Right to privacy has been recognized as a part of the right to life and personal liberty in *People's Union for Civil Liberties v. Union of India*³⁷, *R. Rajagopal v. State of Tamil Nadu*³⁸, *State of Maharashtra v. Madhukar Narayan Mandikar*³⁹ and *Justice Puttaswami (ret'd.) v. Union of India*⁴⁰ etc.

It is worth mentioning here that all the aspect of privacy was discussed in the *Puttaswami Case* and it was held that privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in article 21. Elements of privacy also arise in varying context from other facets of freedom and dignity recognized and guaranteed by the Fundamental Rights contained in Part III.⁴¹ Expanding the scope of privacy, it was further held that privacy is a constitutional core of human dignity.⁴² Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private

³² AIR 1991 SC 420.

³³ AIR 1987 SC 1086.

³⁴ AIR 1996 SC 1446.

³⁵ AIR 2000 SC 1997.

³⁶ AIR 1998 SC 889.

³⁷ AIR 1997 SC 568.

³⁸ AIR 1995 SC 264.

³⁹ AIR 1991 SC 207.

⁴⁰ Supreme Court August 24, 2017; available at <https://www.livelaw.in/breaking-right-privacy-fundamental-right-sc/> (last visited on May 30, 2019)

⁴¹ *Id* at para 3(C) of conclusions of CJI J.S. Khehar and JJ R.K. Agrawal, Dr. D.Y. Chandrachud and S. Abdul Nazeer.

⁴² *Id* at para 1(E).

to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.⁴³

It is the activist approach of the judiciary due to which fairness in governance of the country becomes possible and the rights of the citizens, particularly, of poor and marginalized section of society are protected from arbitrary actions of legislature and executive. There are many judicial pronouncements which may be considered historic in Indian legal system. Following are some instances:

(1) Judgement on Tainted Legislators – The Supreme Court in *Lily Thomas v. Union of India*⁴⁴ declared section 8(4) of the Representation of the People Act, 1951 *ultra-vires* the Constitution on the ground that it is contrary to the provisions of articles 102 (1)(e) and 191 (1)(e). Section 8 of the Act of 1951 deals with disqualifications on conviction for certain offences. The sub-sections (1), (2) and (3) of section 8 make a person, convicted of any offence mentioned under these sub-sections, disqualified from the date of such conviction and to be disqualified for a further period of six years since release. The expression “disqualified” has been defined in section 7 (b) according to which “disqualified” means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of State. The sub-section (4) of section 8 provides exemption to a person, who is a Member of Parliament or State Legislature on the date of conviction, from being disqualified under any of sub-sections (1), (2) and (3) of section 8 for the period of three months or till the disposal of appeal or application of revision if these are brought in respect of conviction within the period of three months. The provisions of Articles 102(1)(e) and 191(1) (e) empower Parliament to make law laying down same disqualifications for a person to be elected as, and for a person being, Member of Parliament or State Legislature, while Parliament has made different laws for a person to be elected as a member and for an elected member under Section 8(4).

⁴³*Id* at para 1(E).

⁴⁴Supreme Court July 10, 2013 at para 20; available at <https://indiankanoon.org/doc/63158859> (last visited on May 30, 2019)

The judgment can be said a historic judgment towards elimination of criminalization of politics because a democratic country cannot be said to be governed in accordance with the principles of democracy unless and until charge -sheeted persons or persons with criminal record are elected or continued as representatives of the people as they do not reflect the will of the people in general and adversely affect the process of election and functioning of government.

In another step towards elimination of criminalisation of politics, a five-judge Constitution Bench of the Supreme Court in the *Public Interest Foundation v. Union of India*⁴⁵ observed that Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. The Court issued following directions also regarding contesting candidate and political parties:⁴⁶(i) Each contesting candidate shall fill up the form as provided by Election Commission and the form must contain all the particulars as required therein; (ii) With regard to criminal cases pending against the candidate, it shall state in bold letters; (iii) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her and the concerned political party shall be obligated to put up that information on its website and (iv) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspaper in the locality about the antecedents of the candidate and also give wide publicity in the electronic media.

(2) Judgment on Section 377 of IPC – In *Navtej Singh Johar v. Union of India*⁴⁷ a five-judge Constitution Bench of the Supreme Court declared section 377 of the Indian Penal Code unconstitutional to the extent to which it criminalises the consensual penile non-vaginal intercourse between adults in private. Section 377 criminalises voluntary carnal intercourse against the order of nature with any man, woman or animal. Due to this provision, the LGBT (Lesbian, Gay, Bisexual and Transgender) community was suffering atrocity and torture and was deprived of Fundamental Rights conferred under article 14 and 21. It is worth mentioning here

⁴⁵Supreme Court September 25, 2018 para 118;available at <http://www.livelaw.in/breaking-candidates-cannot-be-disqualified-on-framing-of-charges-in-criminal-case/> (last visited on May 30, 2019)

⁴⁶*Id* at para 116 (i)-(v).

⁴⁷Supreme Court September 6, 2018 Dipak Misra former CJI (for himself and A.M. Khanwilkar J.) para 253 (xvii), R. F. Nariman J. para 97, D. Y. Chandrachud J., para 156 (i) and Indu Malhotra J., para 21 (i) ;available at <http://www.livelaw.in/celebration-of-sexual-agency-justice-chandrachuds-soulful-judgement-in-section-377-case/> (last visited on May 30, 2019)

that the Delhi high court in *Naz Foundation v. Union of India*⁴⁸ had held the same as has been held in the Navtej Singh Johar Case. These judgements are historic because criminalising the consensual sexual acts between adults in private is against the principle of criminal law.

(3) Judgement on Section 497 of IPC – In *Joseph Shine v. Union of India*⁴⁹ a five-judge Constitution Bench of the Supreme Court declared section 497 of the Indian Penal Code unconstitutional as being violative of article 14, 15(1) and 21 of the Constitution. Section 497 makes the sexual intercourse with wife of another man, without the consent or connivance of that man, the offence of adultery. The judgement can be said to be a historic one because section 497 is founded on the notion that the woman is property of husband and, thus, it is against the status and dignity of person.

(4) Judgement on Euthanasia – The Supreme Court in *Common Cause (A Registered Society) v. Union of India*⁵⁰ held the right to die with dignity as a Fundamental Right under Article 21 and allowed passive euthanasia and living will. In passive euthanasia, life support system is withdrawn in order to smoothen the dying process. Living will is a will purporting to be prepared for the patient expressing willingness to withdraw the medical treatment in order to smoothen the dying process for reducing the period of suffering if the patient is terminally ill or in a permanent vegetative state where there is no hope of recovery. This judgement provides justice to those persons who are terminally ill or in a permanent vegetative state and alive with the help of life support system, and there is no hope for revival.

(5) Judgement on Honour Killing – In *Shakti Vahini v. Union of India*⁵¹, the Supreme Court upheld the choice of consenting adults to love and marry as part of their Fundamental Right and declared that consent of family, clan or community is not necessary if adult couple

⁴⁸Delhi High Court July 2, 2009 para 132; available at <https://indiankanoon.org/doc/100472805/> (last visited on May 30, 2019)

⁴⁹Supreme Court September 27, 2018 Dipak Misra former CJI, (for himself and A.M. Khanwilkar J.) para 55, F.R. Nariman J. para 28, D. Y. Chandrachud J. para 67 and Indu Malhotra J. para 18 (i); available at: www.livelaw.in/33-year-old-judgement-on-adultery-law/. (last visited on May 30, 2019)

⁵⁰Supreme Court March 9, 2018 Dipak Misra former CJI., (for himself and A.M. Khanwilkar J.) para 195, A.K. Sikri J., para 136, D. Y. Chandrachud J., para 143 and Ashok Bhushan J., para 95.; available at: <https://www.livelaw.in/breaking-right-die-dignity-fundamental-right-sc-allows-passive-euthanasia-living-will-issues-guidelines/> (last visited on May 30, 2019)

⁵¹Supreme Court March 27, 2018 para 41, 42 and 53 ; available at : <https://www.livelaw.in/right-choose-life-partner-fundamental-right-consent-family-community-clan-not-necessary-marriage-two-adults-se-read-judgement/> (last visited on May 30, 2019)

decide to marry. The Court also issued a set of guidelines to safeguard young couples under threat for marrying outside their caste or religion, or inside the same clan. This judgment is also historic because in many States in India, the couples of same clan and of different caste or religion loving or marrying to each other were subjected to torture or, often, killing in the name of honour of the family. Sometimes, *khappanchayats* used to order the killing of such couples.

Furthermore, due to the activist approach of the judiciary, the concept of Public Interest Litigation, Procedural Device for Justice to Poor and Doctrine of Basic Structure emerged as a means of justice to poor and disadvantaged section of the society and as the mechanism of control of arbitrary actions of legislature and executive.

1. Public Interest Litigation

Public Interest Litigation (PIL) is the invention of Judicial Activism. As an illustration of its commitment to not to let legal technicalities impede access to justice, the Supreme Court of India developed the strategy of public interest or social action litigation with the motivation of making the legal system more accessible to the poor and disenfranchised. In doing so, the Court redefined the Doctrine of Standing. Traditionally, the Doctrine required a perspective plaintiff to show that some personal legal interest had been invaded by the defendant. It barred a person, who was merely interested as a member of general public, in the resolution of a dispute to be heard in the courts. However, in a significant departure from the traditional contours of the Doctrine and in an activist mode, the Supreme Court has held the view that any member of public or social action group may approach the court on behalf of a victim who is unable to do so due to poverty, disability, or socially or economically disadvantaged position. As a result of this broadening of access to the justice system, a large number of PIL cases have been coming to courts. The judicial creation and practice of the institution of PIL represents the most innovative way and process of achieving or securing the justice in its dynamic form.

PIL was defined by the Supreme Court in *People's Union for Democratic Rights v. Union of India* as follows:⁵²

⁵²AIR 1982 SC 1473 at 1477-1478 para 2.

“Public interest litigation ... is essentially a co-operative or collaborative efforts by the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.”

The motivation behind PIL was explained in *State of Uttaranchal v. Balwant Singh Chauffal* as under:⁵³

This Court exercising its jurisdiction of Judicial Review realized that a very large section of the society, because of extreme poverty, ignorance, discrimination and illiteracy had been denied justice for time immemorial and in fact they have no access to justice. Predominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalized sections of the society, this Court has initiated, encouraged and propelled the public interest litigation. The litigation is upshot and product of this Court's deep and intense urge to fulfill its bounden duty and constitutional obligation.

In a move to further eliminate barriers to access to justice, the Court has even held that a plaintiff can move the Court by means of a simple letter giving way to establishment of epistolary jurisdiction-the jurisdiction invoked by writing epistle to the Court. While being relatively a new developed jurisdiction, its contours have been well defined in *Ms. Veena Sethiv. State of Bihar*⁵⁴, *Citizen for Democracy through its President v. State of Assam*⁵⁵, etc.

The development of PIL jurisdiction in last three decades has been mapped out in three phases by the Supreme Court in *State of Uttaranchal v. Balwant Singh Chauffal*.⁵⁶ First phase deals with those set of cases where directions were issued and orders were passed under article 21 primarily to protect Fundamental Rights of marginalized sections of society who because of extreme poverty, illiteracy and ignorance could not approach the Court. The second phase mainly deals with those cases which are focused on prevention and protection of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc. In the third phase, the courts mainly focused on the various facets of good governance like probity,

⁵³ AIR 2010 SC 2550 at 2560 para 34.

⁵⁴ AIR 1983 SC 339.

⁵⁵ AIR 1996 SC 2193.

⁵⁶ *Supra* note 52 at 2562 para 45.

transparency and integrity in governance mechanism. In the march of law in context of PIL, the Court has noted a few instances of frivolous petitions which amount to abuse of judicial process. To curb abusive practices, the courts have imposed exemplary fines and issued warnings to respective litigants.

Indeed, PIL is the incarnation of Judicial Activism in its people oriented litigative dimension. Justice becomes a living reality only if PIL becomes pragmatic facility for the common people.

2. Procedural Device for Justice to Poor

In another bold move, the Supreme Court decided to address the issue of evidence production for the poor and marginalized. In the adversary system of justice, each side of a case is responsible for producing its evidence and the judge, as a neutral umpire, decides which side presented a more convincing narrative in the light of evidence produced. A judge, in the Anglo-Saxon tradition did not participate in the process of evidence production. Recognizing the socio-economic realities of India, particularly of the poor, the Supreme Court started appointing Commissioners for the purpose of investigating the issue and making report to the Court. The reports, thus, produced are made available to both sides of legal issue so that they can act accordingly⁵⁷.

3. Doctrine of Basic Structure

Besides creating procedural device for the production of evidence, the Supreme Court's activism has enriched the constitutional jurisprudence with novel and seminal concepts such as the Doctrine of Basis Structure. According to this doctrine, any amendment that alters the basic structure of the Constitution is unconstitutional. The doctrine was introduced in the celebrated

⁵⁷ B.S. Chauhan J., *Legislative Aspect of Judiciary: Judicial Activism and Judicial Restraint* at 16-17 delivered under the auspices of "Dr. V.N. Shukla Memorial Lecture, April 13, 2013" organized by Faculty of Law, Lucknow University.

decision of *Kesavananda Bharati v. Union of India*⁵⁸ wherein the Court held that the power to amend the Constitution, enshrined in it, did not comprehend the possibility of amending the most fundamental and essential features of the Constitution. According to the majority judgment, rule of law, separation of powers, secularism, democracy, supremacy of the Constitution *etc.* are basic structure of the Constitution. Further, free and fair election and judicial review⁵⁹, and limited power of amendment of the Constitution⁶⁰ were recognized as basic features of the Constitution.

By coining the Doctrine of Basic Structure, the Supreme Court has ensured that at least some basic rights of the poor and the weaker section of the society cannot be diluted even by way of constitutional amendments.

VI. JUDICIAL OVERREACH

In course of performing judicial function with activist approach, the courts faced criticism in the name of judicial overreach – that is the failure to observe judicial restraint. In addition, on several occasions, the court faced non co- operation from other organs of government at the implementation stage. But, this did not deter the courts to devise remedy. No doubt, on several occasions, the courts have issued directions for construction of roads or bridges, seeking to lay a time table for running trains, beautification of railway station and so on. But, these are mere aberrations. One must look at the generality of the picture. The common citizens have discovered that the administration has become so apathetic and non-performing, and corruption and criminality are so wide spread that they have no recourse except to move the courts through PIL. Evidently the judiciary never over stepped its jurisdiction and, therefore, judiciary cannot be criticized on the ground of overreach.

⁵⁸ Mahendra P. Singh V.N. Shukla 's *Constitution of India* 10th edition 2001, Reprinted October 2004, Eastern Book Company, Lucknow at 887-890.

⁵⁹ *Indira Nehru Gandhi v. Raj Narayan*, AIR 1975 SC 2299.

⁶⁰ *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

VII. CONCLUDING OBSERVATION AND SUGGESTION

In view of the aforesaid discussion, the remark that the judiciary has overstepped its limit is untenable. The Court has always understood it to be obligation of the executive to pass orders in areas of legislative vacuum, because the field of executive is coterminous with that of the legislature. Only when both the legislature and the executive failed to provide law, the Court has found it to be the duty of the judiciary to intervene, and that too only until the legislature enacts proper legislation covering the area. The Court has been remarkably cautious while deciding whether to perform legislative or executive functions. In *Divisional Manager Aravali Golf Club v. Chander Hass*⁶¹, the Court itself observed in this regard that the judges should not unjustifiably try to perform executive or legislative functions in the name of Judicial Activism. The judiciary cannot attempt to take over the functions of another organ.

An act of the judiciary, that is motivated purely by goals other than those enshrined in the Constitution, must be considered constitutionally illegitimate. Evidently, the Supreme Court has always abided by the Constitution. It has valiantly fulfilled its primary responsibility of upholding the constitutional goals. It is constitutionally mandated duty of the Court to enforce the law not for each minor violation but for those violations that result in grave consequences for the public at large.

Really, Judicial Activism is useful and adjunct to a healthy democracy. Keeping in view the ideals of democracy, Judicial Activism is necessary to ensure that unheard voices cannot be buried by more influential voices. Indeed, on most occasions, timely intervention of the judiciary has helped democracy to flourish despite repeated failure of the other organs. Such activism, however, should be resorted to only in exceptional circumstances where the interest of the nation or of the poor or weaker sections of the society would be in peril in the absence of judicial action.

With its activism, the Supreme Court has only protected the citizenry, particularly, the weak and the downtrodden sections against the unconstitutional acts of the legislature and executive. The great contribution of Judicial Activism has been to provide a safety valve in our democratic system and a hope that justice is not beyond reach. Judicial Activism has earned a

⁶¹ (2008) 1 SCC 683 at 688 para 17.

human face by liberalizing access to justice giving relief to disadvantaged groups and have-nots. It will prosper as long as the judiciary is respected and not undermined by negative perceptions.