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JUDICIAL ACTIVISM IS NOT AN UNGUIDED MISSILE

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ABSTRACT- Judges are the official body that are appointed to dispense justiceto the needy and adjudicate legal disputes with the assistance of positive laws and provide a path for ought laws, by interpreting the existing laws. Their duty is to ensure a balance between laws and society. Our constitution provides them with the power of***'Judicial Review'*** which means to keep a check on existing laws and ensure that those laws do not counter the **Basic Structure** of the Constitution of India. But what if they step into the shoes of the legislature and enact laws with the help of their pronouncements. There are so many instances where the court has stepped in to establish the fact that they can not only amend the laws but also make laws. Although their capacity to amend is still questionable. Moreover, can their act of enacting laws be violative of the basic structure doctrine? What about the separation of powers? The concept of separation of power is not rigid and fully applicable in India as at times all the three pillars overlap but there still exists the thin line of difference that separates the Legislature from Executive and Executive from Judiciary and Judiciary from the Legislature.

Mulling over this biggest question that, ***"Whether the judges can legislate"*** and if yes, then ***"Should they be given the power to legislate or not"***, the researchers have plumped for this topic and have tried to scrutinize the issue further. The major intent behind studying this particular affair was the increasing judicial intrusion in constituting laws. The research will help answermany unraised questions as the study will provide a two-way perspective to the chosen case.

Initially, the study providesthe readers with the changing capacities of Judges and how they have broadened their area of work from administering justice to making amends in the laws and even creating new ones with the help of many cases showcasing the difference where they have made laws and where they have declared them. Next,the research provides the view of the jurists on the issue and the reasons of this passive evolution of a Judge's powers, like a fault at the part of the legislature. Further,the researchers providean insight to what is the present condition of judicial legislation and how the legislature reacts to it. And lastly, the researchers provide an ensuing perspective to the chosen issue.

Keywords: Judicial Review, Judges, Laws

I. INTRODUCTION

India has always worked on the principle of separation of powers. This doctrine simply denotes the difference in the functions of the three pillars of the constitution namely – the legislature, the executive, and the judiciary. The legislature is supposed to make laws, the duty of the executive is to enact them and the work of judiciary is to interpret those laws in order to disburse justice. As a novice, everyone perceives a judge as someone who is given the authority andresponsibility to do justice with all and ensure that compensation to the victim is duly made. The compensation is not only monetary but the mental and physical compensation is equally important. This power to dispense justice is given to Judiciary by the constitution itself. It provided the judiciary with the power to review the laws made by the legislature but it never empowered the courts to enact law. But the courts have superseded their powers and what now has replaced 'Judicial review' is the term '***Judicial Activism***'. The mere interpretation of this term is that the courts have the power to go beyond the existing laws and make laws in order to cover all the neglected or uncovered societal issues.In India, the power is entrusted with the Supreme Court and the High Court to declare a law unconstitutional and void if it breaches the constitutional provisions. An overview of a legal survey practically speaking during the most recent thirty years shows that 'Judicial Activism' has described the choices of the Supreme Court at various occasions. Black's Law Dictionary characterizes judicial activism as a "reasoning of legal dynamic whereby judges permit their own perspectives about public policy, among different elements, to direct their choices."

There are many examples of judges usurping their power, for the benefit of society. And their decisions are known as ***'Judicial Precedents'*** which in a layman's language means cases that serve as a basis for future decisions with similar circumstances and those judgments that are given by Supreme Court.

Although precedents are known as a source of law but it will not be wrong to term them as laws.Our constitution under Articles 141 and 143 give power to the apex court to enact laws and those laws havebinding authority. But where this judicial activism is supported as there are areas where the legislature lacks behind but the idea of Judicial Hyper Activism is highly opposed in India. To enlist the areas of development wherein the courts made the law and have proved to be beneficial for the entire society is easy.

The ***Kesavananda Bharti & Ors. vs State of Kerala & Anr.***of 1973 is the best example of judges' law-making power. In this case, a writ petition was filed questioning the validity of the 24th Constitutional Amendment Act of 1971. Whereby the Supreme court came with the best solution to provide the rights to both the parliament i.e., to amend laws, and to the citizens i.e., to protect their fundamental rights. The solution so drawn was the Doctrine of Basic Structure, wherein the apex court gave the right to the parliament to amend laws with the condition to not touch upon the basic structure of the constitution.

The next best example would be the interpretation of Article 21 of the Constitution. In which the apex court gave a vide meaning to the term 'Right to Life and Personal Liberty.' In the case of ***Sunil Batra vs Delhi Administration*** of 1978, Supreme Court gave the judgment thatArticle 21(1) includes the 'right to a healthy life.'In the case of ***Olga Tellis vs Bombay Municipal Corporation***of 1986, Supreme Court gave the judgment that Article 21(1) includes the 'right to livelihood' and in the case of ***PUCL vs Union of India*** of 1997, the apex court made the statement that the 'right to privacy' is an essential part of Article 21(2).

And the other case would be the ***MC Mehta vs Union of India*** of 1987, where the apex court introduced the principle of Absolute Liability after the damage to the environment and loss of many lives due to the oleum gas leak.

But there still many instances where the judges have stick upon the idea that they do only declare law or rather they have tried to state it so profoundly that those who want to really question such instances also get confused. Like in the case of ***Union of India vs Deoki Nandan Aggarwal***where it was observed that the courts are not really conferred with the power to legislate and they act within their prescribed limits or be it the case of ***V.K. Naswa vs Union of India***where the court itself observed that their role is limited to an extent and they can't overdo it. And also, they do not have the law-making power nor do they have the power to instruct the legislature to draft a certain law. But the question still remains that is there a balance between the two or only one side can be correct and the answer to which, is further devised in the study.

II. HISTORICAL CONTEXT

The debate on this burning issue is not a recent one it can be traced back to the times when even the constitution was not made.The issue first arose in the 14th century when an English lawyer raised the question that 'what is law',to which the judge answered that the law is the resolve of justices whereas the chief justice argued that law is something that is right, and hence the argument turned into a controversial concern.

This concern further developed into two theories namely the declaratory theory and the law-making theory. Declaratory theory or the Discovery theory simply refers to the situation where the judges only interpret the existing laws and do not make any new law. And on the other hand, the Law-Making theory or the Creative theory refers to the situation where the judges do the work of the legislature that is, they create new laws. Jurists like Carter, Hale, and Blackstone supported the declaratory theory whereas, Dicey, Grey, and Bacon, and even Austin and Salmond supported the law-making theory.

But the ones who really argued upon these theories were the two eminent jurists, one was HLA Hart and the other was Ronald Dworkin. Hart was of the opinion that judges do legislate and they should legislate in order to fill the gaps created due to a lack of concern on the part of the legislature whereas Dworkin is of the view that laws are based on certain principles and hence the judges by the help of precedents merely discover law, they don't give their own judgements but they decide on the basis of the laws present. But both of them have reached to a similar conclusion that it is not possible to always declare law and hence they have to end up making law.

For instance, in 1983, Justice P.N. Bhagwati introduced the concept of PIL i.e., Public Interest Litigation but Justice Pathak warned that they shouldn't breach the thin line of difference between adjudication and legislation or be it the case of ***Vishaka vs State of Rajasthan***of 1997 where Supreme Court issued the guidelines for sexual harassment or even the apex court appointing the Special Investigation Team for investigating the black money stored. Hence, the debate still continues as the idea of judicial legislation has developed slowly due to various incapacities of the legislature.The incapacity does not refer to making the law but it refers to the state when the legislature has not made any law in regard s to that burning issue and justice needs to be served right. So, to fulfil all these voids judges started making laws in order to ensure justice, but they are not empowered to do so. The constitution under Article 13 gives judges the right to review the laws in order to keep a check on the laws that whether they are in sync with the constitution or not but does not gives them any authority in context of making laws.

III. CURRENT PHASE

In today's time, although courts make laws but they are not ready to accept the fact rather they try and contradict it stating that they don't step into the shoes of the legislature. But Mohammad Hamid Ansari sir the former vice president of India, in one of his interviews clearly state that as and when the parliament makes bad laws the judges are the ones who enact laws. He went so far to say that the assembly sessions so held have merely become a ritual for the parliament and hence they bear no fruit. He says laws can be good only if the legislature does not merely represent the views of the ruler and the bad laws always end up being reported in a High Court or Supreme Court.

The case would be the***Sahara India Real Estate Corporation Ltd. & Ors. vs SEBI & Anr.*** where Supreme Court passed a new doctrine in order to keep a check on the trials by media, 'postponement of publication' after in the mentioned case SEBI was accused of releasing a confidential proposal sent to its learned counsel by Sahara's learned counsel. Although there is the provision of review petition wherein the decision of the Supreme Court can be challenged but then the court has the discretionary power to reject the review petition which in most of the cases are rejected and not paid heed to.

However, the legislature has seemed to realise that the judiciary is overriding its authority and hence they have tried to reverse the decisions of the court by passing legislations which are contradictory to the decisions given by the court as per the rights entrusted to them by the constitution.Likein the case of ***Mahalakshmi Mills vs. Union of India*** where the case was filed in the apex court in due to the concerns regarding the Essential Commodities (Amendment) Ordinance, 2009. Here the court gave the decision to make some necessary changes in the bill and include a statutory minimum price, but again the parliament passed the law ignoring the decision of the court.

In 2011,the legislature passed the Customs Amendment and Validation Bill, 2011 with a retrospective effect, but the bill got challenged in the Supreme Court in the case of ***Commissioner of Customs vs Sayed Ali*** the court found certain clauses to be wrong and it struck them down. But the parliament in 2011 passed the Customs Bill thereby going against the decision of the apex court.

The most recent would be the case of ***Dr. Kashinath Mahajan***of 2018, where the Supreme Court found that the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 was being misused and hence it introduced certain rules to prevent it. But the decision faced higher criticism by all the SCs and STs all over the nation. So, the parliament introduced the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Amendment Act, 2018 by adding section 18A to the act which directly circumvented the decision of the court.

But the Supreme Court in order to maintain its authority have in many cases struck down the law that was initially made to contradict the decision made by it. Like in the case of ***State of Tamil Nadu & Ors. vs K Shyam Sundar&Ors.*** of 2011 where the apex court passed the judgement that Tamil Nadu must follow a uniform education rule however, the legislature passed an amendment which was opposite to the decision of the court. But in the end Supreme Court struck down the law stating that the legislature has no power to override the decision of the court.And therefore, it is obvious that the judiciary make laws and seeks to impose them even after the timely intervention of the legislature.

IV. ENSUING PERSPECTIVE

The researchers are of the impression thatit can be clearly cited that the judicial precedents are not mere decisions of the court that serve as a source of law but they have become laws. thisdebate is a topic of major concern as this breach of the thin line of difference between coordinating with law and making the law has resulted in a rift between the cordial pillars. But what is more of aconcern is that this issue goes way beyond the issue of making law or declaring the law as the main question is should they be given the power as if they are provided with the right to perform legislative functions then there will not be any check imposed on the working of the courts as rightly said by a present day eminent jurist Mr. Salman Khurshid sir in a seminar, which to a large extent mirrors the ideologies of the researchers.

We know that there always exists a severance of competence between the three different pillars, but the constitution provides for certain key provisions whereby the judiciary has the power to keep a check on the laws made. But they seem to have forgotten the line of difference between adjudication and legislation, and all that we can do is try and harmonize the situation. As we know there are only two ways by which the decision of the Supreme Court can be reversed i.e., either by review petition or by a law passed by the legislature, but the Supreme Court can still exercise its overriding power in order to stick to its decision.

All that we can suggest is that one should endeavour to initiate an equipoise wherein the Supreme Court can declare law and if it makes the law it should be contingent on the collective interestsbesides that it should be approved by the legislature and should find its validity under the Indian constitution. And the rationale behind this complete proposition is that when the judges are not designated with any power still, they enact laws. So, what would be the outcome if they are bestowed with the authority?

The result would be that every judge will try to make law and the repercussions would be there will be conflicts of interests whose conclusion be no justice as the bodies that dispense justice would be busy fighting to make their ground clear on what law they have made is absolutely correct and others are invalid. This will create a disparity in the entire legal system which will affect the civilization in the worst possible manner. Moreover, people will be in despair as they would feel as if they are being strangled as they won't be awarded justice all that they would undergo is sheer distress and misery. And if this happens then surely India will not be called a democratic nation as it will lose its authenticity.

All that we could deduce is that there is no obligation on the government to allocate any sort of legislating competence on the judiciary as the cons to this aspect are of major consideration. But the irony is people themselves accept the laws made by the court as they find them to be beneficial. Hence, there is a need to make others understand why is it important to strike a balance between all three different pillars of the State so that the laws that are made could be first checked and then applied instead of people accepting them as laws once the precedents are delivered. As congruously affirmed by Hubert H. Humphrey that, there is no force in this entire world that would make a law enforceable which is not accepted by the people.

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