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JUDICIAL RESTRAINT VS JUDICIAL ACTIVISM VS JUDICIAL OVERREACH

~ *Kundan Mishra*

The creative craft deployed by the Supreme Court of India, as it leverages its power of Judicial Review inferred by Article 13 and conferred on it under Article 32 by the Indian Constitution, has been accused of going beyond its defined domains. For decades, the judiciary has been treading on a very thin line between judicial overreach and activism. Often, the judiciary has been accused of blurring this separation of powers. It almost seems like a question of priority, urgency and importance? What is more essential, what is more needed? Justice by any and every means possible, or justice confined within the boundaries drawn by the Constitution? So, what is the difference between Judicial Overreach, Judicial Activism and Judicial Restraint?

Let's look at a few case examples to understand the distinction between encroachment, proactiveness, and restraint.

JUDICIAL ACTIVISM

Judicial Activism is when the judiciary takes up a proactive role in delivering justice, going beyond their constitutionally confined roles of interpretation and enforcement of law to creatively craft solutions.

What motivates a judge to go beyond his jurisdiction? Before defining any proactive role of judges as overreach, let's see the intention and wisdom that makes them push themselves into the role of policy-making or as it looks like at first glance.

The Keswanand Bharti Case, a landmark judgement of 1973 in which, by a 7-6 vote, **the basic structure of doctrine** was established by the Supreme Court. But what was the need for such creative inference? It could be argued that such proactiveness hinders the balance of power as the Judiciary tries to encroach upon the role of the executive, but what is 'balance of power'?

A balance is not necessarily an equal quantity of weight/value at all times on all entities; the balance of power is a constant pursuit, a constant loop of construction and destruction. Judiciary's proactiveness here is being the saviour, the guard of democracy and preserver of justice, thus performing its function to the best of its potential and possibilities. Thus, it can be safely concluded that the failure of the executive in delivering its promises meddles with justice, and thus, to an extent, compels the judiciary to go beyond its role of merely interpreting and enforcing text and become a little creative.

“Vishakha guidelines” is another significant example where the High Court of Rajasthan went beyond the textual solution because there was an absence of such a law that protects women at workplace from sexual harassment. This guideline ultimately went on to become the Prevention of Sexual Harassment at Workplace Act (Prevention, Protection and Redressal). The guidelines set by the Supreme Court when it comes to the **case of Delhi Air Pollution** and preserving Article 21 of Delhi residents can be seen in the same light of judicial activism.

And yet there has to be a line, a fine line where the Judiciary's proactiveness does not become judicial terrorism, as cautioned by CJI of the Supreme Court of India, B.R. Gavai himself.

JUDICIAL OVERREACH

In the **Shyam Narayan Case vs Union of India** when the SC directed the cinema halls to play national anthem before the starting of the movie, a direction that was later modified in 2018, was criticised for dictating morality and patriotism, of giving a direction that has no constitutional basis; In this case, it is certainly difficult to see how court is delivering justice. Hence, it is a clear example of judicial overreach. In an elected democracy like ours, patriotism and its expression cannot be and should not be dictated, not even by the government; the judiciary is not even close to being in the picture in this scenario. A ban on firecrackers imposed by the SC in the **Arjun Gopal vs Union of India**, while SC is fairly trying to act in the interest of the public, upholding Article 21, imposition of ban is an executive action, perhaps sending a guideline or suggestion in this direction could have been a more appropriate proactive role by the judiciary.

JUDICIAL RESTRAINT

This is when the judiciary does exactly and only as much as is the textual definition of its function. Not more and not less.

Taking up a very recent example of the **Supriya Chakraborty & Anr. Vs Union of India Case**, in which though the judiciary recognised that same sex couples deserve equal rights, a 3-2 verdict ruled against giving constitutional recognition to same sex marriage under the Special Marriage Act of 1954, citing the absence of such a clause in the prevailing law.

Thus, from following the rules word by word to going beyond to deliver justice to propping up as the social reformer, these are the distinctions between judicial restraint, activism and overreach.

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