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SUPREME BUT NOT INFALLIBLE.

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ABSTRACT:

With the shift from a rule of anarchy to rule of people i.e. democracy, the world witnessed sea changes in the global political arena. Legislature, Executive & Judiciary have emerged as the pillars upon which the pedestal of democracy stands. Montesquieu's theory of Separation of Power is central to understanding democracy since it ensures harmonious engagement between the three pillars. This separation of power ensures that each pillar performs the task assigned to it and does not interfere with each other's domain. Therefore, it seems crystal clear that why judiciary has been made final arbiter of the disputes since the most essential & integral function of the judiciary is to resolve disputes. This fact justifies judiciary's opinion in Kesvanand Bharti¹ that Independence of Judiciary & Separation of Power is Basic Feature of Constitution. However, recently the judiciary has been stepping into unwarranted territory thereby destroying the principles enunciated in the Constitution. This unwarranted entrance reflects the anxious attitude of Judiciary where they are seen to be imposing their will towards the elected representatives of the Indian populous. Since the inception of democratic constitutions across the globe, both judicial independence and judicial accountability & executive and judiciary have clashed with one another implicating the lacunae in the whole concept of democracy. However, the answer lies in the full co-operation of each branch to one another because over emphasizing independence may strangle accountability and downplaying it will be a threat to independence. Striking a balance between these values is where Justice lies.

KEY POINTS:

Judicial Overreach, Judicial Activism, Separation of Power, American Realism, Fact & Rule Skepticism, Positivism

¹ Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

1. INTRODUCTION:

There is no greater tyranny than that which is perpetrated under the shield of law and in the name of justice.

-Montesquieu

History is evident of the fact that amidst anarchy where all the powers are vested in the hands of a single authority the only output ever been witnessed is utter chaos and despotism. There is no denying the fact that in a society where there is the absence of any due process it has only led to the oppression of underprivileged. The French monarchy, Italian Fascism, German Nazism, North Korean totalitarianism are nothing but examples of anarchy. When these nations were facing the wrath of autocrats, it was the democracy which emerged as a saviour & cleared the clouds of turmoil from these states (except North Korea).

With the origin of democracy ideas such as Liberty, Equality, and Fraternity etc. were introduced to global politics which lay the foundation of modern society. The essence of democracy is to share the power of governance with the local masses which was initially confined in the hands of autocrats. The idea is to establish the rule of the majority. Gradually with the passage of time, three main powers in a democracy were deduced namely legislation of law, execution of law & interpretation of the law. To exercise these powers three wings of government are provided by the Constitution of each democracy viz. Legislature, Executive & Judiciary.

Legislature enacts a law, executives implement the law & Judiciary interprets the law. The harmonious functioning of democracy lies on non-interference of the wings of government in one another's spheres i.e. Separation of Power (hereinafter SOP). The most significant aspect of democracy is ensuring liberty, thus SOP is central to understanding democracy. The importance of SOP is in the very connection of the branches and in the limitations, they place on each other. SOP plays a vital role in creating checks & balances to prevent the abuse of power. The idea simply is to confine each institution into their respective domain within the framework of the Constitution.

The Judiciary has been kept at paramount adjudication pedestal so that if Legislature & Executive pass any *ultra vires* law or order, it is the duty of the court to see that other wings are in check or not.

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India's Constitution is also based on such principle & from time to time Judiciary has proved itself as guardian of the Constitution, for instance, Judiciary has saved Indian democracy in *Kesavanda Bharti*² when it saved the constitution from autocratic actions of Parliament, fought against the government in *Indira Gandhi v. Raj Narain*³ by making the prime minister subject to law by striking down 39th Constitutional Amendment, in Justice Khanna's opinion in *Habeas Corpus Case*⁴ by upholding Fundamental Rights amidst Emergency, in *Maneka Gandhi v. Union of India*⁵ by reading due process of law over procedure established by law, in *Minerva Mills v. Union of India*⁶ by striking down 42nd Constitutional Amendment up to the extent it violated article 13, in *Vishakha & Ors. v. State of Rajasthan*⁷ by framing Vishakha Guidelines for Sexual harassment of Women at the workplace by a combined reading of Article 51(c), 253 r/w Entry 14th of Union list in Seventh Schedule, in *Shayara Bano v. Union of India*⁸ by declaring Triple Talaq unconstitutional and saving Muslim women from the clutches of discriminatory practices and recently in *K.S. Puttaswamy v. Union of India*⁹ by upholding the right to Privacy as Fundamental Right etc..

Although, the recent chronicles of Indian Judiciary have made the nation think that it has assumed upon itself a lot of roles which were never granted to it by the Constitution. The Judiciary has made itself guardians over the Constitution rather than being guardians of the Constitution. Whether it is the unreasonable Liquor Ban on highways¹⁰ or contentious Justice Karnan's decision¹¹ or baseless National Anthem Order¹² or the unprecedented SC Judges press conference¹³ or where the Conflict of Interest was ignored while setting up of benches¹⁴ and apart from these there were many other instances where the SC has crossed the constitutional boundaries. The Judgments in these cases has mocked judicial process & has blotted the image of judiciary among the masses. Indian Constitution does not mention the due process of law, but through a series of interpretation of art. 14, 19 & 21 judiciary has

²Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

³State of Uttar Pradesh v. Raj Narain (1975) 3 SCR 333.

⁴Additional District Magistrate v. Shivkant Shukla 1976 AIR 1207.

⁵Maneka Gandhi v. Union of India (1978) 2 SCR 621.

⁶Minerva Mills v. Union of India AIR 1980 SC 1789.

⁷Vishakha & Ors. v. State of Rajasthan (1997) AIR 3011.

⁸Shayara bano v. Union of India (2017) 9 SCC 1.

⁹K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

¹⁰State of Tamil Nadu v. K. Balu & Anr. (2017) 2 SCC 281.

¹¹In re v. Sri Justice C.S. Karnan (2017) SCC OnLine 562.

¹²Shyam Narayan Chouskey v. Union of India (2017) 1 SCC 421.

¹³TOI, 'Supreme Court judges' press conference: 'Let nation decide about CJI's, impeachment' The Times of India (Friday 12 January 2018).<<https://timesofindia.indiatimes.com/india/shock-sc-judges-press-conference-let-nation-decide-about-cjis-impeachment/articleshow/62471142.cms>> accessed 20 March 2018

¹⁴ibid 13.

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conferred upon itself these powers; originally found in 4th & 5th US amendment. The SC has interpreted its power in the light of the constitution at par with the judiciary in due process of law. When the Constitution was being framed the framers went through constitutions of major countries & deliberately chose procedure established by law over due process of law. This conspicuous absence of due procedure is evidence of the fact that they were deeply concerned about the possibilities of nullification of legislations by the judiciary which in turn would seriously undermine the functioning of the Constitution.

The most significant function of Judiciary lies in the problem-solving department or the arbiter of the disputes. In order to completely uphold law & ensure the delivery of Justice, it is of immense importance to make the justice delivery system independent of any sort of influence. Here lies the essence of the concept often debated i.e. Independence of Judiciary which basically means that Judiciary while dispensing justice should be subject to nothing but law. It should be free from any sort of political, social or economic control.

The Judiciary while resolving conflicts must essentially understand the text of the statutes i.e., the Jurisprudence behind the law. One of the most influential proponents of the Jurisprudential theory of American Realism, Chief Justice of United States of America, and Oliver Wendell Holmes was a major opponent of the Positivists who claimed that Judges do not make law. Conversely, he argued that judges do make law and considered Judiciary as a means to achieve the Social Ends.

Understanding Holmes, it seems clear that judiciary while adjudicating do make laws. Now to maintain the checks & balances judiciary should & must be accountable to someone as being the other two organs of the government.

Judicial independence is a double-edged sword which works both ways. Overemphasizing independence may strangle accountability and downplaying it will be a threat to independence. Striking a balance between these values is where Justice lies. There is no denying the fact that Independence of Judiciary is essential to the smooth functioning of democracy but recent acts are immaterial to the Independence of Judiciary.

It is good that Indian judiciary is keeping an eye on the executive and legislative acts to ensure the accountability on their part but, these unconstitutional interference defeats the very purpose of Separation of Power and results in the tyranny of the unelected.

2. JUDICIAL ACTIVISM:

The Supreme Court has been of the view that the courts should be slow to interfere with the legislative mandate otherwise for compelling reasons.¹⁵ In Kesavnanda Bharti¹⁶ the Court inter alia read rule of law, federalism, independence of the judiciary as parts so integral to the Constitution that if there is any shift in any of these features, the spirit of the will be damaged *in toto*. This enunciation of the *Doctrine of Basic Feature* is nothing but the greatest example of Judicial Activism. Judicial Activism is the assumption of an active role on the part of the judiciary, which is expected to be adjudicated or formulated by the legislative and executive wing of the government.¹⁷ Judicial activism refers to the active role of the judiciary to provide justice to the underprivileged people in society.

Owing to non-activity or non-application of mind of the other organs of the government, the SC in order to carry forward its duty of dispensing justice, it has established a new stage in the form of Public interest litigation (hereinafter PIL) for the judiciary to provide social relief. The credit goes to the Father of PIL's in India, Justice Bhagwati. This era began with the infamous case of Hussainara khatoon & Ors. v. Home Secretary, State of Bihar¹⁸ which exposed the maladministration in the cases of under trial prisoners of Bihar. Judiciary in an unprecedented way read the right to speedy trial into art.21 and gave a constitutional right of free legal aid¹⁹. Amid whilst, PIL has proven to be a golden remedy to the oppressed litigants and from time to time in a number of cases, it has assisted our democracy in filling the gaps in its administration of justice viz. Sheela Barse v. State of Maharashtra²⁰ (Separated lockups for women convicts), M.C. Mehta v. UOI²¹ (Saved Ganges from untreated sewage), Indira Sawhney v. UOI²² (Justified reservation for the backward classes) and Centre for PIL v. UOI²³ (uncovered 2g scam) etc.

Apart from PIL, another tool of judicial activism which the SC possesses is taking of a matter through *suo moto* cognizance. *Suo moto* proceedings were initiated by the Supreme Court

¹⁵Som Lal v. Vijay laxmi & ors. (2008) 11 SCC 413.

¹⁶ibid 1.

¹⁷ Semwal, M. M. and Sunil Khosla, 'JUDICIAL ACTIVISM' (2008) The Indian Journal of Political Science 113.

¹⁸Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar (1980) 1 SCC 81.

¹⁹The Constitution of India Article 39A.

²⁰Sheela Barse v. State of Maharashtra (1983) 2 SCC 96.

²¹M.C. Mehta v. Union of India 1988 SCC (1) 471.

²²Indira Sawhney v. Union of India & Ors. AIR 1993 SC 477.

²³Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1.

taking a note of various instances of large-scale destruction of public and private properties in the name of agitations, bandhs and hartals²⁴. In another matter, Court initiated Suo moto proceedings on learning about the gang rape of a 20-year-old woman pursuant to the direction of Village panchayat, as punishment for having a relationship with a man from a different community in Subalpur, West Bengal.²⁵

At times the SC also uses the provision of art.142 of the Indian constitution which empowers the SC to do complete justice in sub-judice matters, under which judiciary can go beyond its powers constitutionally.

There were many instances where judicial activism has proven to be a boon for the Indian judiciary to stretch its hand in the administration of Justice. However, the line between judicial activism and judicial overreach is a thin one...

3. JUDICIAL ACTIVISM TO JUDICIAL OVERREACH:

A takeover of the functions of the other organ may become a case of over-reach²⁶.

The laws made to fill legislation gap by the judiciary is convenient to the extent till it does not contradict any express or implied provision of any statute or any general principle of the Constitution. However, lately, the Indian judiciary has shown a pattern of judicial overreach because of which the nation has witnessed increased conflicts between the three wings of democracy. Judiciary in the blanket of judicial activism has been indulged in making rules and regulation which is the primary function of the legislature and the executive. Judicial activism occurs when the legislature and the executive fail to perform their part although; just because in judicial perspective there is a more reasonable alternate solution this activism shifts to overreach.

It is imperative here to quote the opinion of a division bench of Supreme Court where they warned judiciary on their over emphasis on Judicial Overreach by holding that *“If the judiciary does not exercise restraint and over-stretches its limit there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers or even independence of the judiciary. The judiciary should, therefore, confine itself to its proper sphere, realising that in a democracy many matters and controversies are best*

²⁴In Re: Destruction of Public and Private Properties Vs. State of A.P. and Ors. MANU/SC/0575/2009.

²⁵In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News MANU/SC/0242/2014.

²⁶Manmohan Singh, Prime Minister, Conference of C.M.'s & C.J.'s (Apr. 8, 2007).

resolved in a non-judicial setting..... We are compelled to make these observations because we are repeatedly coming across (instances) where judges are unjustifiably trying to perform executive or legislative functions. In our opinion, this is clearly unconstitutional. In the name of judicial activism, judges cannot cross their limits and try to take over functions which belong to other organs of state..... Recently, the courts have apparently, if not clearly, strayed into the executive domain or in matters of policy. For instance, the orders passed by the High Court of Delhi in recent times dealt with subjects ranging from age and other criteria for nursery admissions, unauthorized schools, criteria for free seats in schools, supply of drinking water in schools, number of free beds in hospitals on public land, use and misuse of ambulances, requirements for establishing a world-class burns ward in the hospital, the kind of air Delhiites breathe, begging in public, the use of subways, the nature of buses we board, the legality of constructions in Delhi, identifying the buildings to be demolished, the size of speed-breakers on Delhi roads, auto rickshaw over-charging, growing frequency of road accidents and enhancing of road fines, etc. In our opinion, these were matters pertaining exclusively to the executive or legislative domain. If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce”²⁷

There is no denying the fact that the Judicial activism or overreach are subjective concept, but a pragmatic approach may make us realize that stepping forward to fill the legislative gap by introducing guidelines on sexual harassment at workplace²⁸ is something that falls within the domain of judicial activism but, forcefully directing bureaucrats to send their children to government school is a clear act judicial overreach.²⁹ Commenting, upon the court’s rationale, it is the government’s sole responsibility to better the conditions of the public schools. The Court’s rationale in reaching this decision was flawed and inappropriate as the stakeholders’ right to freedom of choice was infringed. The willful imposition of such order would result in grave injustice and misery to the stakeholders’.

Almost entire Procedural law works on the discretionary approach of the Judiciary. The words *may & shall* are used numerous times. It clearly implies that judiciary is to apply the law by understanding the context of each case. This vesting of discretionary powers in judiciary denotes the legislature’s belief & faith in judicial application of mind. The grant of this discretionary power also comes with its respective checks & balances where the judiciary

²⁷Chander Hass v. Aravali Golf Club (2008)1 SCC 683.

²⁸ibid 7.

²⁹Abhishek Kumar Mishra v. State of U.P. & 8 ors. Writ A- No. 628 of 2015.

is to give sufficient and reasonable reasons for their discretion. This dual approach of discretion, as well as the reasons of discretion, maintains independence as well as the accountability. Therefore, the thought that judicial will is supreme or unfettered is actually flawed. The judiciary is bound by internal as well as external constraints which stabilize its functioning in a democracy.³⁰

Earlier we have seen how Judicial Activism has proved itself as beneficial to the Justice dispensation but seeing the recent course of Judiciary into unauthorized or virgin territory has not only invited serious criticisms from outside but also from inside. Judicial Activism has always been in such a way that it does not defeat any other statute, thereby, if howsoever any new law is framed by the courts, it is of little difficulty. Also, the rationale and reasoning appear to be sound in such decisions. However, in cases which show reminiscence to Judicial Overreach are decisions in which there appears a clear lack of mind and reflection of irrationality. Judicial Overreach has always been of some sort of imposition upon the stakeholders taking away their rights that are guaranteed under the Constitution.

We do believe in the Sociological school of law which claims that law is a means to achieve the social ends and judiciary is one of the means to achieve that end but not the only one. It is the primary objective of the Legislature which it has inherited from the Constitution. Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.³¹ However, the judiciary may tap on the lethargic legislature or the drowsy executive to perform the task they are expected to do. But, what it cannot do is a step in the shoes of the legislature or executive and does the needful themselves except in compelling circumstances which invite judicial action.³²

4. JUDICIARY V. LEGISLATURE:

One of the most contentious tussles between judiciary and legislature of this decade occurred when 99th Constitutional Amendment was passed unanimously by the parliament and in an abrupt & shocking way struck down by Judiciary by 4:1³³ on the grounds that it destroys the basic structure of the constitution i.e. Independence of Judiciary. The majority held that

³⁰Thomas, E.W. The Judicial Process, (Cambridge University Press 2005)

³¹William J. Rehnquist, The Notion Of A Living Constitution. (1976) 54 Texas Law Review, 693.

³²ibid 15.

³³Supreme Court Advocates-On-Record Association and Anr. v.Union of India 2015 SCC OnLine SC 470.

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NJAC will compromise the role of the judiciary in the appointment process & therefore hinders Independence of Judiciary. However, the sole dissenting Judge J. Chelameshwar was of the view that though Independence of Judiciary is a part of the basic structure but the appointment of judges by the judges is immaterial to it. Justice Chelameshwar holding NJAC to be constitutional and denouncing collegium system further opined that Transparency is a vital feature of good governance and is substantial to the appointment process as the proceedings of the collegium are entirely opaque and inaccessible to the public and holding govt. out of the appointment process is illogical & inconsistent to democracy. The Court was of the opinion that executive & legislature should not interfere in judicial process while they themselves are interfering in legislature & executive domain which in turn destroys the basic feature of checks and balances. Arun Jaitley is a major critic of NJAC termed it as the tyranny of unelected and said that “Judiciary in saving one basic structure diminished other five basic structures namely parliamentary democracy, an elected government, the council of ministers, an elected Prime Minister and the elected leader of the opposition.”³⁴

Supreme Court back in *II Judges case*³⁵ deduced the current collegiums (CJI + 4 senior SC judges) system where they overruled their earlier judgment of *I Judges Case*³⁶. Justice Verma, the one who authored the majority opinion later regretted and said in an interview “*My 1993 judgment, which holds the field, was very much misunderstood and misused. It was in that context I said the working of the judgment now for some time is raising serious questions, which cannot be called unreasonable. Therefore, some kind of rethink is required. My judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it.*”³⁷ This clearly reflects the sort of reservation in the mind of the author of the judgment, which has been interpreted wrongly. Such a wrong interpretation opens the gates of the grave and untapped injustice along with the disruption of constitutional harmony.

Another scandalous overreach by the judiciary occurred when in a petition for restricting the commercial exploitation of national anthem the court passed an irrational order of making a

³⁴Indian Express, ‘Arun Jaitley on NJAC verdict: Democracy cannot be ‘tyranny of the unelected’, The Indian Express (19 October 2015) <<http://indianexpress.com/article/india/india-news-india/njac-sc-verdict-democracy-cannot-be-tyranny-of-the-unelected-says-arun-jaitley/>> accessed 19 March 2018.

³⁵Supreme Court Advocates-On-Record Association and Anr. v.Union of India (1993) 4 SCC 441.

³⁶S.P. Gupta v. Union of India, (1981) Supp SCC 87.

³⁷ Venkatesan, V. ‘Honesty Matters’ (2008) 25(20) Frontline, <<http://www.frontline.in/static/html/fl2520/stories/20081010252003500.htm>> accessed 14th March 2018.

compulsion of playing national anthem in movie theaters³⁸. Here, the judiciary made an unwarranted entrance into the lives of the people. The rationale behind the impugned judgment was to propagate the feeling of patriotism within the citizens. However, in reality, it was an unwarranted blow to a person's sense of choice. The bench clearly disregarded that feeling of patriotism is something that cannot be forced upon it comes from within. Patriotism is more of an internal concept than an external one. Interestingly, the said order was not contested by any of the parties to the suit. Deciding a matter by crossing a constitutional boundary for an issue raised in question might seem rational if it is for the sake of justice, but going out of the question on its own is a clear act of irrationality. A stark contrast was made by the Justice Mishra who gave the above order when critiquing on *Rajesh Sharma v. Union of India*³⁹, said that “judges don't make law.”

Supreme Court in absence of any law is empowered for framing rules for temporary use and later the legislature can bring in legislation for such rules to give it real force of law constitutionally but, making a rule which is in itself unreasonable and made without anticipating the immediate consequences is against the purpose for which such power is vested in the court. This was reflected in the unreasonable ban on the sale of liquor on national highways. The Supreme Court in order to curb the ever-increasing road accidents went on to direct all the liquor shops to be closed which are in the range of 500m from National Highways. The order was passed without considering all the facts and consequences of the action rendering in mass unemployment and loss of revenue in the concerned state.⁴⁰ The order was not concerned about the source of livelihood of such affected people and did not even considered to provide an alternative to such evacuation. Rather, if the court was so concerned it should have asked the legislature to draft some stringent laws and the executive to enforce them forcefully.

5. CONFLICT WITHIN:

Apart from a tussle with the executive and the legislature the Indian judiciary took a serious blow when the apex court gave birth to a conflict between the judge and judiciary. When amidst the proceeding of NJAC the Judiciary was standing firm on its argument of “judicial independence”, it contradicted its stand in the case of J. Karnan⁴¹ whereby subverting the HC

³⁸ibid 12.

³⁹Rajesh Sharma v. Union of India 2017 SCC OnLine SC 821.

⁴⁰ibid 10.

⁴¹ibid 11.

under its thumb, the apex court undermined the HC's judicial independence by indirectly impeaching a sitting HC judge. Since it is the duty of the parliament to take note of an erring judge and impeaching him for the same, removal of J. Karnan by SC once again reflected SC's tendency of encroaching upon legislature and executive domain.

The SC reached this verdict on pile much fallacious orders and constitutional enigmas. May, it be an unreasonable gag on media or pronouncement of judgment after weeks of conviction there were many instances in this case where the SC has acted arbitrarily and irrationally. The unprecedented case of J. Karnan is considered as a dark phase in the history of Indian judiciary.

Down the line, the judiciary met the most serious blow when the 4 most senior most judges (Justice Chelameswar, Justice Gogoi, Justice Lokur and Justice Kurian Joseph.) of the SC organized a press conference which was in it an unprecedented act.⁴² The four biggest pillars of the Hon'ble SC came into the open about selective assigning of important cases by the CJI. The 4 judges claimed that "*The CJI is only the first among equals nothing more and nothing less*". In the aftermath of the press conference problem of Conflict of Interest widely debated and showed a clear shift in the procedure of Judiciary from the Constitutional path.

In the background of these cases, the SC has actually taken constitution for granted when it has neglected the procedure prescribed in the Constitution to be followed. Constitutional overreach in order to do complete justice does not grant the SC power to override the Constitution. It seems that SC has made the Constitution as its own personal diary where it can read, write and erase it according to its will. These actions have made constitution subject to the interpretation of judiciary although The Indian Constitution is flexible but its reckless interpretation results in unanticipated harm to the soul & spirit of the Constitution.

6. CONCLUSION:

The foundation of democracy lies in the separation of power. It is the central character in the constitutional system. But when a branch vests upon itself power of making laws, implementing laws and settling disputes arising from them it destroys the idea of separation of power and the democracy fades away. The objective of separation of power is to refrain one branch from accumulating all the power in itself thereby creating a system of checks and

⁴²ibid 13.

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balances. The SOP was evolved to create inevitable friction on the government bodies as to save the state from despotism. Being the sole interpreting authority of the constitution the SC is allowed to interpret the Constitution in accordance with the basic principles underlying. However, it seems that the SC has recently interpreted the Constitution outside the realm of black letter law when it deems convenient according to its agendas. When Judiciary is deciding a case it does not adjudicate for itself but for the protection of objectives enshrined under Preamble.

While it is true that independence of the judiciary is must for fair adjudication but undermining the independence of other branches and depriving them of their liberty is against the spirit of the Constitution. Since utter chaos is the only end result of such encroachment, the branches must confine themselves in their respective spheres.

In the light of the above instances, it is clear that the SC is trying to be the law instead of following it. The judiciary should act in the way it is expected to and let the other organ do what is expected from them otherwise the whole concept of Democracy is defeated as the common people would not able to know the competence of their elected representatives. If all actions or laws are to be made by the judiciary where it acts as the main player and the legislature sits as a silent audience, the inefficiency & incompetency of the legislature would never come up front. At the most what the judicial branch can do is to encourage the sleepy legislature to wake up & the do the needful.

However, if lightest of the element in our periodic table can't remain ideal, expecting such a heavy & big system ideal is to expect too much. Therefore, there comes a time when the branches have to depart from their respective functions and enter into foreign territory but rationality behind the said trespass is the key which distinguishes *activism from overreach*. This is evident as the *Vishakha guidelines* are treated as a product of judicial activism whereas *National Anthem order* is without any doubt a clear by-product of judicial overreach.

The difference between judicial activism & judicial overreach is a thin one which cannot be understood by applying a straight jacket formula. But a red line has to be drawn somewhere. The red line will vary according to each case which will depend upon the facts of each case. The answer lies in active co-operation between the wings of the government. The wings should emerge as protector of rights by maintaining constitutional harmony between them instead of litigants in a suit.

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The courts should maintain their proactive role as the one in *Vishakha* but they should also be considerate of Justice Katju's opinion in *Aravali Golf Club*. Lastly, the branches should be considerate and aware of the fact that overemphasizing independence may strangle accountability and downplaying it will be a threat to independence. Striking a balance between these values is where Justice lies.

Injustice anywhere is threat to Justice everywhere.