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NON-TEXTUAL JUDICIAL ENCROACHMENTS ON POWERS OF PARLIAMENT: ITS IMPACT ON SEPARATION OF POWERS AND DEMOCRATIC GOVERNANCE IN INDIA¹.

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Abstract:-

After the emergence of Welfare and civilized states in this world, the three organs of the Government of a State namely, Legislature, Executive and Judiciary are influencing all citizens of that State. The good governance and peaceful living conditions of all citizens are determined by the proper performance of the organs of the State according to their vested powers and functions. It is inevitable that there should be some proper separation of Powers among the Organs and their powers and functions should be accurately demarcated. At the same time, it should not be forgotten that, there needs to be overlapping of powers and functions of the organs of the state to attain better results in the administration of a State. If one organ is defective then the entire administration of the state will be frustrated. There should not be an unwanted transgress or encroachment of essential functions of the particular organ of the state. Though there are expressly overlapping powers of one organ over the other is enshrined in our Constitution like Articles 13, 32 and 226 of the Constitution of India. i.e., other than the power of Judicial Review by the Supreme Court of India. This article deals with Supreme Court's intervention on the Parliament law-making power in case of non-textual provisions of the Constitution of India. Though powers and functions are clearly provided under the Constitution of India, we can observe that, the Parliament and Supreme Court are at tussle on several occasions and in the present scenario, we can observe that, from the date of commencement of the Constitution, several doctrines have been evolved by the supreme court of India like., Doctrine of severability, Doctrine of Eclipse, Doctrine of Colourable legislation and so on based on literal or textual provisions of Constitution. Likewise, there are several non-textual references and development of theories and doctrines like., Judicial activism, Judicial creativity, Judicial legislation, Judicial over reach, Judicial over stepping, etc., The Parliament is having disrupt over the Judicial activism, Public Interest Litigations and wants to restore the

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Separation of powers as enshrined under the Constitution and is more concerned with Judicial Legislation and Judicial over stepping or otherwise called Judicial over reach, which affects the democratic governance in India and with regard to several aspects. Unless, the above disruptions and tussles are pacified at earliest, the people of India will cause loss of confidence over the democratic set up of India. These tussles will cause unwanted delay in policy implementation of the Government. In some ways, the Executive and Legislature stand on same footing, the Judiciary being an independent body, having the role to protect the constitution is also required to function within the limits of powers entrusted under the Constitution of India. Hence, it has become necessary to probe into the merits and de-merits of overlapping of powers other than textual aspect between the Supreme Court and Parliament of India.

1. Introduction: -

In every monarchical system of Governments in the world, it is pertinent to note that, all the organs of the State are in one hand and hence, there would be no confusion or overlapping of methods of governance of the state. More-over, the Law maker was the king, the Executor, protector of the law and administration of Justice. The Powers of administration will also be converged on that single person namely, King. However, after the emergence of welfare and civilised states, the governance of the state has been entrusted to three major organs of the state called Legislature, Executive and Judiciary. Though proper division of powers has been envisaged to all the organs of state in our constitution, it is impracticable and unavoidable to have overlapping or intersecting or interaction of powers and functions of one organ over the other. The three organs of the state will overlap or interact with one over the other in accordance with facts and circumstances of the case. The research questions arising thereof is whether the Supreme Court's encroachment on Parliament's power other than the non-textual provisions of Constitution of India will impact the theory of separation of powers and democratic governance in India.

2. Significance of the study: -

As constitution of India is considered as living organism and a highest norm of the public law, the constitutional principles have to come up with clear and proper solutions to the current problems faced by the people of India. This article is concerned with overlapping or interaction of Judicial power over the Legislative power. The essential powers and functions of the Parliament is to enact, alter and repeal laws. As we know, it takes several months for the Parliament of India to enact a particular legislation and it involves several stages and

procedures to bring into force. The Constitution of India provides for due separation of powers among the three organs of the state. However, in case of matters not provided in Part III² of the Constitution, the Judiciary ventures its powers over the Parliament by way of Judicial activism, Judicial restraint, Judicial over reach or overstepping in the powers of parliament in enacting the legislation. It is pertinent to note that, the Supreme Court interacts with the Parliament in particular when there is a Legislative Vacuum, whenever there is no express legislation or valid legislation and has clarified the necessity and importance to fill up the legislative vacuum. Under Article 248 along with VII schedule, Entry 97 of our Constitution, the Parliament of India is competent to enact laws on any subject that does not fall within the ambit of the State or concurrent Lists. Thus, there is an express provision under the constitution, which empowers the Parliament to enact laws when there is any Legislative vacuum. However, those legislations should also come under the purview of Judicial Review, if the legislation is violative of fundamental rights enshrined in the Constitution of India or if there are any legislations made without any jurisdiction or of excess or impermissible Jurisdiction. This paper also culls out the impact of overlap as well as the reasons for the encroachment of Judicial power over the Parliament and the circumstances under which the Judicial overlap is acceptable and under what circumstances, the overlap is restricted or not accepted by the Judiciary itself.

3. Literature Review:-

In the internet source one of the top stories published by News Age on 5.7.2025, under the title “Clash of Powers: Parliament and Supreme Court at a Constitutional Crossroads”³ has observed that, in recent debates, Parliamentarians have highlighted the following issues like limiting the power of judicial activism, restoration of separation of powers as envisioned by the constitution and to introduce legislation to regulate the Judicial overreach. Thus, the Parliament is having some clash over the overlapping of powers and functions by Judiciary over the Parliament. Even Members of Parliament are concerned with the transgress of Judicial power with parliament. The Vice President Jagdeep Dhankar has reiterated that Parliament is supreme and elected legislators are the “ultimate Masters”⁴. In an article titled “India’s unlikely democracy – The rise of Judicial sovereignty” by Pratap Bhanu Mehta, observed that, India is not the only democracy, where judges have been coming to play an unprecedented governing role. The expansion of the authority enjoyed by unelected bodies have been a staggering

² The Constitution of India – Fundamental Rights Articles 12 to 35.

³ Internet: NewsAge, top stories, “Clash of Powers: Parliament and Supreme Court at a Constitutional Crossroads”

⁴ The Times of India, ‘Parliament is supreme’:VP Dhankhar renews attack on judiciary over powers. Times of India.com/Apr 22, 2025, 05.17 PM IST.

worldwide trend in recent years. The Courts in India is also extending its role in issues relevant to politics or policy matters and even scrutinize the amendments made by parliament. He further states that, the weakness of the political process provides fertile soil for judicial activism and judges keen to compensate for their failure to defend democratic principles during the 1975-1977 emergency have avidly taken up the task of preserving the republic⁵. Thus, it is found that, from the period of emergency to till date, the Judiciary is interpreting with several issues, which are all related to Policy, political matters and even on the amending powers of the Parliament. He also asserts the reason for such Judicial intervention. The Executive as well as Legislative Members inaction and weaknesses has paved the way for intervention of Judiciary, even though it is an unelected body and wants to maintain its role in proper protection of Constitution as well as the rights of the Citizens of India.

There are some works related to the interactions of Judicial powers with other organs namely “Constitutional Overlaps: Judicial Power and the Executive and Legislative Arms of Government “- by Wilson Tze Vern Tay⁶ has focussed his views on three paradigms scenarios in particular, ouster clauses, transfer and/or outright restriction of Courts’ Judicial powers and concept of non-justiciability. Likewise, there were several works by scholars related to property rights, Judicial appointment, amendment of Indian constitution, Judicial Review, Judicial overreach, Judicial restraint and other constitutional principles and doctrines.

3.1 Separation of Powers: -

We can state that, separation of powers occupies the space of the particular organ in such a manner that it is the specific area allotted to each organ, which cannot be intersected or interpreted. There are various studies by several scholars regarding the separation of powers. As per the wordings of C. Montesquieu⁷, without separation of powers there would be no liberty. The French declaration of the rights of Man, 1789, Article 16 provides that, “any society, in which the safeguarding of rights is not assured and separation of powers is not established has no constitution. In the year 1926, the Supreme Court of United States in *Meyers -vs- U. S*⁸ has observed that, the separation of powers was not to avoid friction incident to the distribution of governmental powers among the three departments but to save the people from

⁵ <https://doi.org/10.1353/jod.2007.0030>.

⁶ <https://dx.doi.org/10.2139/ssrn.3606362>

⁷ C. Montesquieu, *The Spirit of Laws* (1748)bk 11, chapter 6

⁸ (1926) 272 US 52.

autocracy. In an article titled “Prelude to the Separation of Powers”⁹, N.W. Barber has referred to works of Eric Barendt, who had classified the Separation of Powers into Pure and Partial theories of Separation of Powers and has rejected the pure theory, in which there will be complete separation of powers among the organs of the State and provides strict delineation and because of friction, there will be impracticalities discovered. He states that, with no powers to wield against the aggressor, the two weaker branches of state are left at the mercy of the third. He states that partial theory involves some overlap of functions and office-holders is welcomed. Further, it emphasises the significance of checks and Balances within the Constitution¹⁰.

It is evident that, the Indian Constitution does not provide for strict separation of powers, however, there are some powers and functions of three organs intersects and overlaps with powers and functions of other organs. If powers truly were separated so that, each branch of government could exercise only a discrete set of powers to the exclusion of other branches, the nation would be ungovernable¹¹. In an article, Ashutosh Acharya and Manindra Singh Hanspal, “Comparative analysis of separation of powers: Theoretical and practical insights from India”. has discussed the practical insights from India regarding Separation of powers, has observed that, India adopts British constitutional principles, which do not advocate for a strict separation of powers but rather a system of check and balance. This led to unique implementation of the Separation of powers doctrine characterised by significant overlap and interactions among the three branches of state. They add that, the core principles of Separation of powers involve Independence, Checks and Balances and equilibrium between the branches, which must co-operate and not to interfere with each other unduly. They state that, the practical application of separation of powers often reveals the complex challenges like overlap and interdependence between the organs. Moreover, the modern state often requires a more flexible approach, allowing some degree of functional overlap to respond to public needs and emergencies efficiently¹².

3.2 Judicial Review: -

When we speak about the overlap or interaction of powers and functions between the Supreme

⁹ N.W. Barber, *Prelude to the Separation of Powers*, Cambridge Law Journal, 60 (1), March 2001.

¹⁰ E. Barendt, “Separation of Powers and Constitutional Government” 1995 P.L. 599: *An Introduction to Constitutional Law* (Oxford 1998).

¹¹ R. Pierce, ‘Separation of Powers and limits of Independence’ 1989(30) *William and Mary Law Review* 365.

¹² <https://doi.org/10.33545/26646021.2025.v7.i1c.446>

Court and Parliament, Judicial Review or the power of Supreme Court to interpret and scrutinise the constitutional validity of laws made by the Parliament cannot be left without considering the same. Judicial Review refers to power of the courts to declare the laws made by the Parliament as ultra-vires or void, if those laws are made in contravention of the Constitution and also includes the scrutiny of activities of the Executive organ as well. This power of Judicial Review is provided under Article 13 of the Constitution and it gives a supervisory power of Judiciary and as well as act as the Check and Balance over the legislative power of the Parliament.

It is to be noted that, in the case of Common Cause (A registered society) -vs- Union of India¹³, the Supreme Court of India has observed that, since lacuna or defect if any in an Act can only be corrected by legislature by amending the Act, such a lacuna or defect cannot be corrected by the Court. In the case of State of Uttar Pradesh -vs- Chaudhary Ran Beer Singh¹⁴, the Supreme Court has observed that, in case of policy decisions, if infringement of fundamental right is not shown, then Courts will have no occasion to interfere even if a second view is possible from that of the government. In United States of America, the power of judicial review is said to be used to challenge the constitutionality of legislation passed by the Parliament. The Courts' role in Judicial Review is supervisory and focus on determining the lawfulness of decisions or actions or legislation rather than replacing them with its own views¹⁵.

In the case of Marbury -vs- Madison¹⁶, the court has observed that, the judicial review in U.S is used sparingly by Judges exercising caution in striking down congressional statute that violates the constitution. It helped in maintaining public confidence in the federal judiciary and legitimacy of judicial review.

3.3 Checks and Balances: -

To maintain the theory of Separation of Powers and balance of powers, proper check and balances is necessary. It may be noted that, excessive concentration of powers will become a greatest impediment for the promotion of constitutionalism, good governance, democracy and Rule of Law. On analysis of literature review, we can infer that, as a Federalistic state, the Constitution provides division of powers and functions among the three organs of the state, this

¹³ (2008) 5 SCC 511: AIR 2008 SC 2116.

¹⁴ (2008) 5 SCC 550: 2008 (3) SCJ 111.

¹⁵ The Supervisory power of supreme court – Amy coney Barrett. Notre Dame Law school.

¹⁶ 5 U S 137, USSC.

distribution of specific powers and functions on the organs of state reveals that, the Constitution hiddenly reveals the application of theory of separation of powers. As the Constitution of India provides for express overlapping of powers as stated above, the Overlapping of powers acts as check and balance of one organ over the other. Thus, Constitution of India enshrines both separation and interaction of organs of the state. Apart from interaction and exclusive powers and functions of the three organs by way of textual provisions, we could find that, there are various theories and doctrines evolved by the Supreme Court of India and Legal scholars such as Judicial Activism, Judicial Restraint, Judicial overreach, Judicial Legislation, etc., which are all non-textual provisions in the Constitution of India and which are all encroachment and transgression of one organ over the other. While considering the above, there are several research studies related to interaction of powers between Parliament and Supreme Court. There are studies related to Right to property and Judicial Appointments and there are some research gaps with respect to non-textual interactions and overlapping of powers.

4. Research Methodology:-

As the researcher is going to have doctrinal research on this topic, he has utilised the Normative Legal Research Methodology in this study. The researcher has relied upon the primary source of Constitution of India, 1950 and some of the observances made in the Constituent Assembly Debates for clarification of doubts and employed all the necessary secondary sources like Books, Articles published in Journals, Newspaper information, Internet portals and Statutory provisions. The Conceptual frame works on the theories and doctrines are evolved by the Supreme Court of India and research scholars and on collection of information related to Parliament. The researcher has had an intensive study of decided case laws and employed the method of case analysis and employed some other research tools to arrive at the conclusion and suggestions.

5. Judicial encroachments on Parliament and impacts thereof: -

As stated above, this article ventures into the Judicial encroachments of powers over the Indian Parliament other than the powers expressly enshrined in the Constitution of India. It must be noted that, in proper governance of a country, that too with the huge population like our country, the organs of the state machinery namely Executive, Legislature and Judiciary cannot function strictly in accordance with the principle of Separation of Powers. According to Baron de Montesquieu in his book “De L’ Esprit des Lois” The spirit of Laws – 1748. He states that, “There is no liberty, where Judicial power is not separated from Legislature and Executive. If

Judicial powers and Legislative powers are not separated, the power over life and liberty of citizens would be arbitrary because Judge would also be a legislator. However, overlapping of powers and functions by one organ over the other is inevitable. This paper ventures into the consequences of Judicial overlapping and its impact for the past few years in India.

As Justice. Holmes¹⁷ observed that A Judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under Laws supported already to exist. That is its purpose and Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. In *Express Newspaper (P) Ltd., -vs Union of India*¹⁸ A rule (Legislative function) prescribes future pattern of conduct and creates new rights and liabilities, whereas the decision (Judicial function) determines rights and liabilities on the basis of present or past facts and declares pre-existing rights and liabilities. Thus, adjudication reflects What law is? Rulemaking reflects what law will be?

Hence, we can clearly understand that, the Judicial power extends to present and past occurrences, acts and liabilities. Whereas, the Parliamentary power has the role in establishing legislations for the future outcomings and future preparations to organise the people of India with their future welfare in the state of mind. The Supreme Court cannot frame laws in the manner of guidelines, rules and regulations, which will amount to clear breach of theory of Separation of Powers. As observed above, though pure theory of separation of powers cannot be implemented, the role of Judiciary is fettered with limitations within the bounds of the Constitution of India, which ultimately provides authority to popular sovereignty of India.

Professor Dickinson in his *Administrative Justice and Supremacy of Law – 1927*. Page 21 has observed demarcation of powers between Legislature and Judiciary. He states that, the Legislature reflects the rights of individuals in abstract (general applicability), whereas, the Judiciary by way of adjudication operates concretely upon individuals in their individual capacity by way of specific in applicability and addressed to particular individuals or situations. The above-said demarcation will reveal as the accurate point of overlap and separation of powers between Judiciary and Legislature.

As stated above, we can understand that, if a legislation is passed by the Parliament, it will be

¹⁷ In *Prentis -vs- Atlantic Coast Line Co.*, (53 L Ed 150: 211 US 210 (1908)

¹⁸ AIR 1967 SC 1643

viewed as a legislation for the People at large in India, whereas, if that work is done by the Judiciary, then it will be related to individual case in particular nature and cannot be applied to public at large. Likewise, the Law enacted by the Parliament represents the future in time and is going to be applied for the upcoming days and for upcoming generations. The above two distinctions will clearly establish that, the Parliamentary function in enacting legislation is entirely different from the laws, rules, regulations, etc., created or made by two other organs of the state. For instance, the President or Governor makes ordinances¹⁹, which are Laws in par with enacted Laws, but as per the constitution, the ordinances are special arrangements done in the period of recess of parliamentary Houses in times of urgency and immediate necessity and the ordinances should be mandatorily placed before the Houses of Parliament and State Legislatures for its scrutiny. Thus, the overlapping of Judicial powers over the Parliament can be derived from the following cases of Supreme court with reference to matters not expressly enshrined under constitution of India.

The Supreme Court of India in the case of I.C. Golak Nath -vs- State of Punjab²⁰ observed that, the constitution creates Legislature, Executive and Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them. Thus, though Separation of Powers is found, the Supreme Court is of the view that, one organ should not overstep their limits and should not overlap beyond their jurisdictions.

The supreme court in the case of Bhim Singh -vs- Union of India²¹ has held that, in modern governance, there is no place for strict Separation of Powers. The separation of powers aims to achieve the maximum extent of accountability of each instrument. The functional overlap does not infringe the separation of powers and it is a need for harmonious functions of organs of the government. Hence, the functional overlap is essential for smooth functioning of a government. Under some circumstances, the Judiciary may interfere with the policy decisions of the central or state governments. In such cases the interference of the Court will affect the vested interests of the elected government of the centre and States. The Supreme Court has held that, it is the prerogative of each elected government to follow its' own policy. Even change of government may result in change of policy that may result and affect some vested interest. However, the Court cannot interfere unless any illegality is committed by executive mala-fide. Balco

¹⁹ Articles 123 and 213 of the Constitution of India, 1950.

²⁰ 1967 SCR (2) 762 : 1967 AIR 1643

²¹ <https://indiankanoon.org/doc/158311457/>

Employees Union (Regd)., -Vs- Union of India²².

There are several instances of cases decided by the Supreme Court itself and observed that, Judiciary cannot overlap or transgress its powers over the Parliament or State legislatures. The Supreme Court refused to grant divorce in the case of VishnuDutt Sharma -vs- Manju Sharma²³ on the basis of irretrievable breakdown of marriage, as it would be like adding another ground to Section 13 of the Hindu Marriage Act, which is clearly a legislative domain. Thus, even under Article 142 of the Constitution of India, there is some limitation and overlapping of Judiciary is restricted by the Supreme Court itself.

In the In Re Delhi Laws Act²⁴ case, the supreme court is of the opinion that one organ should not perform functions that are essentially belong to others is followed in India. Though overlapping is allowed one organ should not perform the essential functions of the other. Thus, this the first ever limitation to the Judiciary while overlapping with the powers of the Parliament. Likewise, the supreme court in the case of P. Ramachandra Rao -vs- State of Karnataka²⁵ - expressed its opinion on Judicial excessiveness and observed that giving directions of a legislative nature is not a legitimate judicial function.

The supreme court has strictly restrained the Judiciary from some activities of legislative nature. For instance, in the case of State of Himachal Pradesh -vs- A parent of Medical College students (Simla)²⁶, while dealing with a matter of implementation of recommendations contained in the report of Anti Ragging Committee, observed that it is not the duty allocated to Judiciary and should not assume to itself the supervisory role over the law-making authority. The Supreme Court in State of Uttarpradesh -vs- Jeet Singh Bisht²⁷ has observed that, the direction given by the Allahabad High Court to the Uttar Pradesh to constitute five State Level Consumer Forums under Section 16 of the Consumer Protection Act is purely Legislative function and that can be prescribed by the legislature through a Legislative enactment rather than Judiciary. The Supreme Court held that, this appeal from the High court is a typical instance of a widespread malady which has infected the Judicial system in India namely, the tendency in some courts of not exercising Judicial restraint and crossing their limits by

²² AIR 2002 SC 350.

²³ 2009 (6) SCC 379

²⁴ MANU/SC/0010/1951

²⁵ 2002 (4) SCC 578.

²⁶ 1985 (3) SCC 169

²⁷ 2007 (6) SCC 586

encroaching upon into the legislative or executive domain, contrary to the broad separation of powers envisaged under our constitution. The court confirmed that, establishment of court and other related activities are purely legislative functions and can only be prescribed by the legislature through enactment only.

The Supreme Court, while rejecting the stay of selection and appointment of the Election Commissioners in the Writ petitions filed under Article 32 of the Constitution in a case namely, *Dr. Jaya Thakur -vs- Union of India*²⁸. – While rejecting the stay of selection and appointment of the Election Commissioners in the Writ Petitions filed under Article 32 of the Constitution, the Hon'ble Supreme Court has held that, Article 324(2) postulates the appointment of the Chief Election Commissioner and Election Commissioners by the President of India in the absence of any law made by the Parliament. The Judgment in *Anoop Baranwal* records that there was a legislative vacuum as the Parliament had not made any enactment as contemplated under Article 324(2). Given the unique nature of the provision and absence of an enactment, this Court had issued directions constituting the Selection Committee as a pro-term measure. This is clear from the judgment, which states that the direction shall hold good till a law is made by parliament. It is also observed that the Court is neither invited, nor if invited would issue a mandamus to the legislature to make a law. We would also add that the court would not invite the legislature to make a law in a particular manner. However, the Constitutional court within the framework of the Constitution exercises the power of Judicial Review and can invalidate a law when it is violative of the Fundamental Rights, on application of the principle of proportionality, etc.

In *Prakash Singh v. Union of India*²⁹, a writ petition (civil) No. 310 of 1996 was filed before the supreme court under article 32 of constitution and prayed for issue of directions to Government of India to frame new “police Act” on the lines of the model Act drafted by National police Commission to ensure police accountability to the laws of the country. It has been argued that the current legislation Indian Police Act of 1861 is insufficient to meet the evolving needs of the system, as it has not been updated for many years. The court in addition to the committee’s recommendations, issued time limit instructions, including the composition of the National Security Commission, the DGP’s choice and minimum term, as well as the IG’s investigation separation, the composition of the police establishment committee, the police

²⁸ - <http://indiankanoon.org/doc/25459134/>

²⁹ <http://Indiankanoon.org/doc/1090328/> - 2006 (8) SCC 1

complaints bureau and the National Security Commission. To comply with the above instructions, the court instructed the cabinet secretary to submit a statement to the Indian Government and the chief secretaries of the State Governments and the Union Territories stating the observance of the above instructions. Thus, there was necessity for new legislation in place of old and outdated legislation.

In the case of Vishaka and others -vs- State of Rajasthan case³⁰, before the hearing of that case, there was no provision for sexual harassment of women in the workplace. The supreme court issued direction to the central government to enforce the fundamental rights of the working women under Articles 14, 19 and 21 of the Constitution of India. Hence, the Government of India passed the sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act 2013. It is to be noted that, the Supreme Court of India only proposed guidelines to alleviate the problem of sexual harassment in 1997.

In P. Ramachandra Rao -vs- State of Karnataka³¹, the Supreme Court of India has discussed about Judicial excessiveness and held that, giving direction of a legislative nature is not a legitimate Judicial function. Likewise, in State of Himachal Pradesh -vs- Umed Ram sharma³², the supreme Court of India posed a question against a High Court as to how it can direct the State Government to allot a particular sum of amount for the expenditure on account of a particular project and observed that the court could not give directions, which are administrative in nature. In the case of A.K. Roy -vs- Union of India³³, the Supreme Court has held that, neither it is for the Courts to censure the executive nor it is for the courts to take over the functions of Parliament. In the case of Peerless General Finance and Investment Company -vs- RBI³⁴ has held that the courts not to interfere with the economic policy of the government, which is the function of experts and not of Judicial function. In the cases of Narmada Bachao Andolan -vs- Union of India³⁵, where there was a challenge as to the validity of establishment of a large dam and in the case of Balco Employees Union (Regd) -vs- Union of India³⁶, where while deciding an issue held that, the courts in exercise of their jurisdiction will not transgress into the field of policy decision. In Kumari Madhuri patil -vs- Additional Commissioner³⁷, the

³⁰ AIR 1997 SC 3011

³¹ 2002(4)SCC 578

³² 1986 (2) SCC 68

³³2003 (8) SCC 250

³⁴ 1992 (2) SCC 343

³⁵ 2000 (10) SCC 664 : AIR 2000 SC 3751

³⁶ 2002 (2) SCC 333. AIR 2002 SC 350

³⁷ 1994(6)SCC 241

Supreme Court of India issued 15 guidelines in the form of legislation pertaining to the rights of SC/STs. The Judicial power was exercised to interpret the constitution as a living document and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves.

In the case of Lakshmi Kant Pandey -vs- Union of India³⁸, Lakshmi Kant Pandey an Advocate appealed before the Supreme Court that, as there is no law for Indian children being given in adoption to foreign parents and there was misuse by some social organisations and Private Agencies, the Supreme Court ventured into section 8 of the Guardians and Wards Act, 1890 and issued guidelines for the same.

From the above circumstances, we can understand that, Judicial encroachment on Parliamentary functions will have some impact and hence, the Judiciary should not overlap under some circumstances like future course of actions by way of legislation, not to interfere when a legislation has to be considered for public at large, which is a part of legislatures' authority, by way of public Interest Litigations, where there is an encroachment of legislative policy decisions, in case of matters pertaining to legislative nature, matters of administrative nature and functions which are of essential functions of the legislature. We can understand that, Judiciary is not the last resort as observed by the Supreme Court that, Judiciary is not having the last word with respect to constitutional matters and policy decisions. The Legislature can reverse, modify and void a judicial decision to achieve social and economic policy ends.

6. Judicial encroachment in terms of Judicial Activism, Judicial Restraint,

Judicial Over reach and Judicial overstepping:-

It is to be noted that, there are development of new concepts and doctrines with respect to Judicial overlap on legislative powers. The concept of Judicial activism arises, when the courts exceed their jurisdictional limits in order to maintain justice in case of absence of appropriate legislations. The courts are now fed up with several Public Interest Litigations. The supreme court in Aravali Golf Club -vs- Chander Hass³⁹, has observed that 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 other organs of the state. Nonetheless, the court noted that Judicial activism is useful, if not necessary adjunct to a healthy democracy.

³⁸ 1984 (2) SCC 244

³⁹ 2008 (1) SCC 683

Such activism however should be resorted to only in exceptional circumstances, where the interest of the nation or the poorer or weaker sections of the society would be in peril in the absence of judicial action. Ordinarily, the task of legislation is for the legislature.

The Judicial over reach is found in several cases even though they are for the welfare of the people and the matters which were not looked into and not rectified by Legislature. In some instances, there are some excess overlaps of powers of Judiciary over the Parliament. The ban on Liquor sale at outlets within 500 metres of National and State High ways division and fixation of time for firing crackers at the time of Diwali. Arjun Gopal -vs- Union of India⁴⁰ Divisional Manager, Aravali Golf -vs- Chandra Hass and another⁴¹ and Vishaka case 1997 Sexual offences at workplace Act 2013. The Supreme court in the case of Bandhu Mukti Morcha -vs- Union of India⁴², when Justice PN Bhagwathi introduced public Interest Litigation in India, Justice Pathak in the same Judgment warned against the temptation of crossing into the territory, which properly pertains to the Legislature or the executive government. Thus, Justice. Pathak warned that, PIL is a Judicial transgress over the jurisdiction of Legislature.

In the case of Aravali Golf Club -vs- Chander Hass⁴³, the supreme Court held that, Courts cannot create rights where none exist nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. With a view to see that Judicial activism does not become judicial adventurism the courts must act with caution and proper restraint. It needs to be remembered that courts cannot run the government. The Judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties. It is to be noted that power dumping in one branch is anti-thematic to ideas of democracy.

The constitutional experts are of the opinion that, overlapping of powers in India between three organs of the state is intended to be a check and Balance on each branch as followed in the American constitution. The Council of Ministers (Executive Branch) are Members of Parliament (Legislative Branch) and thus there was overlapping of powers between both branches. However, it will act as check and balance, when the President or Governor of a State promulgate ordinances, which are part of Legislative branch, which happens during the period

⁴⁰ <http://indiankanoon.org/doc/140349624/>

⁴¹ 2008(1) SCC683

⁴² AIR 1984 SC 802

⁴³ 2008 (1) SCC (L&S) 289.

of recess of parliament. It is to be noted that, there will be delay tactics on the part of Parliament in implementing the Judicial decisions, if there are any impediments in implementing the decisions. The concerned matter will be dropped by the government itself. Mainly, the Government will go for a Constitutional amendment over the issue and Executive and legislature will re-take the decided issue by using proper legal procedures in some or other ways and means. The legislature may use ouster and Finality clauses to prevent judicial intervention.

7. Analysis of Judicial interaction on Parliament:-

In the case of Hindustan Gum and Chemicals Ltd., -vs- State of Haryana⁴⁴, the Supreme Court itself has laid down that, if a law is struck down by the Courts of being invalid for an infirmity, the parliament can cure the same by passing another law by removing the infirmity in question. In an American case, Justice Frankfurter has observed in the case of Trop -vs- Dulles⁴⁵, The Judiciary must not become a Super-Legislature. In an article titled “The dynamics of judicial power in the New British Constitution”⁴⁶, the author has stated that, the power of judicial review is undemocratic in nature and leads to counter-majoritarian. The unelected judges supposedly enjoy less democratic legitimacy than other political branches. They are not respecting choices they made at the ballot box. In case of judicial overreach, the revision of statute book is for the Parliament and not the Courts.

It must be noted that, unless there are some parameters or limitations for Judicial encroachment on Parliament, it will lead to ambiguity. The Judges will be start drafting their own laws. The Parliamentary democracy will undermine the status or mandate of the elected body of the people, as Judiciary is not the representatives of the people’s authority. Judiciary either comes under the control of other organs of the state or independent over other organs of the state. Unless, limitations are fixed over the overlapping of powers, then will arise several issues like Unaccountability by organs of the state, Erosion of faith of people on parliamentary functions and its efficiency. Even it may lead to accumulation of power on Judiciary on Parliament and it will undermine the spirit of democracy. As we know, too much power on any one of the organs will corrupt that organ itself. The excess overlapping of powers in the name of Judicial activism, over reach or over stepping will affect the development of Nation and impede the

⁴⁴ AIR 1985 SC 1683.

⁴⁵ 356 U.S. 86 (1958).

⁴⁶ Richard Ekins, “The dynamics of judicial power in the new British Constitution”- <http://www.judicial power project.org.uk/iop/-Ekins text final/content/uploads/2017/02>.

smooth functioning of the government.

In case of change in social condition, if Judiciary feels that there is a gap in Law and social condition and if it is brought before the Judiciary and if any issue not addressed by the legislature, then the last resort of the citizens could be Judiciary only. The social issues can be addressed through Judiciary only.

The supreme Court in the year 1998 in Vineet Narain -vs- Union of India and another⁴⁷ observed that, it has obligation under Article 32 to protect and enhance fundamental rights even in the absence of legislation by Parliament.

In the case of Bachan Singh -vs- State of Punjab⁴⁸, the Supreme Court held that, we must leave unto the legislature the things that are (the things of) legislatures'. The highest Judicial duty is to recognize the limits on Judicial power and to permit the democratic process to deal with matters falling outside of those limits.

In the case of Pandit MSM Sharma -vs- Sri Krishna Sinha⁴⁹, the supreme court has held that, no court can go into the questions which are within the special jurisdiction of Legislature itself like., power to conduct its own business. In the England landmark case of Laker Airways -vs- Department of Trade⁵⁰ has observed the role of the Judge in such a manner that a Judge is of a referee. They can blow their Judicial whistle when the ball goes out of play; but, when the game restarts, they must neither take part in it nor tell the players how to play. The Chief Justice added that the judicial whistle needs to be blown for a purpose and with a caution. It needs to be remembered that court cannot run the government. It has the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the constitution to accommodate the challenged violation. The above observation of the supreme court crystal clearly reveals that the Judiciary can overlap the powers and functions of Legislature in such a manner that, there should be some restraint and caution, while overlapping. The Judiciary must realise that they cannot run the government and cannot take the role of executive or legislature and should not take part in the activities entrusted to other organs of the state. The next thing is that, they cannot say how to legislate or how to perform.

⁴⁷ 1998 (1) SCC 226

⁴⁸ 1980 (2) SCC 687

⁴⁹ 1960 SC 1186

⁵⁰ 1977 (2) WLR 234.

Thus, the above said two parameters can be taken into account while there is necessity of overlapping of powers by Judiciary over the Legislature.

9. Conclusions and Suggestions: -

In fine, from the above-said circumstances and analysis of various circumstances, the Judiciary cannot have absolute power in encroaching or transgressing the legislative power, as it will lead to confusion and indirect implications on the democratic arrangement of the country. The efforts and deliberations made by the legislatures of India will be wasted in terms of time and costs and it can be resolved through the changes made in the initial stage of enacting legislation itself. The Parliament itself has to be reformed in such a manner that, it has to enact laws to prevent Legislative Vacuum in future. It has to undergo several studies and discussions and deliberations on various issues prevailing at present and Legislations to rectify the already issues developed and not it resolved. The Parliament has to increase the number of working days, prevent hasty or quick passing of bills. The Parliament may refer all the bills to Departmental standing committees on concerned departmental matters.

In *A.K. Kaul vs. Union of India*⁵¹, the Supreme Court has held that the task of interpreting the constitution was entrusted to the judiciary and it can review the validity of any action of any authority functioning under the Constitution on the parameters laid down in the Constitution so as to ensure that the exercise of power by the authority is not ultra vires of the limitations placed by the Constitution on exercise of such power. This power of judicial review is thus implicit in a written constitution, and unless expressly excluded by a provision of the Constitution, it is applicable in respect of the exercise of powers under any of the provisions of the Constitution. In a case reported in *Rattan Chand Hira Chand -vs- Askar Nawaz Jung*⁵², the supreme court has held that the legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is therefore not only necessary but obligatory on the courts to step in to fill the lacuna.

In the book namely, *Making of India's Constitution* by H.R. Khanna published by Eastern Book Company (2008), 74, the supreme Court in *Dayaram -vs- Sudhir Batham and others*⁵³, the

⁵¹ 1995(4) SCC 73

⁵² 1991 (3) SCC 67

⁵³ 2012(1) SCC 333

supreme court doubted the correctness of this Judgment on the presumption that, the competence of the supreme court to issue such directions were allegedly to be legislative in nature. Hence, the matter was referred to a larger bench. The larger bench held that in exercise of the powers conferred upon it by Article 32 read with Article 142 of the constitution the directions issued by the supreme court were valid and laudable, as the same had been made to fill the vacuum that existed in the absence of any legislation, to ensure that only genuine SC/ST and OBC candidates would be kept out. Simply filling up an existing vacuum till the legislature chooses to make appropriate laws, does not amount to taking over the functions of the legislature.

In *Kalyan Chandra Sarkar -vs- Rajesh Ranjan*⁵⁴, the supreme court has observed that, Article 142 is an important constitutional power granted to supreme court to protect the citizens. In a given situation, when the laws are found to be inadequate for the purpose of grant of relief, the court can exercise its Jurisdiction under Article 142 of the constitution. In addition to that, the court observed that, directions issued under Article 142 forms the Law of the Land in the absence of any substantive law covering the field and such directions fill the vacuum until the legislature enacts substantive law. This Supreme Court has issued guidelines and directions in several cases for safeguarding, implementing and promoting the fundamental rights, in the absence of legislative enactments.

Thus, we can infer that Judicial encroachment though raises some questions on encroachment in the Legislative field, we cannot deny the real fact that, the Judiciary has come up with proper solutions at the times of contingencies and eventualities to support and Co- ordinate with the real powers and functions of the Parliament. Moreover, it is evident that, the guidelines issued by the supreme court in case of D.K. Basu case, Vishaka case, Prakash Sing case and so on are all the measures taken by the Judiciary to fill up the lacuna, which should be finalised and legitimized by the Parliament as a permanent solution and those guidelines will be of temporary nature as observed by the supreme court till the appropriate legislations are made by the Parliament. The Articles 32 and 142 empowers the supreme court to venture its powers over the legislative powers and functions till the proper solution is made out. Hence, the Parliament is entrusted with the role of bring out legislations for future generations and Legislations applicable for the public at large in India in order to prevent Judicial overlapping or encroachment on the powers and functions of Legislature or Parliament.

⁵⁴ AIR 2005 SC 972