TITLE : Judicial Activism V Judicial Restraint

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JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT

1. INTRODUCTION

The concept of judicial activism rests on the concept of Rule of Law and the doctrine of Separation of Powers. it is the doctrine of the Independence of the Judiciary which placesthe Judiciary in such a position where it plays the crucial role of an activist in order to protect the public against any kind of injustice. It is this power which enables the Judiciary to step forward to fill in the gap created by the Legislature and the Executive. According to Glanville Austin[1], the Supreme Court has been called upon to safeguard civil and minority rights and play the role of 'guardian of the social revolution'. It is the ultimate interpreter of the provisions laid down under the Constitution of India.

According to S.C Kashyap[2] , noted Constitutional expert," In a representative democracy, administration of justice assumes special significance in view of the rights of individuals which need protection against executive or legislative interference. An independent and supreme Judiciary is also an essential requisites of a federal polity when tere is a constitutional division of powers between the federal government and governments of the constitutional units and a functional division of powers between the executive, legislature and the judiciary."

1.1 Meaning of Judicial Activism:

An eminent Indian Jurist defines Judicial Activism in the following words:

"(Judicial) Activism is that way of expressing judicial power which seeks fundamental recodification of power relations among the dominant institutions of State, manned by members of the ruling class."[3]

Judicial activism refers to that mechanism of justice delivery to the persons particularly in areas not covered by any statute made by the Legislation. It is a concept which indicate towards the creative aspect of the judicial mind used for dispensation of proper justice to the needy. The two essentials of the Principles of Natural Justice that no one shall be condemned

[1] Austin Glanville , The Indian Constitution – Cornerstone of a Nation 169 (2000)
[2] S. C Kashyap, Our Constitution 205 (1999)
[3]UpendraBaxi, Courage Craft and Contention – The Indian Supreme Court in the Eighties (Bombay: 1985) at p.9.

unheard and no one can be a judge in his own cause are the creation of Judicial Activism which has been applied time and again by the Judiciary in the process of justice delivery. It actually is a kind of obligation shouldered upon by the Judiciary to deliver justice according to the letter and spirit of the Constitution.

1.2 Origin of Judicial Activism:

The concept of judicial activism has it roots in the English concepts of 'equity' and 'natural rights'. Whereas in America te concept of judicial activism can be found in the concept of 'judicial review'. The first landmark judgement related to te concept was the case of *'Madbury v. Madison'*[4] where for the first time the judiciary took an active step above the legislative actions. The American Judiciary with the power of judicial review embarked upon the era of Judicial Activism in 1954 in the landmark case of *Brown v. Board of Education*[5].In the case of*Plessyv. Fergusson* the Supreme Court not only abolished the laws which treated blacks as a separate class but also guaranteed such rights which were clearly provided for in the Constitution.

1.3 Reasons behind the growth and development of Judicial Activism:

it is not practically possible to state the reasons behind the growth and development of Judicial Activism keeping in view the various dynamics of the judicial power. The following are some of the recognized reasons which stimulates the Judiciary to play an active role during the delivery of the judicial functions.

(i) Failure of the Governmental Machinery:
(ii) To safeguard the people against violation of the Fundamental Rights or other rights
(iii)Participation in Social Reform
(iv)Agent of Social Change
(v) To fill in the gap created by the Legislative and the Executive
(vi)Constitutional Empowerment
(vii) Authority to make final declaration as to the validity of law
(viii) Guardian of the Constitution
(ix)Public faith in the Judiciary

[4]Marburyv.Madison5 U.S (1 Cranch) 137 (1803).
[5]Brown v. Board of Education 347 U.S 483 (1954)

The expression 'Judicial Activism' is anathema to Judicial Restraint. Judicial Activism is a dynamic process of the Indian legal system which was introduced by Arthur Schlesinger Jr. in a January 1947 in an article titled "The Supreme Court: 1947" published in the Fortune Magazine.[6]

2. CONSTITUTIONAL PROVISIONS RELATING TO JUDICIAL ACTIVISM

The Judiciary is considered as a separate and an independent entity of the Government as enshrined under the Government of India Act of 1935 and subsequently under the present Constitution of India which thereby make it essential to delve into the development of Judicial Activism post 1935. However,prior to 1935 certain Judges of the High Court had demonstrated the pattern of Judicial Activism such as in the year 1893 Justice Mahmood of the Allahabad High Court gave a dissenting opinion in a case which dealt with an undertrial who could not afford to engage a lawyer. Justice Mahmood held that the pre-condition of the case being heard can only be fulfilled when somebody speaks.[7]

The provisions laid down under the Constitution of India allows the Judiciary to play an assertive role for the benefit of the society at large. Under the provisions of the Article 13 the Judiciary has been empowered to review the validity of any law keeping in view the Fundamental Rights and to declare the same as void if violates the Fundamental Rights. As per the provisions of the Article 19, the Court has the power to examine the "reasonableness" of the restrictions imposed on the exercise of the Fundamental Rights. Under Article 32 any person whose Fundamental Rights have been violated can approach the Apex Court directly for safeguarding the same. Article 32 is considered to be very powerful as this Article is a Fundamental Right in itself under the heading "Right to Constitutional Remedies". Thus the Apex Court has been designated as the guardian of the Constitution of India which allows it to play a crucial role in both legitimate judicial legislation and judicial governance.

Under Article 131 of the Constitution of India, the Supreme Court has been vested with the power of the exercising appellate jurisdiction in all the Civil, Criminal and Constitutional matters.[8] The Supreme Court has been vested with advisory jurisdiction to advise the President on any question of fact or law that may be referred to it.[9] The Apex Court has rule

[6]Kmiec, Keenan D. 'The Origin and Current Meanings of Judicial Activism' (2004)
[7]Balakrishna, When Seed for Judicial Activism was Sowed, Hindustan Times, April 1, 1996
[8]Under Article 132 to 137 of the Constitution of India.
[9] Under Article 143 of the Constitution of India

making power under the provisions of Article 142 and 145. Under the provisions of Article 129 the Supreme Court has the power to punish any person for its contempt.

All the provisions discussed above point towards the vast powers possessed by the Judiciary thereby giving the Supreme Court ample power to play an active role of the protector of the common man during the crisis.

3. COMPARATIVE ANALYSIS WITH BEST PRACTICES

Judicial review is the power of the courts to decide upon the constitutionality of legislative acts.[10] 10 A comparative analysis of judicial review demonstrates that the institution can be implemented in many ways, and the notion of judicial review represents a fascinating synthesis of contradictory schools of thought.[11] 11 The different means by which judicial review is employed also contributes to an amplified understanding of our own psychological responses to the tyrannies of our time.[12]12

Laws will inevitably change, but the Higher Law, which reflects society's fundamental values, must remain.[13] 16 A law that contravenes this Higher Law cannot be a law, and judicial review is a way to ensure that such laws cease to exist.[14]

The doctrine of judicial review lies at the root of natural law theories, and it implies the right to disobey the unjust law, whatever sacrifice disobedience may entail.[15] 18 Judicial review provides the means to restrain the arbitrary exercise of governmental power.[16]

Germany

In Germany the constitutional courts have all the ability to decide for questions of constitutional law. When a party raises a constitutional objection to a statute involved in any civil, criminal, or administrative case, the court hearing the case will refer the question to the

[10] ALLAN R. BREWER-CARIAS,jUDICIAL REVIEW IN COMPARATIVE LAw 1 (D.F. Bur ed., 1989).
[11] See MAURO CAPPELLETTI, THE jUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 117 (Paul j. Kollmer & Joanne M. Olson eds., 1989).
[12] See id.
[13] See CAPPELLETTI, supra note II, at II7.
[14] See id.
[15] See id. Americans, who first effectively implemented judicial review, were willing to admit the theoretical primacy of certain kinds of law and were ready to provide a judicial means for enforcing that primacy. MAURO CAPPELLETTI, jUDICIAL REVIEW IN THE CONTEMPORARY WoRLD 25 (l97I).
[16] See id. at I.

Constitutional Court (the Bundesverfassungsgericht) for decision if it thinks that the statute is unconstitutional.[17](1) When the decision of the Constitutional Court is issued, the original proceeding is resumed.[18](2) The Constitutional Court has a monopoly position in that it alone can declare statutes invalid.[19](3). Furthermore, the Court decision is not only binding on litigants but is also binding on constitutional organs, courts and authorities of Germany. The decisions of the Constitutional Court, however, are not binding on the Court it-self. [20](4) The Court has explicitly declared that it is permitted to dismiss legal opinions stated in earlier decisions, regardless of its importance to the earlier decision.[21] (5)

Four well-known constitutional principles which partially comprise the "Rule of Law" lend explanation for judicial review in Germany.[22] (6) First, the separation of powers is explicitly maintained in the German Constitution, and it is implicitly maintained in the provisions that govern judicial competency. [23](7) Second, the independence of the courts and judges is stipulated by the German Constitution which states that "the judges shall be independent and subject only to the law."[24](8) Third, the binding force of statutory law upon judges and

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[17] . MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 92-93 (2d ed. 1994). The judge is not entitled to leave the statute which he regards as unconstitutional unconsidered in the course of the actual case. Dr. Jorn Ipsen, Constitutional Review of Laws, in MAIN PRINCIPLES OF THE GERMAN BASIC LAW 107, 112 (Christian Starck ed., 1983). According to Article 100(1) of the Grundgesetz, or the Basic Law, he is obliged to suspend the case and submit the question to the German Constitutional Court.

[18] GLENDON, supra note 37, at 93. While the lower courts do not make the ultimate decisions regarding constitutionality, they do play an important role in the judicial process. See id. at 92-93. They determine whether a statute is unconstitutional, warranting review by the Constitutional Court. See id. If they do not think a statute is unconstitutional, then the issue will not go to the Constitutional Court for its decision.

[19] Ipsen, supra note 37, at 112. It has a monopoly of constitutional jurisdiction because the other German courts lack the rights assumed by federal and state courts in the United States to invalidate, or at least refuse to apply, legislation on the grounds of unconstitutionality. BLAIR, supra note 5, at 27. Although German courts, in the course of adversary proceedings, have the unrestricted competence of accessory or incidental judicial review, they do not have authority to declare statutes invalid. Ipsen, supra note 37, at ll2. This procedure is commonly described in legal literature as the right of an individual judge to review but not repeal statutes.

[20] Wolfgang Zeidler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms, 62 NoTRE DAME L. REv. 504, 520 (1987). Once the Court declares a norm unconstitutional, the legislature is prevented from repromulgating the same provision. !d at 521

[21] !d. Realistically, however, the Court departs from its own precedent only with great reluctance. Zeidler, supra note 40, at 521. Because of its unique ability to establish binding interpretations of the Basic Law, the Federal Constitutional Court, as the highest court, must be authorized to correct legal opinions which are later found to be inappropriate, excessively far-reaching, or based on false precepts. !d. In accord with this authority, the Court recently corrected fixed guidelines for building development plans which were too general. Id. (citing 70 BVerfGE 35, 53). After a detailed analysis of the res judicata effect in each individual case, the Court arrived at a more differentiating solution, stating it would no longer adhere to the earlier case law. ld.

[22] Erhard Denninger, judicial Review Revisited: The German Experience, 59 TuL. L. REv. 1013, 1015 (1985).

[23] Erhard Denninger, judicial Review Revisited: The German Experience, 59 TuL. L. REv. 1013, 1015 (1985).

[24] Id. (citing GRUNDGESETZ [Constitution] [GG) art. 97, para. 1). Paragraph 3 of Article 1 of the Basic Law provides that fundamental rights shall bind the legislature, the executive, and the judiciary as "directly enforceable law." GG art. 1, para. 3. Furthermore, Article 20, paragraph 3 of the Basic Law states that the executive and the judiciary shall be bound by "Gesetz and Recht," which means "law and justice." /d. art. 20, para. 3.

executive officers is primarily an interpretive, not a political or institutional, problem.[25](9) Whenever the meaning of a statutory rule is clear and precise, the judge will feel bound by it and will accordingly give deference to the statute.(10) Problems arise in those areas of the law where the meaning of the rule is not clear and precise. [26](11) Fourth, the large and comprehensive jurisdiction of the Federal Constitutional Court allows for judicial review.[27] (12) Although the Constitutional Court has no appellate jurisdiction, when a conflict exists between state and federal law and when the Federal Constitution is at stake, the Court has jurisdiction.[28] (13) Such jurisdiction necessarily allows for judicial review because it allows

the Court to strike down laws inconsistent with the Federal Constitution.[29](14)

I. Means the Constitutional Court Employs to Determine Constitutionality

In Germany, the Court uses "constitutional textualism" to interpret the Constitution. [30](15) According to this method, the Court strictly adheres to the constitutional text. [31](16)However, the Court also utilizes systematic and teleological modes of inquiry. [32](17) The focus is on the text as a whole, and the judges ascertain the theme, or telos, of the Constitution.[33] (18) In order to confirm judgments based on teleological reasoning, the Court employs historical and functional considerations.[34](19)

The Court has invoked theories of its own creation, including the notion of the "objective order of values."[35](20)According to this concept, the Constitution incorporates the "basic value decisions" of the founding fathers, the most basic of which is their choice of a free democratic basic order, including a liberal, representative, federal, parliamentary democracy, buttressed and reinforced by

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[25] Denninger, supra note 23, at 1015-16.
[26] Erhard Denninger, judicial Review Revisited: The German Experience, 44 TuL. L. REv. 1013, 1015 (1985).
[27] Wolfgang Zeidler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms (40, at 505-07,62 NoTRE DAME L. REv. 504, 520, 1987).
[28] Erhard Denninger, judicial Review Revisited: The German Experience, (44 TuL. L. REv. 1013, 1015,1985).
[29] Erhard Denninger, judicial Review Revisited: The German Experience, 44 TuL. L. REv. 1013, 1015 (1985).
[30] See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY LJ. 837, 844 (1991).
[31] See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY LJ. 837, 844 (1991).
[32] See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY LJ. 837, 844 (1991).
[33] See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY LJ. 837, 844 (1991). (The Basic Law must not only be understood as the sum total of individual guarantees and organizational regulations, but also as a unity which is characterized by certain value judgments, especially those concerning basic human rights and the principles of constitutionality and democracy.
[34] Donald P. Kommers, German Constitutionalism: A Prolegomenon,(40 EMORY LJ. 837, 844,1991, at 844-45)
[35] P. Kommers, German Constitutionalism: A Prolegomenon, (at 858, 40 EMORY LJ. 837, 844,1991)

basic rights and liberties.[36](21) These basic values are objective because they have an independent reality under the Constitution, imposing upon all organs of government an affirmative duty to see that they are realized in practice.[37](22) The Constitutional Court incorporates this concept by interpreting the Basic Law (Grundgesetz) in terms of its overall structural unity and by envisioning the Basic Law as a unified structure of substantive values.61 In one case, for example, the Constitutional Court held that a provision in the tax laws which afforded unwed mothers and foster parents certain benefits was constitutionally conforming.[38](23) The Court concluded that fathers of illegitimate children-who are not specifically covered by the wording of the law-could in certain circumstances be considered "foster parents" in view of the constitutional requirement of equality for illegitimate children.[39](24) The Court premised its decision on the assumption that the legislature would have included such a definition if it had recognized the omission.[40](25) In addition to postulating an objective order of values, the Justices of the Federal Constitutional Court have also arranged these values in a hierarchical order crowned by the principle of human dignity.[41](26) It was precisely this principle of human dignity that compelled the Court to strike down a liberalized abortion statute in 1975.[42](27) In its opinion, the Court stated: "That interruptions of pregnancy are neither legally condemned nor subject to punishment is not compatible with the duty incumbent upon the legislature to protect life, if the interruptions are a result of reasons which are not recognized in the value order of the Basic Law. "[43](28)

II. Criticisms and Defenses of Judicial Review as Exercised by the Constitutional Court

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[36] P. Kommers, German Constitutionalism: A Prolegomenon, (at 858-59, 40 EMORY LJ. 837, 844,1991)
[37] P. Kommers, German Constitutionalism: A Prolegomenon, (at 858-59, 40 EMORY LJ. 837, 844,1991)
[38] Wolfgang Zeidler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms,(at 510 62 NoTRE DAME L. REv. 504, 520,1987).
[39] Wolfgang Zeidler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms,(at 510 62 NoTRE DAME L. REv. 504, 520,1987).
[40] Wolfgang Zeidler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms,(at 510 62 NoTRE DAME L. REv. 504, 520,1987).

[41] Donald P. Kommers, German Constitutionalism: A Prolegomenon,(at 860,40 EMORY LJ. 837, 844,1991, at 844-45)
[42] Donald P. Kommers, German Constitutionalism: A Prolegomenon,(40 EMORY LJ. 837, 844,1991, at 844-45)
[43] Abortion Case, 39 BVerfGE 1, 1-2 (1975).

The Constitutional Court is often criticized for its political role. [44](29) Many government agencies and party leaders resort to constitutional litigation for essentially political ends.[45](30) When the Court appears to cooperate in the achievement of these ends, it is sometimes rebuked by German citizens.[46](31) Also, the Court invites objections when it creates value theories, thus imposing its own values on the nation as a whole.[47] (32) For example, in 1993, the Court again asserted an unlimited duty of the state to protect nascent life following the enaction of The Pregnancy and Family Assistance Law of July 27, 1992.[48](33)Therefore, unless one of the exceptions already listed in the law is not present, a termination of pregnancy is fundamentally an unlawful act. [49](34) The difficult problems of judicial review in Germany cannot be resolved by mere resort to statutory or constitutional interpretation because they are caused by functional and political realities. [50](35) The German Constitution's supremacy clause entirely disregards all questions of federal or state competence or jurisdiction. [51](36)"Supremacy" in the German Constitution means the abstract ranking of rules. [52](37) Constitutional rules override all other kinds of rules, including parliamentary statutory law, executive orders, regulations and administrative rulings having the force of law, bylaws of corporations and municipalities, and common law. [53](38) The relationship between federal and state law is briefly covered by a rule within the German Constitution which maintains that federal law shall override state law. [54](39)

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[44] Donald P. Kommers, German Constitutionalism: A Prolegomenon,(at 853, 40 EMORY LJ. 837, 844,1991, at 844-45)

[45] Donald P. Kommers, German Constitutionalism: A Prolegomenon,(40 EMORY LJ. 837, 844,1991, at 844-45)

[46] Donald P. Kommers, German Constitutionalism: A Prolegomenon,(40 EMORY LJ. 837, 844,1991, at 844-45)(Criticism is usually directed against the government agencies or party leaders who would resort to constitutional litigation for essentially political ends.)

[47] See id .

[48] MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 92-93 (2d ed. 1994). (GLENDON, supra note 37, at 116; Rainer Frank, Federal Republic of Germany: Three Decisions of the Federal Constitutional Court, 33]. FAM. L. 353, 355-56 (1994-95). The Pregnancy and Family Assistance Law maintained that a termination of pregnancy within the first twelve weeks was to remain non punishable if the pregnant women consulted a recognized office before the abortion.)

[49] Rainer Frank, Federal Republic of Germany: Three Decisions of the Federal Constitutional Court, 33,FAM. L. 353, 355-56 (1994-95).

[50] Erhard Denninger, judicial Review Revisited: The German Experience,(59 TuL. L. REv. 1016, 1985).

[51] Erhard Denninger, judicial Review Revisited: The German Experience, 59 TuL. L. REv. 1013, 1015 (1985).(The Supremacy Clause asserts that the Basic Law controls the entire German legal order.)

[52] Erhard Denninger, judicial Review Revisited: The German Experience,(59 TuL. L. REv. 1017, 1985).

[53] Erhard Denninger, judicial Review Revisited: The German Experience,(59 TuL. L. REv. 1016, 1985).

[54] See Id (In German, this rule is translated as: "Bundesrecht bricht Landesrecht.")

United Kingdom:

The concept of judicial review has been prevailing in United Kingdom since 1610, when in Dr.Bonham Case [55](40), Lord Coke laid foundation of Judicial Review. But in the case of **City of London v. Wood[56](41)** Chief Justice Holt remarked that "An Act of Parliament can do no wrong, though it may do several things that look pretty odd." The statement established the "Doctrine of parliamentary Sovereignty' which meant that court has no power to decide for the legitimacy of Parliamentary enactments. Britain has been one country where Legislative Supremacy and Parliamentary Sovereignty have existed. Formation of European Convention of Human Rights has widened the scope of judicial review, which had no scope earlier. As we all know, that in UK, there is no written Constitution but still "Parliamentary Sovereignty" is the foundation, not only the foundation, it dominates the constitutional democracy.

The two facets of legislations in UK are:

(i) Primary Legislation categorises those legislations which are enacted by Parliament. They are outside the range of judicial review except in few cases which encroaches the law of European Community law. This state has also changed after the formation of European Union and Human Rights Act 1998, Primary legislation is subject to judicial review in some cases.

(ii) Secondary Legislation, which provides rules, regulation, directives and act of Ministries. This falls in the ambit of judicial review. There are no exceptions to secondary legislation. Courts can review all the executive and administrative functions, rules, regulations and any of the actions can be declared as unlawful, which is ultra vires to the Constitution.

In **Les Verts v. European Parliament**, [57](42) it was held that the "European Union is a community based on the Rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional character"

[55] (1803) 1 Cr. 137
[56] (1701) 12 Mod. 669,687
[57] (1986) E.C.R. 1339.

At present in UK, courts strictly follow the principles of judicial review for secondary legislations and administrative actions. Although primary legislations are not in the ambit of judicial review but except few exceptional cases. Administrative actions which are generally executive in nature, are subject to judicial review.

In, **R. (on the application of Drammeh) v. Secretary of State for the Home Department,[58](43)** an immigration detainee who had failed to take his medication for schizo-affective disorder and had gone on hunger strike, but who did not lack mental capacity, failed to establish that his detention was unlawful by virtue of his pre-existing serious mental illness where the facts indicated that his actions were calculated to avoid deportation. The claimant applied for judicial review of the lawfulness of his immigration detention. It was held that there was no doubt that the effect of detention on a detainee's mental health was a very relevant factor in evaluating what constituted a "reasonable period" of detention. The secretary of state's policy in Chapter 55.10 of the Enforcement Instructions and Guidance in relation to the detention of the mentally ill imposed a duty to inquire into the relevant circumstances of a detainee to assess whether serious mental illness existed and whether it could be satisfactorily managed in detention. Further, it was held that, where a detainee had capacity, his refusal to consent to medical treatment put him outside the scope of the secretary of state's policy statements.

United States of America

Constitution of America is based on Rule of law and provides "separation of powers" with checks and balances. Judicial Review is the power of constitution to check the validity of law. In case the actions of Congress or President are contrary to the constitution, judiciary has the power to declare ultra vires. Constitution of America do not provide any specific provisions for Judicial Review but implicit provisions are incorporated in Article III and IV. According to the ***Bernard Schwartz*** "*The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America."*

Justice Frankfurter in Gobitiz101 case "*Judicial review is a limitation on popular government and is a part of the Constitutional scheme of America*.".

Doctrine of Judicial Review is the most fundamental feature of constitution of America, whose seeds could be traced back in Dr.Bonham's case. ***According to Willis*** *" Dr. Bonham's*

[58] [2015] EWHC 2754.

case was soon repudiated in England , but the doctrine announced in Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the US Supreme Court in the decisions of cases coming before it."103. United States vs Tale Todd was one of the first cases where the act of the Congress was declared as unconstitutional.

But, in 1794, ***United States vs. Tale Todd*** was decided by the Supreme Court of the USA in which Act of Congress was declared unconstitutional. It is said that this was the first case in which the Supreme Court a statute of Congress unconstitutional. Again, in 1796, in ***Hylton vs. United States*** **,** Chief Justice Chase observed that " It is necessary for me to determine whether the court constitutionally possesses the power to declare an Act of the Congress void on the ground of its being contrary to and in violation of the Constitution, but if the courts has such powers, I am free to declare it but in a clear case."

In 1803, again the Act of the Congress was declared as unconstitutional in the historic landmark case of Marbury vs Madison.

According to Chief Justice Marshall, Article III of the Constitution gives the Court the power to exercise original jurisdiction in cases affecting ambassadors and other consuls or where a state is a party.[59] (44) Otherwise, the Supreme Court is to exercise appellate jurisdiction.[60](45) In the last part of his opinion, Marshall considers why the Court, rather than another branch of government, should have the power to pass on the constitutionality of enactments, and he provides several justifications for judicial review. [61](46) First, he asserts that the Constitution controls any legislative act repugnant to it, and the fact that the constitution is written requires judicial review. [62](47) He states, "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."[63](48) Second, Marshall maintains that because judges take an oath to uphold the Constitution, they should be given the power of judicial review.[64] (49) Third, Marshall bases his argument on Article III, Section 2 of the Constitution, and he concludes, "It is emphatically the province and duty of the judicial department to say what the law is."[65](50)

[59] See Marlntry, 5 U.S. (1 Cranch) at 173
[60] See Marlntry, 5 U.S. (1 Cranch) at 173-174.
[61] See Marlntry, 5 U.S. (1 Cranch) at 175-80
[62] See Marlntry, 5 U.S. (1 Cranch) at 173-174
[63] See Marlntry, 5 U.S. (1 Cranch) at 176-177
[64] Marlntry, 5 U.S. (1 Cranch) at 180
[65] Marlntry, 5 U.S. (1 Cranch) at 177

Fourth, Marshall focuses on notions of judicial roles, asserting that it is the ordinary role of courts to interpret the law.[66] (51) That role, Marshall claims, requires judges to construe the Constitution in the ordinary course of conducting business. [67](52) Finally, Marshall contends that the Supremacy Clause lends credence to the existence of judicial review.[68] (53) Laws shall be made in pursuance of the Constitution, and an act repugnant to the Constitution must not be given effect.[69] (54)

After Marbury's judgement there expansion of judicial review has been to a large extent and expanded to powers of the federal. **McCulloch v. Maryland[70](55)** is the historic case is related to the expansion of judicial review in US. Court established that State cannot impose tax on Union authority; court creates immunity to the National Govt. According to this judgment US Supreme court formulates the doctrine of Immunity of Instrumentalities". **Youngstown Sheet Tube Co. vs. Sawyer[71](56)**In this case, President Truman ordered the seizure of the steel in order to avoid the national adversity prevailing at that time. In this way President making a law to seize the steel of all citizen. The Court on the opinion of Justice Black that" it is the instance wherein the legislative encroachment by the Executive was held unconstitutional and further observed that Constitution does not provide law making power to Presidential or Military supervision or control."(57)

The scope of judicial review has widened to a large extent in present scenario. The Supreme Court in the recent case of **Reed v. Town of Gilbert , Arizona[72](58).** In this case an ordinance was passed concerned with Gilbert town which prohibits the display of outdoor sign except some signs which are ***political signs*** which defined as designed to influence the outcome of an election, and ***ideological signs*** which defined as communicating ideas and

[66] Marlntry, 5 U.S. (1 Cranch) at 177-178
[67] Marlntry, 5 U.S. (1 Cranch) at 177-179
[68] The Supremacy Clause provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." U.S. CaNST. art. VI, cl. 2.
[69] GEOFFREY STONE ET AL., CoNSTITUTIONAL LAw 41 (2d ed. 1991).(It is clear, however, that the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that the right to determine the repugnancy of a law belongs to it.)
[70] 4 Wheaton 316(1819)
[71] 343 US 579 (1952)
[72] US Reports Slip Opinion Volume 13-502 (2014**)**

another one ***directional signs*** which defined as directing the public to church or other qualifying event. This ordinance was challenged by a church and its priest.

Justice Clarence Thomas on behalf of the majority held that distinctions drawn by the ordinance were impermissible. It was held that all "content based law" requires the exacting form of judicial review and strict scrutiny. Court further held that content based law which are target speech based on its communicative content are presume to be unconstitutional and may be justified only if the Govt. proves that they are narrowly tailored to serve compelling State interests.

4. Few Cases on Judicial Activism

While the roots of Judicial Activism is deeply embedded in the system of Indian Judiciary and the same could very well be seen in the case of *BandhuaMuktiMorcha v. Union of India*[73].

In India, the interpretation of the concept of 'personal liberty'under the provisions of the Article 21 of the Constitution and its variance from *A. K Gopalan v. State of Madras*[74] *to Maneka Gandhi v.Union of India*[75]demonstrates the power of Judicial Activism exercised under the skill as an Interpreter of the Constitution. The interpretation of equality in terms of "reasonable classification" and the shift towards a focus on "rule against arbitrariness" was witnessed in *E P Royappa*v. *State of Tamil Nadu*[76].

In *Sakal Newspapers Private Ltd. v. Union of India*[77], it was held that a price and page schedule that laid down how much a newspaper could charge for a number of pages was being violative of the freedom of the press. The Supreme Court held that a newspaper was not only a business but a vehicle of thought and information and therefore could not be regulated by any other business. In *Balaji v. State of Mysore,*[78] the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of laws. In *Chitralekha v. State of Mysore*[79], the court imposed similar restrictions on the reservation of jobs in civil services.

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[73] AIR 1984 SC 802
[74]AIR 1950 SC 27.
[75]AIR 1978 SC 597.
[76]AIR 1974 SC 555.
[77]Sakal Newspapers Private Ltd. v. Union of India AIR 1962 SC 305
[78]AIR 1963 SC 649.
[79]AIR 1964 SC 1823

In the Godavaram[80] case, the court with regard to forest protection, made the state government obligated to perform its duty with regard to the same. A classic example of judicial overreach, the court observed " In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non forest activity within the area of any "forest". In accordance with Section 2 of the Act, all on - going activity within any forest in any State throughout the country, without the prior approval of the

Central Government, must cease forthwith. It is, therefore, clear that the running of saw mills of any kind including veneer or ply - wood mills, and mining of any mineral are non - forest purposes and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is prima facie violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forthwith."

The decision in *Sebastian M. Hongray v. Union of India*[81] involved the failure of the Government to produce two persons in the court. In fact, the truth was that these two persons who were taken into custody by the military had met unnatural death. The Court, in the circumstances, keeping in view the torture, the agony and mental oppression undergone by the wives of the persons directed to be produced, instead of imposing fine on the Government for civil contempt of the Court, required that "as a measure of exemplary costs as is permissible in such cases", the Government must pay rupees one lakh to each one of the aforesaid two women.

In *NilabatiBehera v. State of Orissa*[82], is yet another case of custodial death where the deceased was taken into police custody and the next day his body was found on the railway tracks with multiple injuries. The Supreme Court once again reiterated that in case of violation of fundamental rights by State's instrumentalities or servants, the Court can direct the State to pay compensation to the victim or his heir by way of "monetary amends" and redressal. The principle of "sovereign immunity" shall be inapplicable in such cases. Having regard to the age and income of the deceased, the State was directed in this case to pay Rs 1,50,000 as compensation to the deceased's mother. The court stated that " *We respectfully concur with the view that. the court is not helpless and the wide powers given to this Court by Article 32 , which itself is a fundamental right, imposes a constitutional obligation on this*

[80]WRIT PETITION NO. 202 OF 1995
[81]AIR 1984 SC 1026
[82] AIR 1993 1960

Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the awardof monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf The contrary view would not merely render the court powerless and the c o n s t i t u t i o n a l g u a r a n t e e a m i r a g e b u t m a y , i n c e r t a i n s i t u a t i o n s , b e a n i n c e n t i v e t o extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. It the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the fact s of each case. This remedy in public law has to be more readily available when invoked by the have not, who are not possessed of the wherewithal for enforcement of their rights in p r i v a t e l a w , e v e n t h o u g h i t s e x e r c i s e i s t o b e t e m p e r e d b y j u d i c i a l r e s t r a i n t t o a v o i d circumvention of private law remedies, where more appropriate. compensation in civil law or criminal law could still be claimed in addition to this " . The Court clarified that "public law proceedings" are different from "private law proceedings" and the award of compensation in proceedings for the enforcement of fundamental right under Articles 32 and 226 of the Constitution is a remedy available in public law.

In *Indira Sawhney v. Union of India,* a three Judges Bench of the Supreme Court faced an unusual moment when one of its directions in the Mandal Commission Judgement to the States to identify the advanced section among the Backward Classes of citizens that is the creamy layer for the purpose of excluding them from availing the benefits of reservation. In the said case the Kerala State Backward Classes (Reservation of Appointments/Postings Services) Act, 1995 gave retrospective effect that "no creamy layer" exists in State of Kerala was held unconstitutional which took serious note of the actions of Kerala Government and directed contempt proceedings against the State.

The Guidelines laid down by the Apex Court relating to the sexual harassment of women at workplace in the case of *Vishakha v. State of Rajasthan*[83]is a perfect instance demonstrating the Judicial Activism in its actual sense.

In *Centre for PIL v. Union of India*[84] two writ petitions were filed challenging the appointment of the then Central Vigilance Commissioner and said appointment was quashed primarily due to his involvement in 2G Spectrum allocation.

In the case of *Youth Bar Association of India v. Union of India*[85]- the Supreme Court directed that the copies of the FIR (First Information Report) of the cases which are not sensitive in nature to be uploaded on the police website with twenty four hours of the registration of FIR and in cases where there is no such website then on the official website of the State Government. Further the Bench gave certain stipulations for the areas facing internet connectivity issues.

In *Hiral P. harsora and ors v. KusumNarottamdasHarsora*[86]– the SC struck down the words "adult male" before the word "person"in Section 2(q) of the Domestic Violence Act holding these words discriminate between oersons similarly situated and is contrary to the object sought to be achieved by the Domestic Violence Act.

Voluntary Health Association v. State of Punjab[87] The Supreme Court issued additional directions to curb female foeticide by effective implementation of the "The Pre-conception and Pre-Natal Diagnostic Techniques Act, 1994

Vijay Kumar Mishra and Anr v. High Court of Judicature at Patna and Ors[88] the Apex Court held that Article 233 (2) of the Constitution of Indiaonly prohibits the appointment of a person as District Judge, who is already in the service of the Union or the State, but not the selection as a person . The Court set aside the judgment of the High Court of Patna which had required the aspirant to resign his membership of the subordinate judicial service if he aspires to become a District Judge.

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[83] AIR 1997 SC 3011
[84] AIR 2011 SC 1267
[85]W.P (Crl.) No. 68 of 2016
[86]CIVIL APPEAL NO. 10084 OF 2016
[87] W.P (CIVIL) No. 349 OF 2006
[88]CIVIL APPEAL NO. 7358 OF 2016

Kerala Public Service Commission v. State Information Commission[89]– the Supreme Court observed that the request of the information seeker about the information of his answer sheets and the details of the interview marks can be and should be provided to him by the Public Service Commission under the Right to Information Act, 2005.

SwarajAbhiyan v. Union of India[90]- A two judge bench of the Supreme Court of India issued guidelines for disaster / drought management in the backdrop of a declaration of drought in some districts or parts thereof in nine states that is Uttar Pradesh, Madhya Pradesh, Karnataka, Andhra Pradesh, Telengana, Maharashtra, Odisha, Jharkhand and Chhattisgarh.

JeejaGhosh v. Union of India[91]– the Apex Court asked the Spicejet Ltd. to pay Rupees Ten Lakhs to JeejaGhosh who is an eminent activist involved in disability rights for forcibly de-boarding her by the flight crew, because of her disability. The bench comprising of Justices A.K Sikri and R. K Aggarwal also issued the guidelines with regard to 'carriage' by persons with disabilities and /or persons with reduced mobility and observed that People with disabilities also have the Right to live with dignity.

5. CONCLUSION AND WAY FORWARD:

The impact of Judicial Review strengthens the power of the Courts in the present scenario of UK, where parliamentary sovereignty exists with judicial review. In so many countries, judiciary is playing the role of a guardian of the Constitution by using the power of judicial review. Judiciary has been strictly scrutinizing the validity of law or any of the administrative actions. Legislature and Executive must enjoy their powers within their limitation. Separation of power is the concept which is correlating all the three organs and it is the duty of the Court to maintain checks and balances. But in India, courts can only take a decision when a matter comes before it. Parliament is vested with the duty of making law but in USA and UK courts evolving judicial legislation. The courts power of judicial review keep a check over executive and the legislature from delegating essential functions and also sometimes discourage the legislature from enacting void and unconstitutional legislation. In India and US there are constitutional limitations before the legislature so that it does not override its powers. Judiciary do not have all the powers, even there is an limitation over the powers of the Courts. They cannot deal with constitutionality of an issue just in advance, even cannot

[89]CIVIL APPEAL NO. 823-854 OF 2016
[90]W. P (CIVIL) NO. 857 OF 2015
[91]WRIT PETITION (CIVIL) NO. 98 OF 2012

merely void the law on basis of personal sentiments. In all countries, judicial review acts as a guardian to the constitution. Cooperative federalism which once again reemphasis the value of constitutional and political federalism and creates better harmony between States and Centre. Independence of the judiciary is one other important concerns of the judicial review, incase of a wrong judgement, it would be great injustice to giving decision to the invalid laws.

As Justice P.N. Bhagwatiin his minority judgment in ***Minerva Mills case*** observed " *It is for the judiciary to uphold the Constitutional values and to enforce the Constitutional limitations, that is the essence the Rule of law, which inter alia requires that the exercise of powers by the Government whether it be the legislative or the executive or any other authority be conditioned* by the Constitution and the law"

Courts helps in jmaintaing harmony in the State. Declaring unconstitutional laws a s invalid, courts contributes in maintain individual freedom of the citizen. We the speople of India should have faith and belief in the doings of the Supreme Court as it is acts as the guardian of the State.