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A Critical Analysis on Judicial Review, Judicial Activism and Judicial Restraint in India

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ABSTRACT

India practices constitutional democracy with emphasis on constitutionalism. The judiciary protects the Constitution and the rights of the citizens from arbitrary actions of the legislature and Executive for which the judiciary has assumed the onerous role of a watchdog of the Constitution. This paper discusses in detail about the origin and evolution of Judicial Review, and the process of judicial review followed in Germany and Bangladesh and further discusses about the features, types, criticisms and justification of judicial review in India by way of examining various landmark cases and recent decisions pronounced by the Hon'ble Supreme Court and High Court's. The paper also discusses about the Judicial Activism in Indian perspective. Some believe that judicial activism is necessary for the protection of public interest, others are of the opinion that as a judicial function, courts are required to interpret law and not make them. To observe whether the Supreme Court in such cases has 'expanded' its judicial functions beyond its mandate, thus blurring the concept of separation of powers enshrined in the Indian Constitution. To check upon the need for Judicial Restraint. The paper contends that judicial activism has done positive justice but judiciary has to take care of sanctity of the Constitution. For this purpose, various constitutional provisions and judicial decisions are examined.

Keywords: *Judiciary, Complete Justice, Judicial Review, Judicial Activism, Judicial Restraint.*

I. INTRODUCTION

In the Democratic System of Government, various functions of the government are performed by its three different organs - legislature, executive and judiciary. The legislature makes law. The executive, practically known as government, implements law, maintains law and order and makes policies. The judiciary settles dispute in accordance with law and interprets the law. The Doctrine of Separation of Powers envisages that one organ of the government should not perform the functions of other organs and should not interfere with jurisdiction of other organs.

With the emergence of the concept of Welfare State, the functions of the executive increased

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unprecedently and certain power of the legislature was delegated to it so that it can successfully discharge its responsibility[2]. By exercising delegated power, delegated legislation in the form of rules, regulations, notifications, by laws *etc*. are made by it in order to fulfill the multi facet responsibility delegated to it. The executive also performs judicial function while deciding departmental matters which is known as its quasi-judicial function. Hence, the Doctrine of Separation of Powers is not applicable in its strict sense in the age of Welfare State.

It is beyond doubt that the role of judiciary transforms the conventional role into more active participatory role to cope with the changing society. The judicial attempts for protecting the rights of the citizen properly and for restraining constitutional transgressions by the others and sometimes, it suffices beyond the traditional boundary by using judicial mind and judicial intellect and hence, it introduces judicial activism. The modernist judicial approach of „judicial activism" holds its position with the aim of ensuring just and proper justice to all. It is noted that, if judges should use this instrument whimsically, it should be ascertained as judicial overreaching.

(A) Objectives

1. To observe about the concept of separation of powers enshrined in the Indian Constitution.
2. To study in detail about the origin and development of Judicial Review.
3. To explain about the process of Judicial review in India, its features, types and criticisms with various judicial pronouncements.
4. To analyse the process of judicial review in Bangladesh and Germany.
5. To discuss in detail about the Judicial activism with various case laws.
6. To check for the need of judicial restraint in India.

(B) Research Methodology

The present research paper, "A CRITICAL ANALYSIS ON JUDICIAL REVIEW, JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT IN INDIA" is based on both primary and secondary data collected from different sources. The primary data was collected from various Constitutions. So far as the secondary sources are concerned, they were accumulated from number of research papers of reputed journals, articles published in various blocks, judgements delivered by Hon'ble Supreme Court and High Courts, books and newspapers. The research

[2] Seervai HM, Constitutional Law of India: A Critical Commentary. Vol II. 4th Edn. Universal Law Publishing, 2015.

method used in the present study for exploration of data which amassed from different sources is descriptive research method.

II. DOCTRINE OF SEPARATION OF POWERS

The classic statement of Montesquieu has become one of the cardinal principles of governance in a modern constitutional democracy. While formulating the above proposition, however, Montesquieu was not clear about the inherent salient features that are the pre-requisites for a cohesive and hassle-free governance structure. These inherent salient features include :-

(i) A written constitution which establishes its supremacy over any institution created under it;

(ii) Distribution of powers among the three organs of the State; and

(iii) the co-equal status, along with the coordinating powers of each of the three organs.

The doctrine of separation of power has not been adopted in its classical and strict sense. This is very well reflected from the various provisions of the Constitution but no express mention it. For instance, Article 53(1) expressly vests the executive power of the union in the President, and Article 50 clearly states that the State should take necessary steps to separate judiciary from the executive. In the Indian Context, 'Separation of Power' is one of the basic features of the Indian Constitution, which has been rightly declared by the Supreme Court of India in the matter of ***State of Bihar*** v. ***Bal Mukund Shah***[3].

In ***Rai Sahib Ram Jawaya Kapur & Ors.*** v. ***The State of Punjab***[4], the Supreme Court, therefore, observed: *"The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."*

The Constitution further reinforces the doctrine of separation of powers thus:

Article 122: "Courts not to inquire into proceedings of Parliament

Article 212: "Courts not to inquire into proceedings of the Legislature

These provisions are illustrative enough to reach the conclusion that the Constitution makers took every possible measure to have a robust form of 'separation of power' under the Indian Constitutional scheme, thereby upholding the independence of each organ of the state, while

[3] (2000) 4 SCC 640.
[4] AIR 1955 SC 549.

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at the same time, keeping the mechanism of 'Checks and Balances' intact, so as to uphold the flag of the Rule of Law and to maintain the Supremacy of the Constitution.

Subsequently, in ***L. C. Golak Nath & Ors.*** v. ***State of Punjab & Anr.***[5], the Supreme Court reinforced its view with respect to separation of powers thus: *"The constitution creates Legislature, the Executive and the 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"*

The Separation of Powers has been recognized as one of the basic features of the Indian Constitution in *Kesavananda Bharati* v. *State of Kerala*[6] and the same has also been observed in *State of West Bengal* v. *Committee for Protection of Democratic Rights*[7] as follows: "It is trite that in the constitutional scheme adopted in India, besides supremacy of the Constitution, the separation of the powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution."

III. ORIGIN AND EVOLUTION OF JUDICIAL REVIEW

The word judicial review at a very early instance came before the court in Dr Bonham Case. In this case, Dr Bohnam was forbidden to practice in London by the Royal college of physicians as he was not having a license for the same. This case is known for the violation of Principals of Natural Justice as in this case there is Pecuniary bias. As Dr Bonham is fined for his without a license, practicing the fine would be distributed between the king and the college itself.

The Doctrine of Judicial Review was for the first time propounded by the Supreme Court of America. Originally, the constitution of United States did not contain an express provision for judicial review but it was assumed by the *Supreme Court of United States in the historic case of Marbury vs Madison*[8]. *Chief Justice Marshall* observed that "the constitution is either superior paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts and like other acts is alterable when the legislature shall please to alter it..... Certainly, all those who framed written constitutions contemplate them as forming the fundamental and paramount law of the nation and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void.... It is emphatically the province and duty of the judicial department to say what the law is".

In India the power of Judicial Review was exercised by the courts prior to the commencement

[5] AIR 1967 SC 1643.
[6] AIR 1973 SC 1451.
[7] AIR 2010 SC 1476 at 1487 para 26.
[8] 5 U.S. 137 (1803)

of the Constitution of India. The British Parliament introduced Federal System in India by enacting the *Government of India Act, 1935*. Under this act both the Central and State legislatures were given plenary powers in their respective spheres. They were supreme in their allotted subjects. The power of judicial review was not specifically provided in the constitution but the constitution being federal, the Federal court was entrusted impliedly with the function of interpreting the constitution and determine the constitutionality of legislative acts.[9]

The Supreme Court of India as a successor of Federal Court of India after the commencement of Constitution of India, 1950 inherited the great traditions built by the Federal Court. The constitution of India envisages a very healthy system of judicial review and it depends upon the India judges to act in a way as to maintain the spirit of democracy. In the present democratic setup in India, the court cannot adopt a passive attitude and ask the aggrieved party to wait to public opinion against legislative tyranny, but the constitution has empowered it to play an active role and to declare a legislation void, if it violates the constitution.

The constitutional thinkers of India before the Indian Republic were established were of the view that in the constitution of free India there must be provisions for supreme court with the power of judicial review.

IV. JUDICIAL REVIEW IN INDIA

The power of judicial review has been expressly provided in the Article 13 of the Indian Constitution. Article 13 of the Indian Constitution prevents legislatures to make any law which "may take away or abridge the fundamental rights" guaranteed by the Constitution. Any law is declared as void if it is "inconsistent with or in derogation of the fundamental rights".

Constitutional basis of the judicial review has been provided by Article 13 as it entrusts the Supreme Court and the High Courts the power to interpret the pre-constitutional laws and to settle whether they match with the values and principles of our present constitution. But they must be constitutionally compatible, otherwise any deviation makes them void.

(A) Features of Judicial Review

Power of judicial review can be exercised by both the Supreme Court and High Courts: Under Article 226 a person can approach the High Court for violation of any fundamental right or for any legal right. Also, under Article 32 a person can move to the Supreme Court for any violation of the fundamental right or for a question of law. But the final power to interpret the constitution lies with the Supreme Court its decisions are binding all over the country.

[9] Deshpande, V.S., Judicial Review of Legislation (1975), Eastern Book Company, Lucknow.

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Judicial Review of both state and central laws: Laws made by centre and state both are the subject to the judicial review. All the laws, order, bye-laws, ordinance and constitutional amendments and all other notifications are subject to judicial review which are included in Article 13(3) of the constitution of India.

Judicial review is not automatically applied: The concept of judicial review needs to be attracted and applied. The Supreme court cannot itself apply for judicial review. It can be used only when a question of law or rule is challenged before the Hon'ble court.

Principle of Procedure established by law: Judicial Review is governed by the principle of "Procedure established by law" as given in Article 21 of the Indian Constitution. The law has to pass the test of constitutionality if it qualifies it can be made a law. On the contrary, the court can declare it null and void.[10]

(B) Types of Judicial Review

1. **Reviews of Legislative Actions:** This review implies the power to ensure that laws passed by the legislature are in compliance with the provisions of the Constitution.
2. **Review of Administrative Actions:** This is a tool for enforcing constitutional discipline over administrative agencies while exercising their powers.
3. **Review of Judicial Decisions:** This review is used to correct or make any change in previous decisions by the judiciary itself.

(C) Constitutional Provisions for Judicial Review

There is no direct and express provision in the constitution empowering the courts to invalidate laws, but **the constitution has imposed definite limitations upon each of the organs, the transgression of which would make the law void.**

Some provisions in the constitution supporting the process of judicial review are:

- **Article 372 (1)** establishes the judicial review of the pre-constitution legislation.
- **Article 13** declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.
- **Articles 32 and 226** entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.

[10] Ibid.

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- **Article 251 and 254** states that in case of inconsistency between union and state laws, the state law shall be void.
- **Article 246 (3)** ensures the state legislature's exclusive powers on matters pertaining to the State List.
- **Article 245** states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution.
- **Articles 131-136** entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union; but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land.
- **Article 137** gives a special power to the SC to review any judgment pronounced or order made by it. An order passed in a criminal case can be reviewed and set aside only if there are errors apparent on the record.

Thus, the laws which take away or abridge the fundamental rights are liable to be struck down as ultravires or void by the courts under art 13 (2) by exercising the power of judicial review. *Chief Justice Kania in A.K.Gopalan vs state of Madras*[11], pointed out that it was only by way of abundant caution that the framers of our constitution inserted the specific provisions in Art 13. In India, it is the constitution which is supreme and all statute laws must be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not.

The fundamental subjects of judicial review in the constitution of India relates to the following: 1) Violation of fundamental rights; 2. Violation of various other constitutional restrictions embodied in the constitution; 3. Enactment of legislative act in violation of constitutional mandates regarding distribution of powers; 4. Delegation of essential legislative power by the legislature to the executive or any other body; 5. Violation of implied limitations and restrictions.

These facets of judicial review were pronounced by the S.C.I. in case of *L.Chandra Kumar v. Union of India*[12] stating that the judges of higher court have to interpret legislation up to this end that the Constitutional values are not to be interrupted. To achieve this end, the judges have

[11] *AIR 1950 SC 27*
[12] *AIR 1997 SC 1125*

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to keep in mind that the legislature passed the law, which is in harmony by way of establishment of the Indian Constitution.

In *Brij Bhurshan vs State of Delhi*[13], the Supreme Court struck down the East Punjab Public Safety Act 1950, on the ground that pre-censorship restricted the freedom of the press.

Ramesh Thapper vs State of Madras[14], Supreme Court again struck down the Madras Maintenance of Public Safety Act 1949, on the ground that unless a law restricting freedom of speech and expression is directed against undermining the security of the state or to overthrow it, such law cannot fall within the reservation of clause (2) of Article 19.

Shankari Prasad vs Union of India[15]. the First Amendment was challenged on the ground that it abrogated the fundamental right. The argument was based on the fact that the law under Article 13(3) shall include the constitutional amendment law. The Supreme Court rejected the contention and held that the word law in Article 13 must be taken to mean rules or regulations made in exercise of constitutional power and therefore Art 13(3), did not affect amendments made under Article 13(3).

Sajjan Singh vs State of Rajasthan[16], again the validity of the constitution, 17th Amendment Act 1964 was in issue. The Court stuck to the position laid down in Shankari Prasad case and held that the constitutional amendments made under Art 368 fall outside the purview of judicial review by the courts.

This amendment was again challenged in *Golaknath vs State of Punjab*[17] and *Supreme Court through Justice Subba Rao*, held that:

- The power of parliament to amend the constitution is derived from Article 245 read with entry 97 of list 1st of the constitution and not from Article 368. Article 368 only lays down the procedure for the amendment of the constitution. Amendment is a legislative process.
- An Amendment is a law within the meaning of art 13(3), including every kind of law, statutory as well as constitution law and hence a constitutional amendment which contravened Art 13 will be declared void.

[13] *AIR 1950 SC 129*
[14] *AIR 1950 SC 124*
[15] *AIR 1951, SC 455, at page 458*
[16] *AIR 1965 SC 845*
[17] AIR 1967 SC 1643.

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In order to remove the difficulties created by the decision of Supreme Court in Golaknath's case, parliament ended with the 24th Amendment Act 1971.

In 1972, The Supreme Court was called upon to consider the validity of the 24th, 25th and 29th Amendment in *Keshvananda Baharti's case*[18]. The Supreme Court emerged victorious by asserting its institutional role vis a vis parliament in constitutional powers and strengthening its powers of judicial review through the Basic Feature Doctrine. The doctrine of basic feature has since become the bedrock of constitutional interpretation in India.

In sharp contrast was the *Supreme Court's ruling in ADM Jabalpur vs Shivakant Shukla*[19]. During the Emergency the leaders of the opposition were put in prison and fundamental rights suspended. Upsetting rulings by Twelve High Courts in the country, the Supreme Court held that during the Proclamation of Emergency under Article 352 of the Constitution, a court was powerless to protect an individual from state action notwithstanding such action being contrary to law and resulting in complete deprivation of the right to life and liberty.

Minnerva Mills Ltd vs Union of India[20], the Supreme Court struck down clauses (4) and (5) of Article 368 inserted by the 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the constitution. Limited amending power is a basic structure of the constitution, since these clauses removed all limitations on the amending power and thereby conferred an unlimited amending power, it is destructive of the basic feature of the constitution.

In the subsequent case of *S.P. Sampat Kumar v Union of India*[21] *and L.Chandra Kumar v Union of India*[22]. The constitutional validity of Art 323(A) and the provisions of Administrative Tribunals Act 1985 which excluded the jurisdiction of the High Courts under Art 226 and 227 was in issue. The Supreme Court held that the power of judicial review over the legislative action vested in the High Courts under Art 226 and the Supreme Court under Art 32 of the constitution.

Supreme Court Advocates on Record Association vs Union of India[23], the National Judicial Appointments Commission Act was challenged on the ground that the NJAC violates judicial independence by creating a system in which the Chief Justice would no longer have primacy in judicial appointments and in which the judiciary would not have majority control over the

[18] *AIR 1973 SC 1461*
[19] *AIR 1976 SC 1207*
[20] *AIR 1980 SC 1789*
[21] *AIR 1987 SC 386*
[22] *AIR 1997 SC 1125*
[23] *Writ Petition (Civi) No.13 of 2015*

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NJAC in a system where the political influence of the executive and parliament would be dominant. Also, it grants power to the parliament to change and alter judicial selection criteria and procedures, which constitutes the violation of judicial independence, seperation of powers and Rule of Law.

Supreme Court of India in P.U.C.L. & others v. U. O. I[24], case examined that the court will not interfere on the political question and on the policy matter, unless it is essential for the judicial review. However, court can interfere only on the selective ground. The court further stated that the government has to be bound by all the accessible possibilities to avoid the violence inside the establishment of the Indian Constitution.

Shayara Bano vs Union Of India[25], in this case supreme court of India held that triple talaq is a unilateral power given to the husband to divorce his wife and on the face of it, it looks arbitrary therefore triple talaq is unconstitutional being violative of fundamental rights. Justice Nariman propounded Doctrine of Manifest Arbitration and held that triple talaq is violative of Art 14 of the constitution of India.

In *Joseph Shine vs Union of India*[26], *it was* held that sec 497 of Indian Penal Code is unconstitutional. Similarly, before Supreme Court of India in *Navjot Singh Joher vs Union of India*[27], the constitutional validity of sec 377 was challenged on the ground that it violates fundamental right. Justice Chandrachud observed that "I am not bound by societal morality; I am bound by constitutional morality and if the constitution protects the interests of a single citizen of India, I am bound to protect it". Therefore Sec 377 of I.P.C was decriminalized and was held to be unconstitutional.

Anuradha Bhasin vs Union of India[28], The Union Territory of Jammu and Kashmir was directed by Supreme Court to review all orders suspending the internet services forthwith, all orders not in accordance with law must be revoked. Supreme Court held that the Freedom of Speech and Expression and the Freedom to practice any Profession or carry on any Trade, Business or Occupation over the medium of internet enjoys constitutional protection under Art 19(1)(a) and Art 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Art 19(2) and Art 19(6) of the constitution inclusive of the test of Proportionality.

[24] Writ Petition (civil) 515 of 2002, decided on 13.03.2003
[25] *W.P.No. 118 of 2016*
[26] WP (CrL) No.194/2017, decided on 05.01.2018.
[27] WP (CrL) No. 76/2016, decided on 06th September, 2018.
[28] *2020 online SC 25.*

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The Doctrine of Judicial Review is thus, the interposition of the judicial restraint on the legislative, executive and judicial actions of the government. It has assumed the status of permanence through judicial decisions laid down from 1973 till now. Thus, Judicial Review is the basic structure of the constitution of India and any attempt to destroy or damage the basic structure is unconstitutional.

(D) Importance of Judicial Review

It is essential for maintaining the supremacy of the Constitution. It is essential for checking the possible misuse of power by the legislature and executive. It protects the rights of the people. It maintains the federal balance. It is essential for securing the independence of the judiciary. It prevents tyranny of executives.

(E) Problems with Judicial Review

- It limits the functioning of the government.
- It violates the limit of power set to be exercised by the constitution when it overrides any existing law.
- In India, a separation of functions rather than of powers is followed.
- The concept of separation of powers is not adhered to strictly. However, a system of checks and balances have been put in place in such a manner that the judiciary has the power to strike down any unconstitutional laws passed by the legislature.
- The judicial opinions of the judges once taken for any case becomes the standard for ruling other cases.
- Judicial review can harm the public at large as the judgment may be influenced by personal or selfish motives.
- Repeated interventions of courts can diminish the faith of the people in the integrity, quality, and efficiency of the government.[29]

V. POWER OF JUDICIAL REVIEW IN BANGLADESH

Judicial Review is one of the cardinal features of Bangladeshi constitutional system. The Preamble of the Bangladesh Constitution has promised equality and justice to all citizens of Bangladesh and have the laws of Bangladesh are liable to be tested judicially. Bangladesh has a written Constitution, which is the supreme law of the land and all other laws are subject to

[29] TRS Allan, *Constitutional Rights and Judicial Review,* Jul. 20, 2017, http://www.tandfonline.com/doi/full/10.1080/20403313.2017.1331634 Last accessed on 12.03.2021 at 05:45PM.

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this supreme law. The power of the Courts to interpret the Constitution and to secure its supremacy is inherent which provides government by defined and limited powers.

Under a written constitution like that of Bangladesh the doctrine of judicial review can be explained from different perspectives it attaches, particularly both from the viewpoint of constitutional law and administrative law.

The strict or substantive meaning of judicial review has been ensured in Articles 7, 26 and 102(2) of the constitution of Bangladesh[30]. Article 7 declares that the core of the constitutional supremacy. It says that this Constitution is as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void.

Though the provision of the Article 7 gives an umbrella coverage of constitutional supremacy to the whole constitution[31] and Article 26 gives a double sanctity on the provision of the fundamental rights[32]. It says that all existing law inconsistent with the provisions of this Part shall to the extent of such inconsistency become void on the commencement of this Constitution and the State shall not make any law inconsistent with any provisions of this Part and any law so made shall to the extent of such inconsistency be void. Therefore, it is clear that Article 7 and 26 gives the unlimited power to the Supreme Court under the constitution to be declared unconstitutional by issuing prohibition, mandamus and certiorari.

Part III of the constitution provides for 18 fundamental rights and under Article 102(1) of HCD, the Supreme Court can issue direction and orders for the enforcement of these rights. All rights are ordinary rights which are protected under statutory law and common law not by any constitutional guarantee like Bangladesh[33].

(A) The following are the Principles of Judicial Review in Bangladesh

1. **A Unitary, Independent and Sovereign Republic:** Bangladesh is a unitary, independent and sovereign Republic. The Constitution itself expresses in Article 1[34],which is also declared as the basic structure of the Constitution. This is a vital point in absorbing the principle.

[30] Halim, Abdul, Constitution, Constitutional Law and Politics: Bangladesh Perspective. Page 72.
[31] Article 7 of Bangladesh Constitution, 1972
[32] Article 26 of the Bangladesh Constitution, 1972
[33] Halim Md. Abdul (1998); Constitution, Constitutional Law and Politics: Bangladesh perspective; 4th Edition-2008 (Dhaka-Sams Publication).
[34] Article 1 of Bangladesh Constitution, 1972 stated that Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh.

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2. **Separation of Power:** The Constitution of Bangladesh has assigned different activities on the legislature, executive and the judiciary clearly and also demarcated their roles and duties which is necessary for application of judicial review. If this power is not vested on the judiciary, the separation of power would be meaningless as the executive or other organ would be more powerful on other.

3. **Constitutional Limitations:** Article 65 of Bangladesh Constitution has vested the law-making power on the parliament. This is not exclusive power of the Parliament[35]. This power is restrained and chained with factors i.e., the judicial review policy. The parliament is subject to the provision of the Constitution in making laws. If the law violates any part whole provision of the Constitution, that shall be stood void.

4. **Independence of the Judiciary:** The Judicial review philosophy can be applied only where the judiciary of a country is independence. If there is any lacuna in enjoying the judicial power by the court, the judicial review power will not be worthy of having.

5. **Independence in the Exercise of Judicial Activities:** The Constitution of Bangladesh has given the chief justice and other judges of the Supreme Court ample independent power in exercising the judicial functions. According to Article 94(4) of the Bangladesh the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions[36].

In the case of **Siddique Ahmed vs. Government of Bangladesh and others[37],** the petitioner Siddique Ahmed filed the petition in the High Court in January challenging the legality of the seventh amendment to the Bangladesh Constitution. The Seventh Amendment sanctioned the proclamation of martial law and other regulations, orders and instructions carried out by Ershad between March 24, 1982, and November 10, 1986. Along with the petitioner also contested his murder conviction in 1986 by a martial law court. The High Court declared illegal the constitutional amendment that had legitimized the military rule by Hussain Muhammad Ershad using the judicial review power instrument.

VI. JUDICIAL REVIEW IN GERMANY

In Germany, the Constitutional Court has virtually comprehensive competence for all questions

[35] Article 65 (1) of Bangladesh Constitution, 1972 stated that there shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic.

[36] Article 94(4), the Bangladesh Constitution, 1972. The Article stated that Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.

[37] 63 DLR (2011), p 565.

of constitutional law[38]. 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 Constitutional Court (the Bundesverfassungsgericht) for decision if it thinks that the statute is unconstitutional. 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.[39] While the lower courts do not make the ultimate decisions regarding constitutionality, they do play an important role in the judicial process. They determine whether a statute is unconstitutional, warranting review by the Constitutional Court. If they do not think a statute is unconstitutional, then the issue will not go to the Constitutional Court for its decision.

Realistically, the Court departs from its own precedent only with great reluctance. 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.[40]

Four well-known constitutional principles which partially comprise the "Rule of Law" lend explanation for judicial review in Germany[41].

1. First, the separation of powers is explicitly maintained in the German Constitution, and it is implicitly maintained in the provisions that govern judicial competency.
2. 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."[42]
3. Third, the binding force of statutory law upon judges and executive officers is primarily an interpretive, not a political or institutional, problem. 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. Problems arise in those areas of the law where the meaning of the rule is not clear and precise.
4. Fourth, the large and comprehensive jurisdiction of the Federal Constitutional Court allows for judicial review. Such comprehensive jurisdiction includes, among other

[38] PHILIP M. BLAIR, FEDERALISM AND Judicial REVIEW IN WEST GERMANY 26 (1981).
[39] Dr. Jorn Ipsen, *Constitutional Review of Laws, in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW 107, 112 (Christian Starck ed., 1983).
[40] 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).
[41] Erhard Denninger, *Judicial Review Revisited: The German Experience*, 59 TuL. L. REv. 1013, 1015 (1985).
[42] 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." 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."

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powers, the right to conduct abstract judicial review, concrete judicial review, and rule on legislative omissions.

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.

Such jurisdiction necessarily allows for judicial review because it allows the Court to strike down laws inconsistent with the Federal Constitution.

(A) Criticisms and Defences of Judicial Review as Exercised by the Constitutional Court

The Constitutional Court is often criticized for its political role. Many government agencies and party leaders' resort to constitutional litigation for essentially political ends. When the Court appears to cooperate in the achievement of these ends, it is sometimes rebuked by German citizens. Also, the Court invites objections when it creates value theories, thus imposing its own values on the nation as a whole. 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[43]. 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. Therefore, unless one of the exceptions already listed in the law is not present, a termination of pregnancy is fundamentally an unlawful act.

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. The German Constitution's supremacy clause entirely disregards all questions of federal or state competence or jurisdiction[44]. The Supremacy Clause asserts that the Basic Law controls the entire German legal order. "Supremacy" in the German Constitution means the abstract ranking of rules. 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. The relationship between federal and state law is briefly covered by a rule within the German Constitution which

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

[44] Article 1, paragraph 3, declares that the fundamental rights listed in the Basic Law, including the inviolable principle of human dignity, "shall bind the legislature, the executive, and the judiciary as directly enforceable law." Article 20 reinforces this provision by subjecting the legislature to the constitutional order and by binding the executive and judiciary to law and justice. Article 19, paragraph 2 carries the principle of the Basic Law's supremacy even further; it bans any law or governmental action that invades "the essential content of [any] basic right." Article 79, paragraph 3-known as the "eternity clause "-bars any amendment to the Basic Law that would tamper with the principle of federalism or impinge on the state an affirmative duty to respect and protect it.

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maintains that federal law shall override state law.

VII. JUDICIAL ACTIVISM IN INDIA

Judicial activism is a dynamic process of judicial outlook in a changing society. Judicial Activism refers to the process in which judiciary steps into the shoes of legislature and comes up with new rules and regulations, which the legislature ought to have done earlier. ***Arthur Schlesinger*** introduced the term "judicial activism" in a January 1947 fortune magazine article titled "The Supreme Court: 1947". [45] According to Justice J.S.Verma of Supreme Court, "The role of the judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of Judicial Activism."

The evidence of judicial activism in India can be traced back in 1893. Allahabad High Court judge S. Mahmud held that the pre-condition for hearing a case would be accomplished only when someone speaks. In the case, the under trial was not in a position to afford a lawyer (Justice Mahmud, 1893)[46].

Judicial activism is guided by the following two theories of (i) Theory of vacuum filling and (ii) Theory of Social Want.

(A) Reasons for Judicial Activism

It is an uphill task to identify clear-cut reasons for judicial activism. Moreover, universal acceptance of all these reasons may not be guaranteed. But the following reasons are well accepted under Indian conditions which enforce judiciary to become hyper active during execution of judicial functions.

(i) Judicial enthusiasm, (ii) Legislative vacuum, (iii) Moral pressure on judiciary, (iv) Near collapse of responsible government, (v) The Constitutional provisions, (vi) Guardian of Fundamental Rights, (vii) Public confidence, (viii) Enthusiasm of the individual players. There may be so many other reasons based on the prevailing situation which alert the judiciary to become catalyst of change.

(B) Evolutionary timeline for the genesis of judicial Activism in India

1. 1950-1970: This is the phase of traditional judiciary where judiciary mainly focuses upon seeing the constitutional validity of laws and associated with limited functional domain.

[45] Hon'ble Mr. K.G. Balakrishnan, Judicial Activism under the Indian Constitution available at http://www.sci.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf

[46] Evolution & Growth Of Judicial Activism In India', Shodhganga at 79, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf (Last accessed on 20.03.2021).

2. 1970-2000: This is the phase of judicial activism and it continues beyond 2000. in this phase judiciary comes out with a number of landmark judgements. The activist approach of the Supreme Court became discernible after the Emergency was revoked in 1977. It is the activist approach due to which innumerable rights crucial for the welfare of the citizens have been inferred from article 21of the Constitution of India dealing with protection of life and personal liberty. It is notable in the following area:

i. Bonded Labour –*Bandhua Mukti Morcha*v. *Union of India*[47], *People's Union for Democratic Rights* v. *Union of India*[48], *Neerja Chaudhary* v. *State of M.P.*[49]*etc*., are the cases decided on the issue in welfare of the bonded labourer.

ii. Child Welfare – The judgements in *M.C. Mehta* v. *State of Tamil Nadu*[50], *Lakshmi Kant Pandey* v. *Union of India*[51], *Sheela Barse* v. *Union of India*[52], *etc*., have been delivered in the welfare of child.

iii. Woman Welfare – The Supreme Court issued several directions in *Vishaka* v. *State of Rajasthan*[53] for prevention of sexual harassment of working woman and also in relation to trial of rape case in *Bodhisattwa Gautam*v. *Subhra Chakraborty*[54]. In *Gaurav Jain* v. *Union of India*[55], several directions were issued for rescue and rehabilitation of child prostitutes and children of fallen women.

iv. Care Homes – Directions were issued in *Vikram Deo Singh Tomer* v. *State of Bihar*[56] for the improvement of care homes.

v. Human Dignity – Right to live with human dignity was recognized in *Fancis Coralie* v. *Administration Delhi*[57] and reiterated in *Bandhua Mukti Morcha*v. *Union of India*[58],*Chameli Singh* v. *State of UP*.[59],*etc*.

vi. Protection of Prisoners – In *Joginder Kumar* v. *State of U.P.*[60] right against illegal arrest, in *Postsangbam Nigol* v. *General Officer Commanding*[61] right Against police

[47] AIR 1984 SC 802.
[48] AIR 1982 SC 1473
[49] AIR 1982 SC 1099.
[50] AIR 1999 SC 41.
[51] AIR 1984 SC 469.
[52] AIR 1986 SC 1773
[53] AIR 1997 SC 3011.
[54] AIR 1996 SC 922.
[55] AIR 1997 SC 3021.
[56] AIR 1988 SC 1782.
[57] AIR 1981 SC 746.
[58] AIR 1984 SC 802.
[59] AIR 1996 SC 1051.
[60] AIR 1994 SC 1349.
[61] AIR 1997 SC 3435.

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torture, in *People's Union for Civil Liberties* v. *Union of India*[62], right against fake encounter, in *Kishore Singh* v. *State of Rajasthan*[63],right against inhuman treatment, in *D.K. Basu* v. *State of West Bengal*[64] right of compensation for death in police custody, *etc*., have been recognised for protection of prisoners.

vii. Protection of Environment – Right to live in pollution free environment was recognized in *Subhash Kumar* v. *State of Bihar*[65] and directions were issued for the protection of environment in *M.C. Mehta* v. *Union of India*[66], *Indian Council for Enviro-Legal Action* v. *Union of India*[67], *M.C. Mehta* v. *Kamal Nath*[68],*etc*.

viii. Enforcement of Public Duty – The Supreme Court has issued several directions in *Vineet Narain*v. *Union of India*[69] so as to compel the law enforcing agencies to perform their duties.

ix. Privacy – Right to privacy has been recognized as a part of the right to life and personal liberty in *People's Union for Civil Liberties* v. *Union of India*[70],*R. Rajagopal* v. *State of Tamil Nadu*[71],*State of Maharashtra* v. *Madhukar Narayan Mandikar*[72].

3. 2000 – TILL NOW: this is the phase of judicial activism along with instances of judicial overreach. In this phase, because of a number of situations such as: Globalization and complexities of laws in the backdrop of globalization, Growing consciousness of people, Role played by the media and civil society organizations, Growing concerns for the environment, Growing number of the PILs and besides that problems associated with the executives and legislatives.

a) **Judgement on Tainted Legislators** – The Supreme Court in *Lily Thomas* v. *Union of India*[73] and *Public Interest Foundation* v. *Union of India*[74] declared section 8(4) of the

[62] AIR 1997 SC 1203.
[63] AIR 1981 SC 625.
[64] AIR 1997 SC 610.
[65] AIR 1991 SC 420.
[66] AIR 1987 SC 1086.
[67] AIR 1996 SC 1446.
[68] AIR 2000 SC 1997.
[69] AIR 1998 SC 889.
[70] AIR 1997 SC 568.
[71] AIR 1995 SC 264.
[72] AIR 1991 SC 207.
[73] Supreme Court July 10, 2013 at para 20; available athttps://indiankanoon.org./doc/63158859(last visited on May 30, 2019)
[74] Supreme Court September 25, 2018 para 118;available at http://www.livelaw.in/breaking-candidates-cannot-bedisqualified-on-framing-of-charges-in-criminal-case/, accessed on 20.03.2021.

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Representation of the People Act, 1951 *ultra-vires* the Constitution on the ground that it is contrary to the provisions of articles 102 (1)(e) and 191(1)(e).

b) Judgment on Section 377 of IPC – In *Navtej Singh Johar* v. *Union of India*[75], a five judge Constitution Bench of the Supreme Court declared section 377 of the Indian Penal Code unconstitutional to the extent to which it criminalises the consensual penile non-vaginal intercourse between adults in private.

c) Judgement on Section 497 of IPC – In *Joseph Shine* v. *Union of India*[76], a five-judge Constitution Bench of the Supreme Court declared section 497 of the Indian Penal Code unconstitutional as being violative of article 14, 15(1) and 21 of the Constitution. The judgement can be said to be a historic one because section 497 is founded on the notion that the woman is property of husband and, thus, it is against the status and dignity of person.

***d)* Judgement on Euthanasia** – The Supreme Court in *Common Cause (A Registered Society)* v. *Union of India*[77], held the right to die with dignity as a Fundamental Right under Article 21 and allowed passive euthanasia and living will.

e) Judgement on Honour Killing – In *Shakti Vahini* v. *Union of India*[78], the Supreme Court upheld the choice of consenting adults to love and marry as part of their Fundamental Right and declared that consent of family, clan or community is not necessary if adult couple decide to marry. The Court issued a set of guidelines to safeguard young couples under threat for marrying outside their caste or religion. This judgment is historic because in many States in India, the couples of same clan and of different caste or religion loving or marring to each other were subjected to torture or, often, killing in the name of honour of the family.

f) Decision on the Supreme Court that the National Eligibility-cum-Entrance Test (NEET) would be the only test for medical and dental courses admission has created lot of confusion (NEET, 2016)[79].

[75] WP (CrL) No. 76/2016 decided on 6th September, 2018.
[76] WP (CrL) No. 194/2017, decided on 05.01.2018.
[77] *(2018) 5 SCC 1*
[78] (2018) 7 SCC 192
[79] "NEET 2016: Kerala government may move Supreme Court over medical admission', Indian Express (August 27, 2016) available at http://indianexpress.com/article/education/neet-2016-kerala-government-may-move-supreme-court-over-medical-admission/.

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g) Supreme Court ruling in a PIL case ordered Union government and the State governments to formulate new policy to combat drought (***Swaraj Abhiyan case***, 2016)[80].

h) Supreme Court is trying to reform Board of Cricket Control of India (BCCI) as per Lodha Committee recommendation[81]. It is amazing as BCCI is private body. Constitution of BCCI is as per Tamil Nadu Societies Registration Act, Supreme Court can not alter the bye laws.

i) On 3rd November, 2015, SC invalidating the NJAC bill thwarted the authority of the parliament. On 3rd November SC upheld that it would bring more transparency in the collegium system. But till date nothing has happened; the recent revolt of Justice J Chelameswar on the issue of lack of transparency in the collegium system clearly proved it[82].

j) The apex court has also directed the union government to set up a National Disaster Mitigation Fund within three months.SC orders government to set up a bad loans panel: it can be debated whether the apex court even has the authority to decide how the banks with collect their dues or even with respect to write-offs. But the Supreme Court has ordered the government to appoint a committee to look into the issues pertaining to bad loans and the huge write-offs by public sector banks. This, despite the Reserve Bank (RBI) counsel saying that systems are already in place for most of the issues raised.

VIII. INTRODUCTION OF PIL

Though the theory of Public Interest Litigation (hereafter referred as "**PIL**") is the result of judicial activism, it raises up as efficient way of the higher judiciary to entertain judicial activism. It was introduced in Bangladesh as an outcome of the case *Kazi Moklesur Rahman v. Bangladesh*[83] (hereafter referred as "***Berubari Case*"**) in which the concept of locus standi was raised and hereafter, the concept was finally settled in the case *Dr. Mohiuddin Farooque v. Bangladesh & others*[84].

Apparently, PIL indicates a legal action for indemnifying common interest or for protecting

[80] Swaraj Abhiyan vs Union of India and Ors on 13 May, 2016
[81] 'Supreme Court Ruling on Lodha reforms 'unconstitutional' - former judge' Espn cricinfo, (August 7, 2016) available at http://www.espncricinfo.com/india/content/story/1043655.html.
[82] Bhadra Sinha, 'Revolt' in SC collegium: Senior judge boycotts meet over lack of transparency', The Hindusthan Times (Sept. 3, 2016) available at http://www.hindustantimes.com/india-news/revolt-in-sc-collegium-senior-judge-boycotts-meet-over-lack-of-transparency/story-g9MofXzIxCuHeRv1Q72VHI.html.
[83] [1974] 26 DLR 44 (AD)
[84] [1997] 49 DLR 1(AD).

from civic grievance in which individuals have interest and by which their legal rights are infringed.[85] As PIL allows any person without being actually aggrieved to activate the judicial method, it should be considered as device by which public participate in judicial review of administrative action.[86] Even though the court can take PIL case on sou moto role and can entertain its duties through judicial activism.[87]

(A) Pros associated with Judicial Activism India

Judicial Activism sets out a system of balances and controls to the other branches of the government. It accentuates required innovation by way of a solution. In case where the law fails to establish a balance, it allows judges to use their personal judgment. It places trust in judges and provides insights into the issues. It only allows judges to do what they see fit within rationalised limits. Thus, showing the instilled trust placed in the justice system and its judgments. It helps the judiciary to keep a check on the misuse of power by the government when it interferes and harms the residents. In the issue of majority, it helps address problems hastily where the legislature gets stuck in taking decisions.

(B) Judicial Activism Criticism

In the name of judicial activism, the judiciary often mixes personal bias and opinions with the law. The theory of separation of powers between the three arms of the State goes for a toss with judicial activism. Many times, the judiciary, in the name of activism, interferes in an administrative domain, and ventures into judicial adventurism/overreach.

IX. JUDICIAL RESTRAINT IN INDIA

Judicial restraint is a theory of interpretation for the Judiciary. It is a notion which portrays that the judges should limit the exercise of their powers by not influencing the decision or the proceedings with their own preferences and perspectives, rather by the constitutional and statutory mandates. It propounds that judges must hesitate in striking down the laws until and unless these laws are unconstitutional. The jurists supporting judicial restraint argue that judges do not possess any policy-making powers and hence, they should rely upon the legislative intent, stare decisis and strict application of judicial interpretation.

Any limitations on the act of judiciary expressed or implied either by Constitution or any statue

[85] Stephen Holmes, "Precommitment and Paradox of Democracy" in Douglas Greenberg (ed), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press 1993) 195-240

[86] Awal Hossain Mollah, „Judicial Activism And Human Rights In Bangladesh: A Critique" (2014) 56 (6) International Journal of Law and Management 475.

[87] *State v Deputy Commissioner, Satkhira and Others* [1993] 45 DLR 643 (HCD)

is judicial restraint. The restraint are in areas relating to 1. Political questions; 2. Legislative powers and 3. Administrative discretionary power.

In ***ADM Jabalpur v. Shivkant Shukla***, the court held that fundamental rights remain suspended during Emergency and thus the writ of Habeas Corpus is not maintainable. In ***State of U.P. v. Jeet Singh Bisht***, J. Katju commented that Judiciary must show self-restraint and refrain from entering into the domains of legislature and executive. Judicial Restraint protects the independence of Judiciary.

Judicial activism can become an unguided missile if not aimed correctly. **Article 142** provides that "*The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it…*"

In a no. of cases such as ***State of Tamil Nadu v. K. Balu*** – banning of liquor shops within the vicinity of 500 meters of National highways- resulting in lack of employment for many, **coal block allocation case –** coal blocks granted from year 1993 were cancelled in 2014 with a penalty of Rs, 295 per ton of coal mined without granting the right of audi alteram partem, **banning of bursting of crackers**, **Subhash Kashinath Mahajan** – amendment of SC/ST Act, **K. Puttaswamy v. UOI**[88] including Right to privacy under Article 21, etc Supreme Court has misused its power under Art. 142. We see that such activism has failed to accord co-respect to other branches of government and led judiciary to take arbitrary decisions.

(A) Babri Masjid demolition case

In this case, an order was passed by a two-judge bench which was earlier a three-judge bench decision of the Supreme Court. After the decision of the larger bench was put forward the court again invoking Article 142 in view of the long pendency of the case for 25 years directed another retrial which was transferred from Raebareli to Lucknow. The judgment supplanted the law and did not supplement it which is the basic nature of the passing of laws.

Supreme Court asks court to curb judicial activism as it disturbs the balance between the organs. Since the constitution did not provide that for the failure of other organs the judiciary will bear the crown and act for them all it is important that the organ which is failing to carry out its duties should be managed. Judicial Restraint has been introduced to prevent the formation of government of judges. However *judicial restraint does not mean abdication of duty*. Powers have been granted to the Judicial mechanism to ensure that legislature and

[88] (2017) 10 SC 1.

executive act within the bounds of the power specified in the constitution. It is to prevent the tyranny of one over others.

1. ***Kihota Holohan v. Zachillu and Others***[89] – The Supreme Court was asked to examine the constitutional validity of 52nd amendment Act, 1985. The court did not express any views on the validity of provisions curbing the freedom of members of legislature. The court did not find the objections strong enough to make amendment invalid.
2. ***State of Rajasthan v. Union of India***[90] – The court rejected the petition on the ground that it involved a political question.
3. ***S.R.Bommai v. Union of India***[91] – The exercise of power under Art. 356 which included a political element was in question. Being involved would mean entering into the political dominion and the court must avoid it.
4. ***Almitra H. Patel v. Union of India***[92] – the court on the issue whether directions should be issued to the municipal corporations on how to make Delhi clean said that it could only direct the municipal authorities to carry out the functions prescribed under law.

Article 142 has been involved in the above judgments for the intention of doing good to a large section of people and even to the nation as a whole but the Supreme Court took this article too seriously which resulted in judicial activism and now it is time to include checks and balances in those unlimited powers provided under this Article.

X. HAS SUPREME COURT IN ITS JUDICIAL ACTIVISM FAILED TO RESPECT CONSTITUTION OF INDIA?

It has frequently been remarked that the Indian Supreme Court through its activism has assumed the role of the Legislature; the criticism is that it has not only performed the circumscribed role of a law giver, but that it has actually assumed the role of a plenary law-making body, like the Legislature. Many proponents of judicial restraint have opined, that some remedies designed by the Supreme Court such as the 'continuous mandamus' demonstrate the failure of the judiciary to observe judicial restraint, and that is undesirable because it is a failure to accord respect to other co-equal branches of the government.

It is, of course, true that our Constitution comprehends three co-equal branches of the government. No democracy and no constitution gives absolute powers to the judiciary. Any

[89] AIR 1993 SC 412.
[90] (1977) INSC 145(6TH MAY 1977)
[91] 1994 (3) SCC 2734
[92] (1998) 2 SCC 416.

attempt made by the judiciary to re-write the Constitution, ought to be regarded as unconstitutional. An act of the judiciary that is motivated purely by goals other than those enshrined in the Constitution must be considered constitutionally illegitimate, and such an act must be curbed in its infancy.

The basic question that then arises is whether the Supreme Court has followed the principle of separation of powers even as it has embraced judicial activism? The answer has to be a resounding yes. The Court has always abided by the Constitution. It has valiantly fulfilled its primary responsibility of upholding the Constitutional goals. It is the Court's constitutionally mandated duty to enforce the law, not for each minor violation but for those violations that result in grave consequences for the public at large. Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism. It is only when both the legislature and the executive have failed to provide legislation in an area, that the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area. Being pragmatic and prudent, the Court has withstood the test of time and proved to be an illustrious example of an active judiciary in a democratic set-up.[93]Thus, the aforesaid cases clearly reveal that the courts in India have not violated the mandatory constitution, rather they have only issued certain directions. Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till the legislature enacts a particular law to deal with the situation.

XI. WAY FORWARD

1. Though **Article 142 and judicial review** has been put to many constructive uses but some actions, like declaring the National Judicial Appointments Commission unconstitutional as it tried to apply checks on judicial powers, highlight the need for more judicial restraints in using judicial review.
2. **Maintaining 'independence':** Judiciary is expected to maintain its primary allegiance to the law and the Constitution i.e. to the text of legal instruments and legal interpretation, and to the body of judicial precedents. Though there exists a two-way interaction between judiciary and executive but the judiciary should keep its moral and philosophical independence intact.

[93] Hon'ble Mr. K.G. Balakrishnan, Judicial Activism under the Indian Constitution available at http://www.sci.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf

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3. **Limiting judicial discretion:** All cases invoking Article 142 should be referred to a Constitution Bench of at least five judges so that this exercise of discretion may be the outcome of five independent judicial minds.
4. **Review and feedback mechanism:** In all cases where the court invokes Article 142, the government must bring out a white paper to study the effects of the judgment after a period of six months or so from its date.

XII. CONCLUSION

Bridging the gap between law and society is a central task of a judge. This calls for balancing different values. **As Aharon Barak points out, "A judge must maintain the delicate balance, something that requires some measure of activism and some measure of restraint."**

In view of the aforesaid discussion, the remark that the judiciary has overstepped its limit is untenable. Only when both the legislature and the executive-failed to provide law, the Court has found it to be the duty of the judiciary to intervene, and that too only until the legislature enacts proper legislation covering the area. The Court has to be remarkably cautious while deciding whether to perform legislative or executive functions. But many a times the judges do not exhibit judicial restraint in deciding cases that are political or concern larger public sentiments. The judiciary cannot attempt to take over the functions of another organ.

Really, Judicial Activism is useful and adjunct to a healthy democracy. It is necessary to ensure that unheard voices cannot be buried by more influential voices. Such activism, however, should be resorted to only in exceptional circumstances where the interest of the nation or of the poor or weaker sections of the society would be in peril in the absence of judicial action. It gives hope that justice is not beyond reach.

Furthermore, the judiciary should strictly adhere to '*de minimus non curat lex*' ("law is not concerned with small things") so that trivial matters are disposed off at the initial level and the fine line remains maintained. The fine line needs to be reconciled and addressed with the judiciary endeavouring to not enter the lanes of other organs of the government and restricting itself to the activism and not adventurism.

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