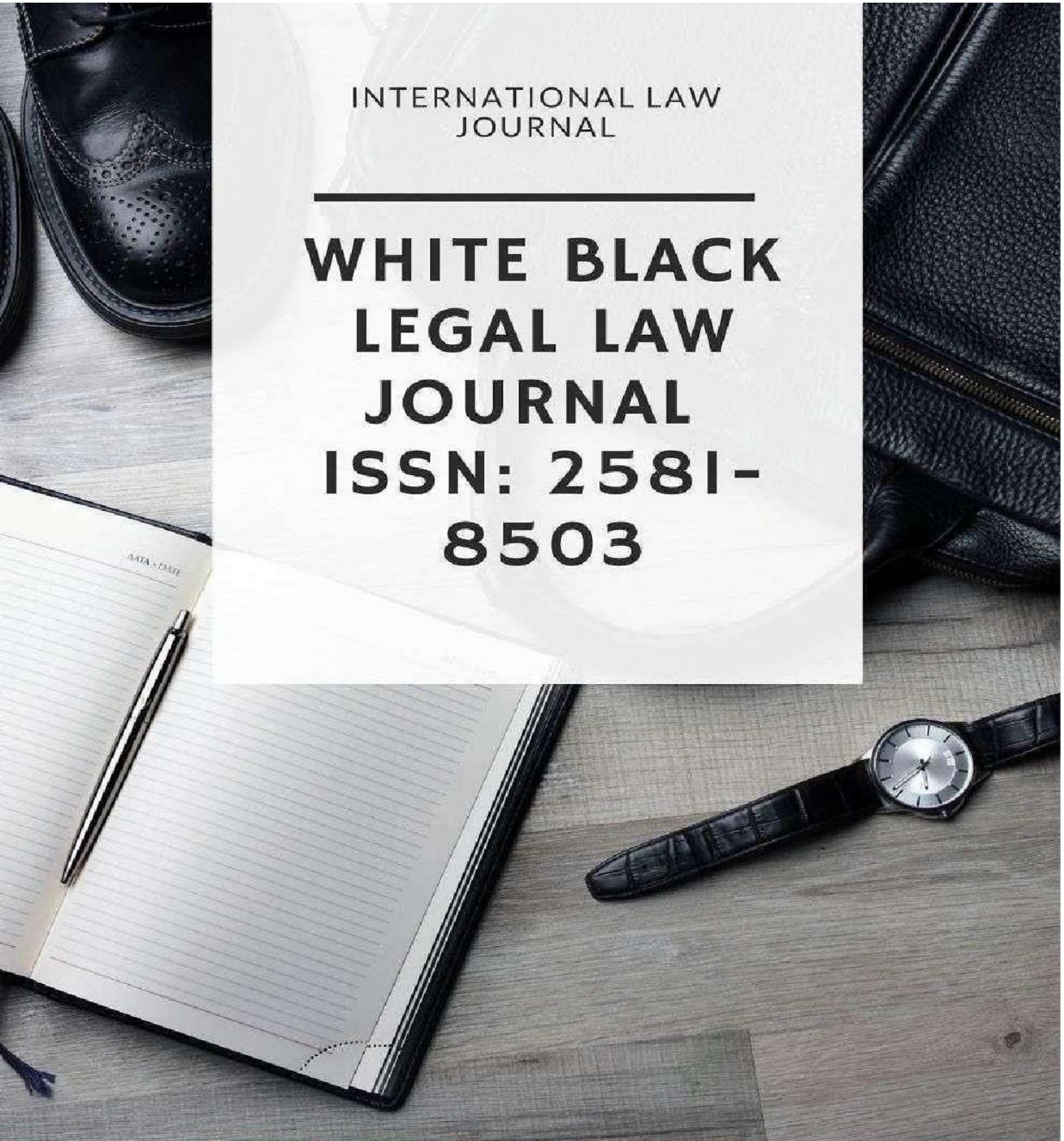




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ROLE OF JUDICIAL ACTIVISM AND NEED FOR JUDICIAL RESTRAINT

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ABSTRACT

Law is a dynamic concept and it constantly needs to adapt to match and echo society's changing values, advancements and economic needs. For this old laws have to be amended or repealed and legal meanings have to be shifted through interpretations. This gave rise to the idea of "judicial activism." Judicial activism plays a vital role in safeguarding fundamental rights and addressing governance gaps. But at the same time, unchecked intervention can escalate into judicial overreach and excessive restraint can hinder the functioning of judicial system.

This paper critically examines the dynamic interplay between judicial activism, judicial overreach and judicial restraint and emphasizes the need to maintain a balance between them so as to uphold the basic principles of constitution such as; separation of powers. For writing this paper a number of existing research papers and case laws have been analysed.

Keywords: Judicial Activism, Judicial Restraint, Judiciary, Judicial Outreach.

INTRODUCTION

The judiciary plays a vital role in upholding constitutional values but many times it has to balance between three conflicting concepts; judicial activism, overreach and restraint. While judicial activism empowers the courts to protect fundamental rights and address legislative gaps, the unchecked intervention can spiral into overreach and can violate the idea of separation of powers. In such a situation, judicial restraint helps in respecting the boundaries of executive and legislative authority. This paper examines these contrasting doctrines and argues that it is a high time that judiciary maintains a balance between these three concepts so as to preserve trust of public in the democracy.

1. CONCEPT OF JUDICIAL ACTIVISM

Meaning of Judicial Activism:

Judicial Activism has transformed the role of judiciary from a conservative one to that of an activist. In the words of Sam Ervin, “*A judicial activist is a judge who interprets the Constitution to mean what it would have said if he, instead of the Founding Fathers, had written it*” The term judicial activism was coined by historian Arthur Schlesinger, Jr. in 1947.¹

Judicial activism is defined in **Black’s Law Dictionary** as: “Judicial Activism is way of exercising judicial power that motivates judges to defend from normally prescribed strict adherence to judicial precedent in favour of progressive and new social policies.”²

It is commonly marked by decision calling for social engineering and occasionally these decisions represent, infusion in the legislative and executive matters”.³ Judicial Activism can be defined as a kind of judicial philosophy where the Courts *proactively* and *positively* interpret various existing provisions to consider the broader societal implications. It involves the power of the Court to step into shoes of the legislature to review and potentially declare a statute ultra vires.⁴

The concept of judicial activism evolved significantly in India during the period of 1970 and 1980. The key pioneers of judicial activism are **Justice P.N. Bhagwati and Justice V.R. Krishna Iyer**.⁵ The main objective of judicial activism was to make justice available to the poor and to hold the executive accountable.

Constitutional Provisions Related To Judicial Activism:

Several constitutional provisions empower the judiciary to exercise its power of judicial activism. A detailed analysis of these provisions can aid in understanding the manner in which the judges take a proactive stance and assert their authority.

According to **Article 13** of Indian Constitution, there is prohibition on the State from enacting any law that infringes upon the fundamental rights of its citizens. The Supreme Court has opined that the inclusion of **Article 13(1) and 13(2)** in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights are infringed by any legislative enactment, the Court has the authority to declare the enactment invalid to the

¹ Trishla Dwivedi, *Judicial Activism*, International Journal of Law, Management and Humanities 4.

² Ibid.

³ Khyati Nayak And Anu Misra, *Judicial Restraint And Judicial Overreach: A Never Ending Conflict*, A Landmark of the Indian Constitution.

⁴ Soumi Bandopadhyay, *Judicial Activism V Judicial Overreach: A Critical Analysis In Indian Scenario*, Journal of Legal Research and Juridical Sciences 2.

⁵ Ibid.

extent that it transgresses the provided limits.⁶

In case of violation, the fundamental rights can be enforced as the Apex Court has the authority to issue any orders or writ under *Article 32*.⁷ *Article 226* of the Constitution of India grants the High Courts of each state the power to issue writs, orders or directions to any individual, authority, or government within their respective jurisdiction, for the enforcement of fundamental rights or for any other legal purpose.⁸

Article 226 is not confined to fundamental rights; it also covers a wider area of public law remedies like challenging administrative and executive actions: quashing arbitrary, mala fide, or ultra vires orders of Government departments, statutory authorities etc., via certiorari or mandamus. High Courts under Article 226 can also enforce statutory duties, control misuse of discretionary power. So Article 226 goes beyond fundamental rights to include remedies against public law wrongs.

Article 227 confers upon every High Court the authority to exercise superintendence over all other courts and tribunals under its jurisdiction.⁹ *Article 136* of the Constitution of India grants the Supreme Court the power to grant special leave to appeal against any judgment, decree, or order passed or made by any court or tribunal in the country, including the High Courts, subject to certain limitations and conditions.¹⁰

Under *Article 142*, the Supreme Court is provided with discretionary powers and it draws sweeping authority to exercise executive and legislative responsibilities in order to do “complete justice in any cause or matter pending before it.”¹¹

Evolution of Judicial Activism Through Judgements

The judicial activism has evolved through several judgements. In *Kesavananda Bharti v. State of Kerala (1973)*, Supreme Court established the “basic structure” doctrine, ruling that Parliament’s power to amend the Constitution could not destroy its essential framework. It is the one of the best examples of judicial activism where judiciary departed from all the precedents and gave a totally new theory of basic structure. This doctrine of basic structure is the evolution made by the judiciary in its exercise of judicial activism¹²

⁶ A.K. Gopalan V. State of Madras, AIR 1950 SC 27.

⁷ Article 32, The Constitution of India 1950.

⁸ Article 226, The Constitution of India 1950.

⁹ Article 227, The Constitution of India 1950.

¹⁰ Article 136, The Constitution of India 1950.

¹¹ Article 142, The Constitution of India 1950.

¹² AIR 1973 SC 1461.

In the case of *Shayara Bano v. Union of India*¹³, Supreme Court made the practice of talak-e-biddat null and void and decided the case in favour of petitioner. Earlier it was held valid on the ground of freedom of religion as mentioned under Article 25 of the Indian Constitution. But in this case, by a decision of 3:2, the Supreme Court held that this practice is against the principle of equality and violates Article 14 of the Constitution.

The practice of Talaq-e-biddat was a real problem for the women of Muslim faith as they could be easily divorced by simply pronouncing Talaq thrice. By abolishing this the Court provided a big relief to the Muslim women as in today's society such old patriarchal laws shall have no place.¹⁴

In the case of *A.K. Gopalan v. State of Madras*¹⁵, the Supreme Court of India held that in order to deprive a person of his life or liberty due process of law must be followed and the procedure should be fair, reasonable and just. The Apex Court gave a restrictive meaning of Article 21 of the Constitution and held that personal liberty means freedom of physical body only and nothing else.

But in the case of *Maneka Gandhi v. Union of India*¹⁶, the Apex Court overturned the earlier verdict of A.K. Gopalan case. In this case, it was held that the expression "personal liberty" in Article 21 has the wildest amplitude and covers a variety of rights that constitute the personal liberty of man. Some of these rights have also been raised to the status of distinct fundamental rights and have been given additional protection under Article 19.

In the case of *Francis Coralie v. Union Territory of Delhi*¹⁷, the Supreme Court ruled that the right to life entails more than just animal existence. The bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and missing and with fellow human beings shall also be available.

In *KihotoHollohan v. Zachillhu*, the constitutional validity of the 10th schedule of the Indian Constitution was challenged. The concern that came before the Supreme Court was that whether the powerful position of the Speaker violates the theory of basic structure or not. The broad discretionary powers of Speaker have been outlined in paragraph 6(1) of the 10th schedule of the Indian Constitution.¹⁸

¹³ Writ Petition(C) No. 118 of 2018.

¹⁴ Ibid.

¹⁵ AIR 1950 SC 27.

¹⁶ 1978, 1 SCC 248,280

¹⁷ AIR 1981 SC 746

¹⁸ Supra note 4.

The Supreme Court held that though the Speaker acts as a tribunal under paragraph 6 and the orders which are passed by Speaker are final but still the order passed are subject to judicial review on four grounds; mala fides, perversity, violation of constitutional mandate and order passed in violation of natural justice.¹⁹

2. CONCEPT OF PUBLIC INTEREST LITIGATION

The judicial activism in India has reached new heights due to the emergence of the idea of Public Interest Litigation.

Public Interest Litigation (hereinafter referred as PIL), the brainchild of *Justice P.N. Bhagwati*, is a way through which Judicial activism has flourished in India. PIL is not similar to regular litigation. PIL started as a measure to safeguard the fundamental rights of the oppressed and socially and economically disadvantaged sections of the society.²⁰

PIL differs from the regular litigation in the sense that it is filed by one private individual against the another for the enforcement of his personal rights. The PIL allows any public spirited individual to approach the Court for enforcing the Constitutional or legal rights of the ones who are unable to approach the Court owing to their economic disabilities.²¹

Thanks to PIL, the bonded labours, women prisoners, untouchables, children of prostitutes and victims of rape and custodial violence are now attracting the remedial attention of the courts. Over the time the judicial activism in the form of PIL has helped to alleviate the sufferings of many individuals, in the protection of environment and in promotion of human rights.²²

Some of the noteworthy cases include; *Hussainara Khatoon v. State of Bihar*, the Supreme Court declared importance of timely justice as a part of fair trial. The PIL was filed based on a news article published in The Indian Express. More than 40000 convicts were released based on the proceedings of this case.²³

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid

²² Ibid.

²³ 1979 AIR 1369.

In ***Bandhua Mukti Morcha v. Union of India***, the Apex Court directed the State Government of the Uttar Pradesh to eliminate child labour in the carpet industry and issued welfare directions aimed at banning child work under the age of 14. Additionally the State Government was also directed to provide educational and medical services to the child labourer.²⁴

In ***Vishakha v. State of Rajasthan***²⁵, the Supreme Court of India addressed the problem of sexual harassment of women at work place and observed that every trade occupation or profession must offer a safe working environment to its female employees in accordance with the Fundamental Rights mentioned under Article 14, 19 and 21 of the Indian Constitution.

In ***Maneka Gandhi v. Union of India***, the right to life was construed by the Supreme Court. Its application was broadened and the right to live with human dignity was made a part of it.²⁶

In ***Laxmi v Union of India***, passed directions limiting the selling of acid and awarded the victim compensation. It was because of this judgement that recommendations for the benefit of acid attack survivors were put forward.²⁷

In ***MC Mehta v. Union of India***, the usage of coal and coke was banned near the Taj Mahal and the units were asked to switch to the compressed natural gas as the infamous mausoleum was facing serious threat due to pollution caused by the Mathura Oil Refinery.²⁸

In ***Ganga River Pollution case***, the Supreme Court ordered more than 250 Municipalities and localities to build sewage treatment plants and ordered hundreds of factories and industrial plants to stop polluting Ganga.²⁹

Judicial Activism if on the one hand has opened up the doors of justice to the disadvantaged

²⁴ AIR 1997 10 SCC 549.

²⁵ AIR 1997 SC 3011

²⁶ AIR 1978 SC 597.

²⁷ 2014 SCC 4 4 27.

²⁸ AIR 1997 2 SCC 353.

²⁹ AIR 1988 SC 1037.

sections of the society, then on the other hand the questions have been raised regarding the over-interference into the functioning of other organs and transgressing of the boundaries established by the law. This has given rise to the debates regarding the judicial overreach.

3. CONCEPT OF JUDICIAL OVERREACH

Meaning of Judicial Overreach:

Judicial Overreach refers to a situation where judiciary interferes with the normal functioning of the legislative or executive powers of the Government. Such an interference violates the principle of separation of powers.³⁰

Judicial activism allows the courts to overturn the decisions made by parliament and state legislatures. But when it takes the form of judicial overreach it becomes undemocratic as unelected judges cross the line between two branches of Government and quash the will of the elected representatives.³¹

Negative Consequences of Judicial Overreach:

- i. It undermines the confidence of public in the courts and other public institutions.
- ii. It appears as the tyranny of unelected in a democracy where the real power lies in the hands of elected officials.
- iii. It is also a waste of precious time of judiciary that could be spend on hearing other serious matters of public concern.
- iv. Judicial overreach is not at all desirable as judiciary must not indulge in adventurism and should focus on maintaining order between three organs of the Government. The judiciary must abide by the principle of balance of power and if it fails to do so then it will turn out to be huge crisis for the State. If one organ of the Government start performing the functions of the other organ then there are chances that a conflict might arise between different organs of State and resultantly the functioning of the Government will get hindered. Excessive judicial overreach will put the welfare of the public in danger as the ultimate victim of such a clash will be the public.
- v. It must be noted that judiciary is a law interpreting body and has no expertise in the field such as policy formulation and implementation. It is being argued that due to this many a times judges while passing judgements overlook some essential aspects.

³⁰ Supra note 3.

³¹ Ibid.

- vi. If judiciary enters into the domain of executing and legislature then it creates a feeling of distrust in the minds of people against the other two organs of the Government and also lead to chaos in the society.

Instances of Judicial Overreach:

The Indian Courts are frequently accused of judicial overreach. There are many instances that point out the same. This situation never arose when judiciary was not involved in performing tasks of law making and was pronouncing decisions within the ambit of its jurisdiction. Many critics are of the view that the overly active attitude of the judiciary is posing a threat to the foundational principles of the Constitution. Some of the noteworthy cases have been mentioned hereinafter:

- i. **Shyam Narayan Chouksey v. Union of India:** In this case the Supreme Court declared that the National Anthem should be played in all the movie halls.³²
- ii. **Rajiv Sharma V. State of West Bengal:** In this case the Supreme Court asked Priyanka Sharma, a BJP Yuva Morcha representative, to apologise for posting a meme on one of its bail ruling.³³
- iii. **State of Tamil Nadu v. V.K. Balu:** In this case the Supreme Court prohibited the sale of alcohol at retail establishments, restaurants and bars.³⁴
- iv. **Ajay Kumar Waghmare v. Union of India:** In this case the High Court of Bombay directed to form a three member Committee to review a film as it perceived it to be against the morality of judicial profession. Since CBFC is already in existence for reviewing the films, the formation of a separate body to do so was considered as judicial overreach.³⁵

Judicial Overreach can even give good results but it becomes a problem when judiciary makes decisions for promoting the welfare of one while effecting a much larger community and ignoring other aspects of the society.

Due to the increasing instances of judicial overreach and its resultant issues have now led to the demands for judicial restraint.

³² AIR 2003 MP 233.

³³ Soumi Bandopadhyay, *Judicial Activism V Judicial Overreach: A Critical Analysis In Indian Scenario*, Journal of Legal Research and Juridical Sciences 2.

³⁴ 2016 SCC 1487.

³⁵ PIL No. 11 of 2017.

4. CONCEPT OF JUDICIAL RESTRAINT

In the words of *Justice Markandey Katju*, “Judicial Restraint is consistent with and complementary to the balance of power among the three independent branches of State.”³⁶ Judicial restraint accomplishes this goal in two ways.

- i. Firstly it recognizes the equality of the other two branches of the Government with the Judiciary.
- ii. Secondly it tends to protect the independence of judiciary.”³⁷

In this way judicial restraint complements the twin overarching values of independence of judiciary and separation of powers.³⁸

The judicial restraint plays a role in upholding constitutional values. It ensures that the judiciary maintains a balance between interpreting laws and respecting the boundaries of other organs of government. This restraint is crucial for protecting democratic processes and honouring the separation of powers.

Judicial restraint prevents judicial overreach. Courts recognize that legislation and policymaking are the functions of the legislature and executive, and their members are elected by and are accountable to the public. This respect for the roles of other branches reinforces democratic accountability and undermines the authority of elected officials.³⁹

In federal structures like India judicial restraint supports the autonomy of state governments by limiting judicial interference in state matters unless they violate constitutional mandates.

Principles Related To The Judicial Restraint

In practicing judicial restraint, the judges rely mainly on the following principles:

- i. Deference to Legislative and Executive Decisions: Judicial restraint ensures that judges respect laws enacted by the representative authority directly answerable and responsible to the people, and reinforces democratic principles.⁴⁰

³⁶ Supra note 3.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Mudita Singhal, *The Role Of Judicial Restraint In Upholding The Constitution: A Study Of Indian Jurisprudence*, International Journal of Creative Research Thoughts, 12 (2024).

- ii. Adherence to Precedents: By following precedents, judicial restraint provides consistency and predictability in legal interpretations and upholds the stability of legal principles.⁴¹
- iii. Narrow Rulings: Judicial restraint often calls for narrow rulings that are limited to the facts of the case at hand, and this avoids broad pronouncements that might affect areas that are beyond the specific.⁴²

5. THE NEED TO MAINTAIN BALANCE BETWEEN JUDICIAL RESTRAINT AND INDIVIDUAL RIGHTS

Judicial restraint appears to be in conflict with the idea of protection of individual rights, especially in cases where legislative or executive actions encroach upon the fundamental rights. It does not mean passive non-intervention but signifies a cautious approach, whereby courts only.⁴³

The concept of judicial restraint keeps the activism to its minimum. Judicial decision makers construe rights based on the contingencies of the constitution and this avoids evolving of novel rights which are otherwise not recognised by the constitution. The decision makers take a highly selective approach, and destroy the constitutionality of action only where it offends a particular constitutional provision as mentioned in a statute or executive order.⁴⁴

Benefits of Judicial Restraint:

- i. The judicial restraint plays an important role in upholding constitutional values.
- ii. It ensures that the judiciary maintains a balance between interpreting laws and respecting the boundaries of various organs of government.
- iii. Judicial Restraint is essential for the judiciary for protecting democratic processes and honouring the separation of powers.
- iv. Judicial restraint supports the principle of separation of powers by preventing judicial overreach.
- v. It helps in respecting the roles of other branches of government, reinforces democratic accountability and avoids undermining of the authority of elected officials.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

- vi. Additionally, it guards the constitutional provisions, preserves the integrity of democratic process, and maintains stability in the legal system by preventing judicial overreach.⁴⁵
- vii. The concept of judicial restraint keeps the activism to its minimum and interferes only when required to vindicate rights. Owing to judicial restraint, judicial decision makers generally construe rights in terms of the contingencies of a constitution and avoid evolving novel rights which the constitution does not recognize.⁴⁶
- viii. Judicial restraint reinforces legislative accountability as the courts place responsibility on elected representatives for addressing social issues by deferring the democratic matters to organs of government that require deeper democratic engagement.⁴⁷
- ix. Judicial restraint encourages the legislature to respond to evolving needs and rights of society especially the ones that require broad consensus and statutory clarity.⁴⁸

Constitutional Provisions Related to Judicial Restraint:

Certain provisions of the constitution put a restraint on the functioning of judiciary. These provisions include:

- i. **Article 50:** It emphasizes separating the judiciary from the other two organs.⁴⁹
- ii. **Article 121 & Article 211:** These articles prohibit discussion of judicial conduct in Parliament and state legislatures.⁵⁰
- iii. **Articles 245-255:** Define the powers of Parliament and state legislatures to make laws. These articles highlight the framework within which the judiciary must interpret laws.⁵¹
- iv. **Article 368:** It endows upon the Parliament, power to amend any of the provisions in the of the Constitution including fundamental rights.⁵²

In federal governments like that of India judicial restraint provides the much needed support to the autonomy of state governments as it limits the interference of judiciary in the matter of state until and unless they do not violate the constitutional mandates. In practicing restraint, judges rely on the following principles:

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Article 50, The Constitution of India 1950.

⁵⁰ Article 121 and 211, The Constitution of India 1950.

⁵¹ Article 245- 255, The Constitution of India 1950.

⁵² Article 368, The Constitution of India 1950.

- i. ***Deference to Legislative and Executive Decisions:*** Judicial restraint defers the decisions of the bodies that have been democratically elected. It ensures that judges respect laws enacted by the representative authority who are directly answerable and responsible to the people.⁵³
- ii. ***Adherence to Precedents (Stare Decisis):*** Judicial restraint provides consistency and predictability in legal interpretations and upholds the stability of legal principles over time.⁵⁴
- iii. ***Narrow Rulings:*** Judicial restraint calls for rulings that are narrow, limited to the facts of the case at hand, and avoids broad pronouncements that could affect areas beyond the specific cases.⁵⁵

These principles aim at guarding constitutional provisions and values by preserving the integrity of democratic process, maintaining stability in the legal system, and preventing judicial overreach. Judicial restraint appears to be in conflict with protection of individual rights, in cases where legislative or executive actions encroach upon fundamental rights. Judicial restraint, signifies a cautious approach, whereby courts act only when there is a clear and compelling violation of Constitution. In an attempt to not interfere with the functioning of a democracy, the principle of judicial restraint means that only those provisions that explicitly violates the rights of citizens, are struck down. Due to this, constitution is upheld and it saves the courts from making decisions that are coloured with their own values or political persuasions that make the courts an umpire. This promotes public debate, discussions and societal opinions.

Instances of Judicial Restraint:

Adherence to the well- established precedents is the main postulate of judicial restraint, as it ensures consistency and predictability while interpreting various individual rights. Courts practicing restraint prioritize *stare decisis*, which means sticking with the previous decisions, respecting prior rulings for ensuring consistency in constitutional interpretation. This approach discourages abrupt shifts in jurisprudence and ensures that rights-based decisions are rooted in well-settled precedents rather than the subjective views of individual judges on such matters.

In *Supriyo v. Union of India*, Apex Court adhered to the principle of judicial restraint as it refrained from giving legal recognition to same-sex marriage, even when it acknowledged

⁵³ Supra note 40.

⁵⁴ Ibid.

⁵⁵ Ibid.

LGBTQ+ rights. The court recognized that this issue required democratic debates, dialogues and rigorous discussions in the democratic front.⁵⁶

In *ADM Jabalpur v. Shivkant Shukla*, the Hon'ble Supreme Court of India adopted a restricted approach while interpreting the right to life and liberty under Article 21 and upheld that the suspension of this right during proclamation national emergency could be allowed.⁵⁷

Courts practicing restraint shy away from giving interpretative rulings and often prefer to give decisions that do not implicate areas beyond that particular case. This ensures that courts protect rights without encroaching into the legislative functions or making expansive declarations that are in conflict with democratic values.

6. CONCLUSION

The integrity of constitutional democracy relies not on the supremacy of any single organ, but on a delicate balance among them all. Judicial activism remains an indispensable tool for vindicating rights and for correcting institutional failures. It must never substitute legislative or executive actions. When judicial activism takes form of judicial overreach it undermines separation of powers and erodes democratic accountability.

The true strength of judiciary lies in principled self-restraint paired with courageous intervention especially when constitutional rights are at stake. Conversely, strict adherence to judicial restraint must not come at the expense of justice. Maintenance of this equilibrium, is crucial so that the judiciary continues to serve as a trusted guardian of the law and constitutional values without exceeding its boundaries.

⁵⁶ 2023 SCC Online SC 1348.

⁵⁷ Basu, D.D., *Introduction to the Constitution of India*, LexisNexis, 2022.