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A COMPARATIVE STUDY ON LAW MAKING POWER OF JUDICIARY IN INDIA AND USA

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Abstract: The theory of separation of power means that the three organs: Legislature, Executive and Judiciary are separate from each other and perform distinct functions. One of the organs i.e. judiciary is seen sometimes making laws. While the legislature has the constitutional authority to enact laws. There are still some circumstances where the existing laws made by the legislature prove to be inadequate in the process of administration of justice, then judiciary plays active role. Judges do make laws to fill the lacunas in the legislative laws with the help of judicial review. It leads to judicial activism and also judicial overreach.

This paper is an attempt to understand the law-making power of the judiciary in India and USA. It also explores the different concepts relating to judicial legislation, judicial review, judicial activism and judicial overreach.

Index Terms **- Judicial legislation, separation of power, judicial activism, judicial overreach.**

I. INTRODUCTION

The judiciary secures the people's rights and the Constitution from the legislature's and the executive branch's arbitrary actions. When a statute is in question and the relevant legislation has become irrelevant or insufficient to address the current needs, the judiciary interprets the statute's existing provisions to give it meaning. It has often been said that the court has overreached itself and intruded upon the territory of other governmental branches, particularly the legislature[1]. This power of intervention can lead to judicial activism and judicial overreach.

II. SEPARATION OF POWERS

The concept of the separation of powers was first introduced by Montesquieu in his writings on the spirit of the laws. Montesquieu describes the division of governmental duties among the three branches to ensure that no branch encroaches on the territory of another. This model states that laws are made by the legislative branch, enforced by the executive branch, and interpreted by the judiciary branch. In theory, every branch solely serves its own purpose, and individuals in one branch shouldn't work in another branch at the same time. The primary rationale behind dividing authority across independent branches is to avoid any one person or organisation from acquiring undue power and exercising despotic authority. However, in the era of the welfare state, separation of powers does not apply in the traditional sense. It is still important today simply as a check and balance system for how the government operates[2].

The responsibilities and duties of the various branches of government have been clearly defined in the Indian constitution. Articles 245 and 246 of the Indian Constitution grant the Union Legislature (Parliament) and State legislatures the authority to enact laws. According to articles 53 and 154, respectively, the President and

[1] Legislative Role Of Judiciary In India: A Critical Appraisal , available at: http://ili.ac.in/pdf/akdu.pdf (last visited on February 20 , 2024).

[2]Separation of Powers, available at: https://www.researchgate.net/publication/328216540_Separation_of_Powers/link/5fa5feafa6fdcc06241cc21b/download (last visited on February 17, 2024).

the State Governor are granted the executive authority of the Union and the States, respectively. The Constitution's Chapter IV of Part V and Chapter V of Part VI contain the provisions pertaining to the Union and State judiciaries.

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*[3], the application of Doctrine of Separation of Powers under Indian Constitution was discussed as: "The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but, the functionsof the different parts or branches of the government have sufficiently differentiated and consequently, it can very well be said that our Constitution does not contemplate assumption, by one organ or part of State, of functions that essentially belongs to another". In *Kesavananda Bharati v. State of Kerala*[4], it was held that the Separation of Powers is one of the basic features of the Indian Constitution.

The American concept of separation of powers serves as the cornerstone around which the entire framework of the Constitution is built. The Congress has entire legislative authority under Article 1, Section 117. The President of the United States is granted full executive authority by Article 2, Section 118. The Supreme Court is granted entire judicial authority under Article 3, Section 119. By using its judicial review authority, the judiciary tampers with the powers of the President and the Congress. It is accurate to state that the US Supreme Court has amended the US Constitution more times than the US Congress.[5]

III. JUDICIAL LEGISLATION

The definition of judicial legislation is "laws held to be created by the pronouncements of a judge who departs from a strict interpretation of a law according to the manifest intention of the legislature".[6]The phrase "judicial legislation" carries on its face the notion of judicial usurpation. It is an oxymoron.[7] The words may imply a wrongful exercise by the courts of a power constitutionally assigned only to the legislature, thus charging a usurpation by the judiciary. The charge of usurpation assumes that the judge can ascertain when his action is within the limits of the proper exercise of the judicial function and when his action would infringe on the legislative function. "Judicial legislation" also may be applied to a court's activity in praise of what the court has done and said. Far from condemning judicial action on the ground that it amounts to "judicial legislation," and hence is wrong, it is argued that a court cannot exercise properly its judicial function without legislating, and that it is wrong to condemn a court for doing that which it must do. Although it is also here assumed to be possible for a judge to recognize when a choice of decision would or would not be "judicial legislation," the importance of recognition and proper classification is not stressed as a means of avoiding usurpation by the judiciary. Rather, the recognition and proper classification is sought on the assumption that the quality of the judicial legislation will be increased or the extent thereof reduced, if the judge does his "judicial legislating" consciously and intentionally[8].

The answer to the question that do the judges make law can be studied with two theories. Firstly, the declaratory theory in which the historical jurists like Coke, Matthew Hale, Blackstone, Prof. Hammod, Dr. Carter and Lord Esher have given their view that the judges only declare the existing law But Bentham and Austin have criticised this theory, where Bentham says that " it is a willful falsehood having for its object the stealing of legislative power by and for hands which could not or does not openly claim it" and Austin described this theory as a 'childish fiction employed by our judges that common law is not made by them; but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges'. On the other hand, the other theory is creative theory or judges make law. It is being supported by Prof. Dicey, Gray, Salmond, Radcliffe and Lord Denning[9]. Justice Cardozo said, "The theory of the old writers was that judges did not legislate at all. A preexisting rule was there, embedded, if concealed, in the body of the customary law. All the judges did was to throw off the wrappings and expose the statute to our view". Bentham and later Gray, asserted that judges produce law just as much as legislators do; and they even make it more decisively and authoritatively than legislators, since statutes are construed by the courts and such construction determines the true meaning of the enactment more significantly than its original text[10].

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[3] AIR 1955 SC 549

[4] AIR 1973 SC 1461.

[5] *Supra* note 3.

[6] Judicial legislation, available at: https://www.merriam-webster.com/dictionary/judicial%20legislation(last visited on February 18 , 2024).

[7] The problem with judicial legislation, available at: https://www.thehindu.com/opinion/op-ed/theproblem-with- judicial-legislation/article27199572.ece (last visited on February 15, 2024).

[8] Judicial Legislation, available at: https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2454&context=ilj (last visited on February 16 , 2024).

[9] B.N. Mani Tripathi, Jurisprudence 234, (Allahabad Law Agency, Faridabad, 19th edn., 2012).

[10] Judicial legislation, available at: http://docplayer.net/165827354-Judicial-lawmaking-in-india-isha-wadhwa.html (last visited on February 18 , 2024).

Montesquieu went so far as to describe judicial power as being "in some measure, next to nothing" and judges as merely "a sight and a sound", providing some sort of animation to the codes. The attribution of a secondary status to adjudication is, however, not only confined to the civil law tradition. In the common law orbit too, the jurisprudential ideologies have inclined predominantly to the view that adjudication merely consists in the application of the law enunciated by the legislature and that judges declare the law but do not make it. In England where codification did not reach and which evolved almost all its basic principles and doctrines due to judicial creativity. David M. Trubek remarked that, "The Common Law was nothing but the law made by the judges unaided by the legislatures to meet the needs of expanding capitalism". However, the Blackstonian theory still persists that judges do not make law; what is more, judges and everybody else are asked to believe this unquestioningly. In the United States of America and India, where the Constitution provides for judicial review of the legislative and executive action and where the Courts have at times been activist, question concerning the legitimacy of judicial review has become the standard feature of political and academic precincts[11].

IV. JUDICIAL REVIEW

Supremacy of law is the essence of Judicial Review. It is the power of court to review the actions of legislature, executive and also of the judiciary. It is the power to scrutinise the validity of law or any action whether it is valid or not. It is a concept of Rule of Law. Judicial Review is the check and balance mechanism to maintain the separation of powers & separation of functions. The Constitution is intended to operate as a limitation upon the powers of the various organs of the State. Under those Constitutions where Judicial Review exist, this guardianship of the Constitution belongs to the Courts. Judicial Review power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution[12].

IN INDIA

The cornerstone of the Indian Constitution is the Doctrine of Judicial Review, which is regarded as its defining characteristic. The Indian Constitution includes judicial review even if it isn't specifically mentioned in it. The Indian Constitution includes judicial review even if it isn't specifically mentioned in it. Three distinct dimensions of judicial review are specifically provided for in the Indian Constitution: judicial review of constitutional amendments, judicial review of state and parliamentary legislation, and judicial review of executive branch administrative activities[13]. The question came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*[14] .The Supreme Court held that the power to amend the Constitution including the fundamental rights is contained in Art. 368 and that the word 'law' in Art. 13 (2) includes only an ordinary law made in exercise of the legislative powers and does not include Constitutional amendment which is made in exercise of constituent power. Consequently, even if a constitutional amendment restricts or eliminates any of the essential rights, it will still be enforceable. It guarantees that laws must adhere to the constraints imposed by constitutional provisions. These phrases provide courts the authority to carefully examine the legality of legislation.

In *Sajjan Singh v. State of Rajasthan*[15], the existence of the Constitution under the 17th Amendment Act of 1964 was in question. The Court eradicated the position in the Shankar Prasad case and held that the constitutional amendments made under Article 368 are not within the ambit of judicial review by the courts. In *Golaknath & Ors v. State of Punjab*[16], there was a challenge made to three constitutional amendments, namely- the first (1951), fourth (1955) and seventeenth (1964). The Hon'ble Supreme Court asserted that Parliament has no authority under Article 368 to change the Constitution or to take away or restrict fundamental rights. In *Keshavananda Bharti v. State of Kerala* [17], a challenge was made to the 24th (1971) and 25th (1971) Constitutional Amendments. A 13-bench judge was formed to attend the case, and with a 7 : 6 ratio, the Court deduced that: Article 368 of the Constitution provides the President with the power to bring

[11]Judicial legislation, available at: http://upendrabaxi.in/documents/On%20the%20problamatic%20distinction%20between%20legislation%20and%20 adjudicat.pdf (last visited on February 18, 2021).

[12] A judicial review a comparative analysis of India, USA,UK , available at : https://www.ijlmh.com/wp-content/uploads/2019/03/Judicial-Review-A-Comparative-Analysis-of-India-USA-UK.pdf (last visited on February 19 , 2024).

[13]A judicial review a comparative analysis of India, USA, UK , available at : https://www.ijlmh.com/wp-content/uploads/2019/03/Judicial-Review-A-Comparative-Analysis-of India-USA-UK.pdf (last visited on February 19 , 2024).

[14] A.I.R. 1951 S.C. 455

[15] A.I.R. 1965 SC 845

[16] A.I.R. 1967 SC 1643

[17] A.I.R. 1973 SC 1461

about changes in the Constitution. Amendments to the constitution are not the same as regular statutes. The Parliament cannot alter or overturn the Constitution's fundamental principles.

In *Indira Nehru Gandhi v. Raj Narain*[18], the then Prime Minister of India- Indira Gandhi was held guilty of electoral malpractices by the Supreme Court. In *Minerva Mills Ltd. v. Union of India*[19], clauses (4) and (5) of Article 368, which were inserted by the 42nd Amendment (1976), were struck down by the Apex Court on the grounds that these clauses destroyed the basic structure of the Constitution.

IN USA

The United States Constitution does not specifically assign the judiciary this guardianship role. But the common law doctrine of ultra vires, according to which courts had the power and duty to invalidate the act of an inferior body which transgressed the mandate of a superior authority which is binding on the inferior or subordinate body. One of the fundamental process in the U.S. to determine the validity of law is Judicial Review. The power of judicial review to declare the laws unconstitutional and to scrutinise the validity of law implicitly incorporated in the Art.III and IV of the Constitution of United States of America. As early as 1803, *Marbury's Case*[20],Marshall C.J., placed the doctrine upon a sure footing by saying that since the Judges, as directed by the Constitution itself, took oath to support the Constitution, which constitutes the paramount law of the nation, it was the duty of the Judges to annul any law made by the Legislature which violated the Constitution or was repugnant to it. According to the Bernard Schwartz, "The decision on the question of constitutionality of a legislative act is the essence of the judicial power under the Constitution of America." After Marbury's case the expansion of judicial review in U.S.A. is very broad in nature, its widened the scope of judicial review in U.S.A. in present scenario. The Supreme Court in the recent case of *Reed v. Town of Gilbert, Arizona*[21], in this case, Clarence Thomas J., on behalf of the majority held that distinctions drawn by the ordinance were impermissible. It was decided that rigorous judicial assessment and close examination are necessary for every "content-based law." The Court further held that content based law which are target speech based on its communicative content are presume to be unconstitutional and may be justified only if the Government proves that they are narrowly tailored to serve compelling State interests.

V. JUDICIAL REVIEW IN INDIA AND USA : COMPARISON

Although the American Constitution does not specifically include the concept of judicial review in any of its sections, the scope of judicial review in India is less than that of the USA. The Supreme Court will enact new legislation in lieu of those that it rejects. Judge-made legislation is prevalent in the United States. However, the Supreme Court of India leaves it up to the legislative branch to enact new laws when it rejects one. In USA, It can declare laws violative of these rights void not only on substantive grounds of being unlawful, but also on procedural grounds of being unreasonable but in India, Supreme Court examines only the substantive question. In India, both, the American principle of judicial supremacy and the British principle of parliamentary supremacy exist. The American Supreme Court has consumed its power to interpret the constitution liberally by the use of the due process of law clause. It has occupied the position of a maker of law and has been correctly described as a 'third chamber of the legislature. Like the American Supreme Court, the Supreme Court of India enjoys the power of Judicial Review' in relation to 'judicial review of legislation is more restricted than USA. Stated differently, the Indian judiciary, comprising the Supreme Court, does not assert itself as a Third Chamber with the authority to render decisions about the policies enshrined in legislatively passed laws[22].

VI. JUDICIAL ACTIVISM

Due to activist approach of judges, a new facet of Judicial Review emerged during course of time to be known as Judicial Activism that envisages changes in interpretation of constitutional and statutory provisions in consonance with the dynamics and uncertainties of human affairs andrelations. The broad contours of Judicial Activism is visible in Black's Law Dictionary that defines it as a "judicial philosophy which motivates judges to depart from strict adherence to precedents in favor of progressive policies which are not always consistent with the restraint expected to be exercised by appellate judges[23]".

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[18] A.I.R. 1975 SC 2299
[19] A.I.R. 1980 SC 1461
[20] 5 U.S. 137, 12 (1803)
[21] 13 US 502, 23, (2014).
[22] Judicial Review in India and U.S.A., available at: http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-And-USA.html (last visited on February 20, 2024).
[23] Supra note 1.

IN INDIA

Judicial activism in India is defined as the active interpretation of any existing law with the goal of improving its usefulness for societal improvement in line with the Constitution. In India, judicial activism has taken off and gained a great deal of public support. But there will inevitably be conflict and strain between the judiciary and the other state agencies as a result of this activist approach. Such tension is normal and even desired in certain situations.

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. In *Bandhua Mukti Morcha v. Union of India*[24]*, People's Union for India, Democratic Rights v. Union of India*[25], etc., are the cases decided on the issue inwelfare of the bonded labourer. The judgements in *M.C. Mehta v. State of Tamil Nadu*[26], *Sheela Barse v. Union of India*, etc., have been delivered in the welfare of child. The Supreme Court issued several directions in *Vishaka v. State of Rajasthan*[27] for prevention of sexual harassment of working woman. In *D.K. Basu v. State of West Bengal*[28], case of compensation for death in police custody, etc., have been recognised for protection of prisoners. It is worth mentioning here that all the aspect of privacy was discussed in the *Justice K.S. Puttaswamy v. Union of India*[29] and it was held that privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in article 21. There are many judicial pronouncements which may be considered historic in Indian legal system. Following are some instances: Judgment on Section 377 of IPC – In Navtej Singh Johar v. Union of India, 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. Due to this provision, the LGBT, community was suffering atrocity and torture and was deprived of Fundamental Rights conferred under article 14 and 21. It is worth mentioning here India had that the Delhi high court in *Naz Foundation v. Union of India* [30]held the same as has been held in the Navtej Singh Johar Case[31]. The Supreme Court in *Common Cause (A Registered Society) v. Union of India*[32] held the right to die with dignity as a Fundamental Right under Article 21 and allowed passive euthanasia and living will. In the recent case of *Anoop Baranwal v Union of India*[33], The Supreme Court held that a committee comprising the Prime Minister, the Leader of the Opposition and the Chief Justice of India will advise the President on appointments to the Election Commission of India until Parliament enacts a law on the subject. Furthermore, due to the activist approach of the judiciary, the concept of Public Interest Litigation, Procedural Device for Justice to Poor and Doctrine of Basic Structure emerged as a means of justice to poor and disadvantaged section of the society and as the mechanism of control of arbitrary actions of legislature and executive. Judicial activism is responsible for the creation of Public Interest Litigation (PIL). By permitting civic-minded individuals to petition the court on behalf of public issues, the Indian Supreme Court loosened the strict interpretation of loci. As a result, since 1977, the number of PIL cases has grown. The events that took place between 1975 and 1977, while emergency rule was in effect, are primarily responsible for the expansion of PIL after 1977The judicial system in India before 1977 and after the country's declaration of emergency are notably different from one another. The aspirations of the people and the changing circumstances prompted this shift in strategy. This expansion of access to the legal system has resulted in a significant increase in PIL cases that are being heard in court.

IN USA

Even in America, judicial activism could be seen as modern Supreme Court has fashioned a general, independent constitutional right of privacy by drawing on the 14th Amendment and on various provisions of the Bill of Rights, there are some who support a right of privacy cannot reasonably be inferred from the language of the original Constitution or any of its amendments. The Supreme Court highlighted in *Griswold v. Connecticut*[34] that the right to privacy "emanated" from various provisions of the Bill of Rights. The Court

[24] AIR 1984 SC 802.
[25] AIR 1982 SC 1473.
[26] AIR 1999 SC 41.
[27] AIR 1997 SC 3011.
[28] AIR 1997 SC 610.
[29] 2017 (10) SCC 1
[30] 2009 (6) SCC 712
[31] 2017 (9) SCC 1
[32] (2018) 5 SCC 1
[33] Anoop baranwal v. Union of India, available at: https://www.manupatra.com/corporate/Blog/pdf/Anoop-Baranwal-vs-Union-of-India.pdf (last visited on February 25, 2024).
[34] 381 U.S. 479 (1965)

struck down a state statute which prohibited the use of birth control devices insofar as the statute applied to married couples. Court relied upon the 3rd Amendment which explicitly protected the 'privacy' of the home in peacetime from soldiers seeking quarters, the 4th Amendment which protected individuals from unreasonable searches and seizures, the 5th Amendment which prohibits compulsory self- incrimination and the 1st Amendment which ensures freedom of conscience in both political and religious matters, recognizing the autonomy of the individual.

This judgement followed many controversies and political unrest. This controversy escalated because of the judgement given by the Hon'ble Supreme Court in *Roe v. Wade*[35], where the Court relied on the right of privacy to strike down a statue passed in Texas which criminalized abortions. The United States Supreme Court ruled that a woman's choice to end her pregnancy falls within the ambit of her right to privacy.

The United States Supreme Court, unmoved by the 'Anti-Abortion or Right to Life Movement, reaffirmed the decision of given in Roe, in 1992 judgement of *Planned Parenthood v. Casey*[36]and 2000 judgement of *Stenberg v. Carhart*[37]. To the extent that judicial recognition of the right of privacy relies on the Due Process Clauses of the Fifth and Fourteenth Amendments, it may be viewed as a modern application of the doctrine of substantive due process. Justice Louis Brandeis in his dissenting opinion in *Olmstead v. United States*[38] has also emphasized on the right of an individual 'to be left alone'. The third branch is often overlooked due to the publicised coverage of Congress, the legislature, and the President, the executive, but SCOTUS has actually been equally consequential in the American political system. In fact, it has determined a presidential election outcome (Bush versus Gore), provided corporations potentially unlimited access to political power (Citizens United versus FEC), and even asserted the legality of abortion based on the constitutional right to privacy (Roe versus Wade)[39]. In recent years, conservative justices have joined the liberal wing of the Court for decisions on highly contested issues, from legalizing same-sex marriage in *Obergefell v. Hodges*[40] to protecting the status of young undocumented immigrants in *Department of Homeland Security v. Regents of the University of California*[41].

VII. JUDICIAL OVERREACH

The judiciary's conventional passive function has given way to one that is more active and involved. It is stated that judges should be held accountable for judicial overreach if they arbitrarily use this kind of instrument. It has been separately accused as being an act of judicial overreach by jurists including former Supreme Court judge J. Katju. Since judicial activism starts where genuine activism ends, it is possible to understand the term "judicial overreach" as being closely related to its predecessor's idea. In addition to the issue of lack of knowledge, Justice Verma claims that if the court does tasks that are not supposed to be assigned to him, it denies the aggrieved party an opportunity in which to express their complaints. It is overreach for courts to assume the role of other organisations or experts; yet, when they decide a legal matter and provide a rationale for their judgement, this is acceptable judicial activism[42].

There are instance where judicial overreach can easily be noticed. The censoring of the movie Jolly LLB II is a well-known example of judicial overreach. The case, filed as a writ petition, alleged that the film was a provocation and an act of contempt since it made fun of the legal system. In response to a PIL regarding road safety, the Supreme Court outlawed the selling of alcohol at retail stores, eateries, and bars within 500 metres of any state or federal highway. The court was not presented with any evidence linking the number of fatalities and the ban on driving after intoxication. This decision cost the state governments money and resulted in job losses.[43] Because it included an administrative issue that required executive understanding, the case was viewed as an overreach. In the matter of *Arjun Gopal v. UOI*[44], to defend the right to an environment free from pollution, the Supreme Court outlawed extremely polluting firecrackers in 2017. In 2018, the supreme court ruled that only "green crackers" would be permitted, outlawing the manufacture and sale of all other types of crackers except "green crackers" with reduced sugar content. A week before Diwali in 2020, seven states outlawed the purchase and use of firecrackers. In the latest judgement of Supreme court in the matter

[35] U.S. 113 (1973)
[36] 505 U.S. 833 (1992)
[37] 530 U.S. 914 (2000)
[38] 277 U.S. 438 (1928)
[39] Judicial activism, available at: https://www.firstpost.com/world/donald-trumps-impact-on-us-supreme-court-could-reverberate-in-american-politics-for-a-generation-9221691.html (last visited on February 23, 2024)
[40] 576 US 644 (2015)
[41] 591 US _ (2020)
[42] Judicial activism, available at: https://core.ac.uk/download/pdf/112282.pdf (last visited on February 19, 2024).
[43] Prerna Sharma, "Judicial Activism VIS-A-VIS Judicial Overreach: A Comparative Study" 5 IJFMR 4 (2023).
[44] *Ibid.*

of *Anoop Baranwal v. UOI*[45], 'A group of petitions calling for change in the selection of members of the Election Commission of India were being heard by a Constitution Bench made up of Justices KM Joseph, Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy, and CT Ravikumar.

In USA, judicial overreach can be seen in *Dobbs v. Jackson Women's Health Organization* in June 2022, the Supreme Court overturned the constitutionally protected right to access abortion, leaving the question of whether and how to regulate abortion to individual states.[46] Also, they imposed their own policy preferences on the people of D.C when it comes to Gun rights where guns are banned under the second amendment.[47]

While there are legitimate benefits to judicial activism, there is a serious risk that it may lead to judicial overreach. The American and Indian judiciaries must adhere to "self-regulatory practices" in this regard because the Constitution places restrictions on the authority and conduct of all other state organs, which the judiciary monitors. But, when it comes to judicial action, there is no body in place that can detect or curtail the judiciary's abuse of power. The judiciary is an arbiter in its own case since it is empowered to disregard the constitutional concept of separation of powers and is responsible for judging any such violations. Last but not least, the US Supreme Court established the requirements for judicial involvement. It establishes that the dispute in front of the court must have a legitimate cause of action and cannot only be the result of a deficiency of standards that are manageable and discoverable by the judiciary. Furthermore, he makes it clear that when judicial activism falls within the purview of acceptable judicial review, it is valid. The approach ought to be neither judicial despotism nor ad hoc. These are the general guidelines used to evaluate the validity and appropriateness of court interventions[48].

VIII. CONCLUSION

It can be said that judiciary in recent times, is surely making laws. Although, this law-making function is of legislature, judiciary is playing active role. The Court has always understood it to be obligation of the executive to pass orders in areas of legislative vacuum, because the field of executive is coterminous with that of the legislature. 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 judiciary can do this by the help of judicial review which is expressly mentioned in Indian constitution and not so in the USA constitution.

Even, the new facet of judicial review has come, popularly known as judicial activism. This has brought many historic changes in the smooth functioning of the society. The Court has been remarkably cautious while deciding whether to perform legislative or executive functions. Sometimes, judiciary goes beyond its jurisdiction known as judicial overreach. Judicial overreach is particularly egregious in the Indian context where judicial accountability is ineffectual, with impeachment by the legislature being the only recourse open to the other organs of the State. Democracy wins when each of its pillar performs its duties to the optimum, without trying to trip the others.

The judiciary is expected to play active role wherever needed and give their guidelines or directions. It will be beneficial when this judicial activism is used for national interest and just filling the gaps left in the statutory law by interpreting it in a correct manner and by conferring right guidelines. So, there is a need of self-judicial restraint.

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[45] *Supra* note 33.

[46] Abortion in US, available at: https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs (last visited on February 29, 2024)

[47] Guns rights and domestic violence protections collide at US Supreme Court, available at: https://www.reuters.com/legal/guns-rights-domestic-violence-protections-collide-us-supreme-court-2023-11-06/ (last visited on March 1, 2024)

[48] Judicial overreach, available at: https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/recent_issues_pdf/2018/January/January_2018_1516451857_139.pdf (last visited on February 20,2024)