CHAPTER II

JUDICIAL ACTIVISM UNDER DIFFERENT CONSTITUTIONS – A BRIEF COMPARATIVE STUDY

The Constitution of India provides scope for judicial activism. Similarly different constitutions of the world provide scope for judicial activism. Judicial activism has been a global phenomenon. The phenomenon called judicial activism has been observed under most constitutions of the world, written or unwritten. Under the unwritten Constitution of U.K. (Britain) often described as ‘a child of wisdom and chance’¹ judicial activism has been the consequence of a gradual evolution of the concept. Subtle in form, judicial activism in Britain has been directed mostly against the executive and not against the legislature since Britain recognizes the principle of parliamentary sovereignty but subject to rule of law and international treaties signed by Britain. Under the Constitution of the Fifth French Republic, 1958 which operates on the principle of ‘popular sovereignty’², judicial activism (activism to be precise) has been through a political non-judicial body known as the ‘Constitutional Council’. The French Constitutional Council has played an activist role in reaffirming the rights and freedoms guaranteed in the Declaration of Rights, 1789.

Complex form of judicial activism appears under the colonial constitutions of Canada and Australia enacted through an Act of the British Parliament. With no Charter of Rights in the British North America Act, 1867, Canadian judicial activism saw two phases – one, before the adoption of the Bill of Rights and another, after the adoption of the Bill of Rights. The pre-charter judicial activism mainly concentrated in promoting the principles of federalism whereas the post-charter judicial activism indulged in the protection of the fundamental rights and freedoms of the Canadian citizens. In the absence of a specific Bill of Rights, the Australian courts have shown activism in promoting the principles of federalism.

Judicial activism has been more visible and more prominent under the written constitutions of America and Ireland. In America, the judges adopt an activist approach based on the principle that “judges not only interpret laws but also make laws”. Hence the American judges liberally indulged in defining un-enumerated rights from the existing enumerated rights by applying the theory of emanation. Similarly, under the Constitution of Free Irish State, 1937, the Irish courts have indulged in liberal interpretation by occasionally appealing to the Preamble. Like the American courts, the Irish courts have deduced unenumerated ‘natural rights’ from the not so exhaustive list of ‘personal rights’.

Judicial activism has also been observed under the post World War II constitutions of Japan and Germany. Though based on the American model, the

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Japanese Supreme Court was a little cautious in declaring an unenumerated fundamental right and protecting human rights of its citizens. In this regard, the German courts were more open either in promoting the principles of federalism or in protecting the human rights of its citizens through the theory of basic structure.

A discussion of judicial activism under the above constitutions is attempted in this Chapter. The constitutions discussed in this Chapter covers those constitutions which were framed before the Constitution of India came into force. Consequently, judicial activism in the above constitutions had, in more or less way, an impact on the judicial activism in India. The discussion, however, is brief, comparative and made from historical perspective. For the sake of convenience, it is proposed to discuss the chapter under the following headings: -

1. Judicial activism under the constitutions with parliamentary sovereignty;
2. Judicial activism under the constitutions with constitutional supremacy.

This discussion is further continued under the subheadings of

A. Without a Bill of Rights
B. With a Bill of Rights

**Judicial Activism under the Constitutions with Parliamentary Supremacy**

The discussion of judicial activism under the constitutions with parliamentary supremacy shall be confined to the constitutions of U.K. (Britain) and France.

**Britain - Judicial Activism v. Parliamentary Supremacy**

The origin of judicial activism through judicial review can be traced back under the unwritten Constitution of Britain during the Stuart period of (1603–1688).
Sometime, in the year 1610, the power of judicial review was asserted for the first time in Britain through the activism of Justice Coke. Evolving the principles of judicial review, Chief Justice Coke declared that if a law made by the Parliament violated the principles of ‘common law’ and ‘reason’ then the courts might review and adjudge it as void. Coke’s theory of judicial review was repeated by Sir Henry Hobart in 1615 and again in 1702 by Sir John Holt. The British chief justices asserted the power of the judiciary to review acts of the British Parliament under ‘reason’ and ‘common law’. “Though Coke’s words were repeated”, John Agresto finds that “except for Dr. Bonham’s case instances of actual nullification of parliamentary laws by British courts cannot be cited.” Since then, however, judicial review did not get an upper hand as it was over-shadowed by the evolution of parliamentary sovereignty in Britain.

**British Parliament is Sovereign** – Parliamentary sovereignty was established in Britain during the same Stuart period when the British Parliament abolished monarchy through an Act and declared Britain to be a ‘Commonwealth’ or ‘Republic’ in 1649. With monarchy coming to an end, the maxim, “The King can do no wrong” became ‘The Parliament can do no wrong.’

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5 *Bonham’s case* (1610) 8 Co. Rep. 114 (118)
9 Ibid. p. 25
The sovereignty of the British Parliament was also confirmed by its jurists. According to Blackstone:

“The Parliament has the supreme and unlimited power to make, all kinds of laws, to sanction them, to elaborate them and to interpret them. It can do all those acts, which are possible.”

Giving an exhaustive description of the sovereignty of the British Parliament, Dicey describes the sovereignty of the British Parliament as the dominant characteristic of the British Constitution under which the Parliament’s power to make or unmake any law can never be questioned by any person or body.

It is now settled that the courts cannot invalidate any Act duly passed by the Parliament on the ground that it has violated the principles of common law and reason. The reason was clearly explained by Willes J. in 1871 in the following words: “Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists.”

The court’s view is completely in tune with Austinian jurisprudence that law is the command of the sovereign. In Britain, the Parliament is the sovereign whose authority to make or unmake any law can never be questioned by anyone (including the courts). The British Parliament is viewed as a legislative assembly and at the

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10 Ibid. p. 76
13 In Lee v. Bude & Torrington Rly Co., (1871) LR 6 CP 577 (582); R. v. Barnsley Licensing JJ., (1960) 2 All ER 703 (CA)
same time a constituent assembly having full powers to amend any law including the Constitution.\textsuperscript{14}

The concept of parliamentary sovereignty is supported by Dicey’s rule of law theory. According to Dicey, the English constitutional system is characterized by two features – (a) Sovereignty of Parliament and (b) Rule of Law. Dicey suggested that the second principle of Rule of Law was derived from and complementary to the first principle of sovereignty of Parliament which itself favours supremacy of the law. In this regard, the word ‘law’ means the laws passed by the sovereign British Parliament. There exists a symbiotic relationship between Dicean rule of law and Blackstone’s parliamentary sovereignty. Describing the interrelationship between the rule of law and parliamentary sovereignty in Britain, Barker quotes: “Sovereignty of Parliament and Rule of Law are not merely parallel; they are also interconnected and mutually inter dependent.”\textsuperscript{15} This symbiotic relationship is maintained through the recognition of each other’s authority. On the one hand, the British judges recognize the authority of the British Parliament as the only law–makers; on the other hand, the British Parliament recognizes the authority of the British judges as the only interpreters of the law made by the Parliament and the rest of the law of the land.\textsuperscript{16}

\textsuperscript{16} Ibid at p. 25
Parliamentary Sovereignty does not mean Despotism - However, parliamentary sovereignty in Britain does not mean despotism of an omnipotent parliament. International law operates as a significant principle which does circumscribe the plenary powers of the sovereign British Parliament. The International treaties signed by Britain limits the jurisdiction of the British Parliament. Professor S.P. Sathe finds that over the years, parliamentary sovereignty in Britain has been considerably eroded in practice as well as in law. This was since Britain had joined the European Convention on Human Rights (ECHR) and has accepted the jurisdiction of the European Council on Human Rights in 1951. According to Anthony Lester, British Courts were not prepared to give full domestic effect to the ECHR in the absence of legislation incorporating it into domestic law, but they developed the common law to protect civil and political rights. The implementation of ECHR gained an impetus with the passage of the Human Rights Act, 1998 which came into force for the whole of UK in October 2000 and also the Equality Act, 2010 for tackling unlawful discrimination in the protection and promotion of human rights. With the passing of these legislations judicial activism has ensured that the British Parliament’s law-making power is subject to principles of international treaties adopted by Britain.

Anthony Lester suggests that the Human Rights Act, 1998 reconciles the sovereignty of British Parliament with the effective protection of Convention rights.

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by requiring the courts where possible to read and to give effect to legislation in a way compatible with Convention rights and also by requiring public authorities other than Parliament—including the courts to respect and uphold these rights.\textsuperscript{19}

Accordingly, the court interprets a statute, which is ambiguous in accordance with the international law. If, however, the language of the statute is clear and unambiguous, the court enforces the statute even if it is contrary to a treaty, or convention to which Britain is a party.

The court’s insistence on implementing the international treaties has won criticism from the political circles. Recently Mr. Howard, a conservative leader warned the British judges against such “aggressive judicial activism” that could put the country’s safety from terrorist at risk and undermine public faith in the justice system.\textsuperscript{20} In this connection, he referred to the House of Lord’s decision made in 2004 that the indefinite detention without trial of foreign terror suspects under the Anti Terrorism Act, 2001, contravened the Human Rights Act, 1998. The Human Rights Act 1998 was passed in pursuance to an international treaty, which Britain made under the Geneva Convention, 1951. Warning against aggressive judicial activism Howard wrote in The Telegraph:

“Parliament must be supreme. Aggressive judicial activism will not only undermine the public’s confidence in the impartiality of our judiciary. It could also put our security at risk and with it the freedom that judges seek to defend that would be a price we cannot be expected to pay.” \textsuperscript{21}

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\textsuperscript{19} Ibid
\textsuperscript{20} “Howard warns against judicial activism”, from http://www.uksecurity.terrorism/print2005/aug/10/uksecurity.terrorism/print, 21.11.08
\textsuperscript{21} Ibid
Judicial trend during War Emergency – Most of the English judges advocate the doctrine of literal interpretation. The gist of the literal interpretation is that the statutes must be construed according to the plain, literal and grammatical meaning of the words. Though such literal interpretation of statutes was in conformity with the concept of parliamentary sovereignty, it ran counter to Dicey’s rule of law theory which advocates the absence of arbitrary power of the government.

Such observation was made during the emergency. In this regard, the illustration of *Liversidge v. Anderson*\(^\text{22}\) can be cited. In *Liversidge’s case* the majority judges refused judicial scrutiny of the reasonableness of the Home Secretary’s power of preventive detention during a war emergency. Lord Atkin, the lone dissenting judge, however, held that the words ‘reasonable grounds to believe’ must be interpreted to make the satisfaction of the Home Secretary justiciable. Regulation XII B of the Defence of the Realm Act gave power to the Home Secretary to detain a person if he had reasonable grounds to believe that the person was an enemy. The above judicial attitude which involved a most beneficial judicial construction of the emergency powers conferred on the administration by statute law was based on the idea of not embarrassing the executive in times of war. The judicial attitude developed in *Liversidge’s case* was a manifestation of a similar judicial attitude developed in *R. v. Halliday*\(^\text{23}\) during the First World War.

\(^{22}\) (1942) AC 206

\(^{23}\) (1917) AC 260
Fundamental Freedoms and Liberties - The English judges believed that their function was to merely declare the pre-existing law or to interpret the statutory law. S.P. Sathe finds that “the entire common law is the creation of the English courts which is based on the myth that the judges merely found the law.” Even with such self-negation perception of their own role, the English judges developed the law of contracts and torts.

The fundamental freedoms and liberties of British citizens are not guaranteed by any parliamentary statute but by the common law of the land. Even in the absence of any constitutional or statutory protection the British citizens enjoy fundamental freedoms and liberties due to judicial activism of the British judges. The courts in Britain have played an active role in upholding and enforcing the different fundamental freedoms and liberties guaranteed by the British common law and the different British Charters. The different rights and freedoms are the consequence of the court’s jurisprudence developed under the law of torts and the law of contracts.

In Britain freedom of press includes publication and communication through various electronic media but subject to public criticism against the King and seditious libel against the Government. Of course, freedom of press to say

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25 “Freedom of press in Britain” from www.google.co.in, 26/04/10
anything can be forbidden by law.\textsuperscript{26} Similarly invasion of a man’s privacy is actionable under the law of torts if it constitutes trespass, defamation or nuisance.\textsuperscript{27}

In the recent years, the British courts have adopted an activist approach in promoting the different human rights as fundamental rights such as right against cruel and inhuman punishments\textsuperscript{28}, right against delayed execution of a death sentence\textsuperscript{29}, right of correspondence between a prisoner and his lawyer\textsuperscript{30}, if not objectionable and right against self incrimination.\textsuperscript{31} The promotion of human rights by the British courts has gained momentum particularly after the implementation of the Human Rights Act, 1998. “Although the Human Rights Act, 1998 (HRA) preserves the formalities of the principle of parliamentary sovereignty, there were many features of the HRA which placed substantial and (substantive) limits on the law–making power of Parliament.”\textsuperscript{32}

Judicial activism under the unwritten constitution of Britain had inspired judicial activism under the American Constitution and under the different constitutions of British colonies. What was said by Lord Coke in Dr. Bonham’s case was repeated by Chief Justice Marshall in the American Supreme Court in

\begin{footnotesize}
\begin{enumerate}
\item Ibid at p. 258
\item \textit{Schering v. Falkman} (1981) 2 All ER 321 (CA)
\item \textit{Gufoyle v. Home Office}, (1981) AER 943 (947) (CA)
\item \textit{Rio Corp. v. W.E.C} (1978) 1 All ER 434 (HL); \textit{R v. Coote}, LR 4 PC 599; \textit{Triplex Co. v. L.S. Glass} (1939), 2 All ER 613
\end{enumerate}
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Marbury v. Madison\textsuperscript{33} in the year 1803. Lord Coke’s theory of judicial review laid the foundation for judicial review under the American Constitution and other colonial constitutions.

As observed by John Agresto, though the concept of judicial review was politically dead in Britain after the establishment of sovereignty of the British Parliament but it was an emerging concept in the British colonies.\textsuperscript{34} The concept of judicial review emerged in the British colonies through the jurisdiction of the Privy Council over the laws and courts of British colonies. Till 1949, the Privy Council which was the appellate court of British colonies could disallow acts of colonial legislations contrary to British policy. Edward Mc Whinney found that “the appellate jurisdiction of the Judicial Committee of the Privy Council in relation to the overseas Dominion and colonies extended to both private law and public law matters.”\textsuperscript{35} The Privy Council also assumed appellate jurisdiction over court decisions in British colonies till 1949. After 1949 judicial review of the Privy Council ended with the end of its jurisdiction over the courts and laws of British colonies.\textsuperscript{36}

\textsuperscript{33} M.V. Pylee, Constitutions of the World, 3\textsuperscript{rd} ed., Vol. 1, (New Delhi: Universal Law Publishing Co.,), p. xiv
\textsuperscript{36} The jurisdiction of the Privy Council ended in Canada by the Supreme Court Act, 1949; in South Africa by the Privy Council Appeals Act 1950; in India by The Abolition of Privy Council Jurisdiction Act, 1949
France – Non-Judicial Activism v. Parliamentary Supremacy

Another constitution which works on the principle of parliamentary supremacy is the Constitution of the Fifth French Republic, 1958. Though the French Constitution operates as the higher law yet the French Parliament enjoys supremacy in the sense that its law-making power cannot be questioned by its judiciary. In other words, there is no judicial review of parliamentary legislations in France. That does not mean that there is no scrutiny of parliamentary legislations in France. Under the French Constitution of 1958, the power of scrutinizing the constitutionality of legislations is entrusted to a non-judicial body known as the Constitutional Council. The Constitutional Council (hereafter referred to as CC), a non-judicial body is empowered to determine the constitutionality of a Bill but before its promulgation. After promulgation, the CC has no power to invalidate a law passed by the National Assembly and the Senate.

The Constitutional Council (CC) is a non-judicial political body of nine members. All the nine members are appointed, in equal number, by three different authorities, namely, the President of the Republic, the President of the National Assembly (lower House of Parliament) and the President of the Senate (upper House). Besides these nine nominated members, all former Presidents of the Republic shall be ex-officio members. There is no requirement that any of these members shall have any judicial qualification or experience. The CC is, therefore, considered as a non-judicial political body. However, the independence of the CC

is ensured through Article 57 and Article 62 of the Constitution of the Fifth Republic of France. Article 57 provides that no minister or member of Parliament can be a member of the CC and Article 62 provides that the decisions of the CC are final.\(^3\)

**Activism of Constitutional Council (CC) - Adopting an activist approach**

the CC has grown from a rather fragile institution to a stronger body.\(^4\) Though the CC is not a court, it should be pointed out that its decisions have a judicial flavour and up to 1977 it has pronounced several laws passed by the French Parliament as unconstitutional as it assumed the role of ‘Guardian Angel’ and the ‘Protector of civil liberties and individual’s freedom’.\(^5\) In this context, two decisions of the CC may be cited. In one such decision the CC struck down a Government Bill as unconstitutional for it has seriously curtailed the freedom of political association. The freedom of political association was to be curtailed on the ground that it had been formed for an illicit or immoral purpose or amounted to a revival of an illegal association.\(^6\) To support this ruling the CC interpreted the Preamble of 1958 Constitution as incorporating all the rights enumerated in the 1789 Declaration of the Rights of Man and the Preamble of the Constitution of Fourth Republic. In another instance, the CC declared invalid an amendment of a tax law which denied an exemption to assesses having income above a specified level on the ground that it

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\(^5\) Ibid at p.180

violated “the principle of equality before law contained in the Declaration of 1789.”

The political importance of the CC increased with the Constitutional Amendment of October 29, 1974. Now a reference regarding the constitutionality of a Bill can be made even by a minority group in either House (i.e., about ⅓ in the Senate or 1/5 in the Assembly). With increased political importance activism of the CC increased as more Bills were referred to it for determination of their constitutionality. In this context, three instances are cited which have been cited by R. Sridhar in his article ‘Judicial Review and the Constitutional Council of France – A Survey.’

In the first instance in the year 1975, 81 deputes referred to the CC an abortion bill which enabled a woman to abort either within the first 10 weeks of pregnancy if she were in distress or if two doctors certified that a continuation of pregnancy would put her health in grave danger. The deputes contended that the Bill was a breach of Article 2 of the European Convention of Human Rights. However, the CC declared itself incompetent to determine the constitutionality of a Bill, which was in conformity with a treaty. It was outside its jurisdiction.

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42 (1974) AJ 236 quoted and seen in Ibid at p. 416
44 Durga Das Basu, Comparative Constitutional Law, loc. cit.
45 Ibid at p. 416
In another instance, in the year 1977, a Bill aimed at more effective repression of crime was referred to the CC by 130 opposition deputes supported by 79 senators. The Bill armed the police officers with power to search any vehicle on the public highway. The CC struck down the Bill as it conferred arbitrary power to the police officers, which was inconsistent with the liberty of the individual, one of the fundamental principles guaranteed by the laws of the Republic.

In the third instance in the year 1989, the CC ruled five of ten socialist reforms partially unconstitutional. Such form of activism on the part of the CC was unacceptable. The purpose of the 1974 Constitutional Amendment was to give the Council the task of holding the constitutional balance between the opposition and the Government. Its purpose was not to give the CC more powers to invalidate the Bills proposed by the Government. However, a government proposal to abolish the CC made it careful in obstructing completely the Government’s reform agenda. The CC restrained its activism in view of the government proposal to abolish it.

Judicial Activism under the Constitutions with Constitutional Supremacy

A. Without a Bill of Rights – The discussion under this heading shall be confined to the colonial constitutions of Canada and Australia.

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48 Article 2 declares the motto of the Republic shall be “Liberty, Equality and Fraternity.”
Canada-Charter Activism – Edward Mc Whinney suggests that: “in its preamble, the Constitution of Canada speaks of the desire of the provinces of Canada to be ‘federally united into one Dominion under the Crown of the United Kingdom of the Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom. Historically, then, the Constitution of Canada, like the Constitution of the United States, stems from a compact between a number of different territorial units… Juridically speaking, however, the origins are rather different.”

The concept of judicial review is somewhat complex under the Canadian Constitution, 1867. The Canadian Constitution, 1867 was a colonial constitution enacted through an Act of the British Parliament known as the British North America Act, 1867 – henceforth known as the BNA Act, 1867. The British Parliament alone could amend the Canadian Constitution of 1867. In this sense, “this was indeed a full concession to the formalism of Austinian jurisprudence” suggests Edward Mc Whinney.

The Constitution of Canada constituted under the British North America Act, 1867 contained two controversial aspects. First, the BNA Act, 1867 allowed some external judicial review of parliamentary legislations in Canada primarily through the Privy Council. Secondly, since the BNA did not guarantee fundamental rights like freedom of worship, of the press and of the Assembly as

52 Vishnoo Bhagwan & Vidya Bhushan, (eds.), *World Constitutions*, op. cit., p. 504
53 Edward Mc Whinney, op. cit., p. 62
these fundamental rights and freedoms were denied to the Canadian citizens. Even legislation on a Bill of Rights by the Canadian Parliament in 1960 did not prevent the abuse of these fundamental rights and freedoms by the Government. The scenario changed only after the incorporation of a Charter of Rights under the amended Canadian Constitution of 1982.

**Pre–Charter Activism** – During the pre–Charter days, the Canadian courts confined its activism in promoting the principles of federalism. The Canadian courts believed that the Constitution of Canada, 1867 has a federal model because of the double enumeration of powers. Consequently, the Canadian courts have rejected the American doctrine of ‘Immunity of Instrumentalities’ and held that there is no immunity from mutual taxation of the civil servants or judges appointed by either government.\(^{54}\) Similarly, the American doctrine of ‘Implied powers’ is rejected by the Canadian courts in interpreting Sec. 91 of the BNA Act, 1867. With a precise delineation of legislative powers between the Dominion and Provincial governments and in the absence of a Bill of Rights it was thought that there would be no judicial conflict in the interpretation of the Canadian Constitution, suggests Mc Whinney.\(^{55}\)

But the Canadian experience tells otherwise. According to Mc Whinney,\(^{56}\) the judicial approach to the interpretation of the Canadian Constitution has widely fluctuated between two alternative approaches between two periods. In the first

54 Ref. Re Alberta Statutes (1937), DLR 100 (130); 
Judges v. A.G. (1937) 53 TLR 464 (PC)

55 Edward Mc Whinney, Judicial Review in the English Speaking World, 2\(^{nd}\) ed.
(Toronto, Canada: University of Toronto Press, 1960), p. 62

56 Ibid at p. 64
period, from the passing of the BNA Act in 1867 until the middle 1890’s the judicial construction construed the legislative powers of the Dominion Parliament broadly. The second period, beginning about 1896 and often referred to as Lord Watson–Lord Haldane era, the judicial construction was in favour of the contraction of Dominion legislative powers and the concomitant assertion of provincial rights. In this regard the illustration of Attorney General for Ontario v. Attorney General for Canada 57 can be cited. In Attorney General for Ontario’s case, the Canadian Supreme Court has held that though the words ‘peace and good government’ in section 91 are quite broad but they are controlled by the words “not coming within the classes of subjects … assigned exclusively to the province.” 58 Thus, the Canadian Supreme Court has held that the “Dominion Parliament should not transgress upon the provincial subjects with respect to any of the classes of the subjects enumerated in section 91.” 59

In the coming years gradually the judicial construction favoured a harmonious construction of the legislative powers of both the Dominion and Provincial Legislatures. Such a judicial trend was observed in Abbott v. City of St. John. 60 In Abbott’s case, judicial construction applied the doctrine of ‘colourable legislation’ to ensure that the taxing powers of either legislature are not transgressed by each other.

57 (1896) AC 348 (P.C.)
59 Ibid
60 (1908) 40 SCR 597
The doctrine of colourable legislation has been applied by the Canadian courts to determine the plenary powers of the Dominion and Provincial Legislatures. The doctrine of colourable legislation provides that you cannot do indirectly what you cannot do directly. The Canadian courts have held that a legislature cannot use colourable devices to deal with matters beyond the powers assigned to another legislature by the Constitution.\footnote{In \textit{A.G. for Alberta v. A.G. for Canada} (1939) AC 117 (130); \textit{A.G. Ontario v. Reciprocal Insurers}, (1924) AC 328 (345)}

Like the Canadian courts, the Indian courts have applied the doctrine of colourable legislation to determine the legislative competency of each legislature. The doctrine of colourable legislation has been laid down in \textit{K.C.G. Narayan Dev v. State of Orissa} \footnote{AIR 1953 SC 375} and in \textit{State of Bihar v. Kameshwar Singh}, \footnote{AIR 1952 SC 252} the Bihar Land Reforms Act, 1950 was held void on the ground of colourable legislation.

From 1930 onwards, the Privy Council followed a trend which favoured a liberal construction of the legislative powers of the Dominion legislatures. This was particularly after Lord Sankey declared in the \textit{Person’s case}, in 1930:

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“The [B.N.A] Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada … Their Lordships do not conceive … to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal construction…”\footnote{\textit{Edwards v. Attorney – General for Canada}, (1930) AC 124 (PC)}
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The decisions that followed were similar to the one delivered in \textit{Person’s case}. The jurisdiction of the Privy Council over Canada ended with the enactment...
of The Supreme Court Act, 1949. But the decisions of the Canadian Supreme Court which assumed the role of the final arbiter as to the meaning of the BNA Act did not substantially differ from the ones delivered by the Privy Council. The decisions embody the Canadian Constitution of 1987 as a centralized federation in which the Dominion legislative power was of paramount importance.

Post–Charter Activism - With the incorporation of a Charter of Rights under the amended Canadian Constitution of 1982 judicial activism in Canada entered a new phase. Now, the Dominion Parliament and the Provincial Legislatures cannot make a law infringing any of the fundamental freedoms enumerated in Sections 2 - 6 as a full – fledged judicial review may now be anticipated. 65

The incorporation of the Charter now provides a firmer foundation for judicial review. “The significance of the Charter has increased when the Supreme Court contended that the Charter has the status of a social compact because of the historic decision to entrench the Charter in the Constitution was not taken by the courts but by the elected representatives of the people of Canada.” 66 Consequently, the Canadian Supreme Court has started to look at the Charter as a grundnorm for determining the constitutionality of laws passed by the Canadian Parliament.

However, in interpreting the Charter, the Canadian Supreme Court has adopted an originalist approach which has come as a surprise. 67 Adopting an

65 Ibid
66 In Re B.C. Motor Vehicle Act (1985) 2 SCR 486, 497
67 Mathew P. Harrington, Originalism and Judicial Review, Saskatchewan: Saskatchewan Institute of Public Policy, May 23 – 25, 2007, pp. 1 – 3, p. 2
originalist approach the Canadian Supreme Court has interpreted a Charter claim in respect of its historical, social and economic context. 68 Such an approach enables the Supreme Court to interpret the text of the Charter in the light of their expectations and understandings. 69 The problem with this mode of interpretation is that judicial activism become unmoored and the judges unrestrained. 70

**Australia – Judicial Activism promoting Federalism**

Like the Canadian Constitution of 1982, the Commonwealth of Australia Constitution Act, 1900 though was enacted by the British Parliament is the product of the efforts of the Australian people. 71 The other similarity is that like the Canadian Constitution, the Australian Constitution does not provide for a specific Bill of Rights. In the absence of a specific Bill of Rights in its Constitution, the Australian Courts have literally interpreted the right to property and the right to freedom of religion.

**Right To Property** – In the interpretation of the right to property, the Australian High Court has departed from the American decisions. This was inspite the presence of an express provision in the Australian Constitution relating to right to property 72 and found to be similar to an analogous provision of the American Constitution. 73 The Australian courts have refused to apply the American

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69 In *Re Quebec Secession* [1998] 2 SCR 217

70 Ibid at p. 2


72 Article 51 of the Australian Constitution 1900

73 5th Amendment of the American Constitution
precedents thus empowering the Commonwealth Parliament to provide for acquisition of property on just terms. The Australian courts have refused to accept the contention that the determination of just compensation for deprivation of public property can be judicially reviewed. In this context, the Australian High Court has held that:

“... it is a legislative function to provide the terms and the Constitution does not mean to deprive the legislature of all discretion in determining what is just...Thus, under the above circumstances the Australian High Court has turned to the British principles of providing compensation and how other British legislatures have regarded the same matter.”

Unlike the Australian High Court, the Supreme Court of India questioned the policy–making of the executive and the legislature in laying down the principles for determining compensation for government acquisition of property. The Supreme Court’s activist judgments during the post–Nehruvian period made the determination of compensation a justiciable issue.

**Right To Freedom Of Religion** - The right to freedom of religion is guaranteed under Sec. 116 of the Australian Constitution Act, 1900. The Australian High Court has held that this freedom is not absolute but subject to such restrictions as may be necessary to maintain law and order, in times of peace, by prohibiting secular practices such as polygamy or human sacrifice, though committed in the name of religion or to maintain the existence of the state itself during war, by prohibiting anti–war propaganda or subversive activities carried on by religious

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74 *Australian Building Construction Employees ex – parte* (1974) 48 ALJR 42 (43)
75 Ibid
organizations. In this context, the High Court through the eyes of William J. observed:

“…it is impossible to impute the framers of the Constitution an intention that the free exercise of religion should confer an absolute right to propagate a belief that the system of government created by the constitution was of satanic nature … such principles and doctrines would not be considered religion but subversive activities carried on under the cloak of religion.”\(^76\)

Similar views were expressed by the Supreme Court of India in *Mohd. Hanif Quareshi v. State of Bihar* \(^77\) and in *State of W.B. v. Ashutosh Lahiri*.\(^78\) In *Mohd. Hanif Quareshi’s case* and in *Ashutosh Lahiri’s case*, the Supreme Court held that the slaughter of cows on the occasion of Bakrid was not an essential part of Islam as secular activities associated with religious practices could be regulated by the State.\(^79\)

The positivist conception of the nature and scope of the judge’s task has been emphasized by many judges in Australia. In the words of Lord Jowitt: “The problem is not to consider what social and political conditions of today require; that is to confuse the task of the legislator…”\(^80\) Similar views were shared by other judges of the High Court of Australia like Mr. Justice Dixon and Sir Owen Dixon. Sir Owen Dixon supported the legal positivism of the High Court of Australia in the following words:

\(^76\) In *Adelaide Co v. Jehovah’s Witnesses* (1943) 67 CLR (159 –160)
\(^77\) AIR 1958 SC 731
\(^78\) AIR 1995 SC 464: (1995) 1 SCC 189
\(^79\) Clause 2 (a) of Article 25 (1) of the Constitution of India
\(^80\) In a speech delivered late in 1951 by Lord Jowitt, the then Lord Chancellor of the United Kingdom, seen in Edward Mc Whinney, *Judicial Review in the English Speaking World*, 2nd ed., (Toronto, Canada: University of Toronto Press, 1960), p. 76
“It is not sufficiently recognized that the Court’s sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of that measure…”

The trend followed by the judges of the Australian High Court was based on what Edward Mc Whinney calls “legal-certainty myth” – that “law is unwavering, fixed and settled.”

**Federalism** – The Australian courts have adopted an activist approach in promoting the strict principles of federalism under the Australian Constitution. Unlike the Canadian Construction, the Australian Constitution does not follow the double enumeration of powers so far as the concurrent powers are vested in the states. The residuary of legislative powers are assumed to remain with the states. At the same time, in case of inconsistency the federal law shall prevail over the state law.

Under the above circumstances, the Australian courts have assumed the role of maintaining the delicate balance of powers. The Australian courts has ensured the autonomy of the states by holding that “The Constitution predicates their (i.e. The states) continued existence as independent entities” Similarly, the court has held that the “Federal legislature shall not be allowed to exercise its taxing powers as to impose a special burden upon a state as a state.”

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81 Reported in (1952) 26 ALJ 2 at p. 4
83 In *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31
84 Ibid
Similarly, a federal law was held to be invalid if it violated the doctrine of pith and substance\textsuperscript{85} or it related to a matter not incidental to an enumerated power\textsuperscript{86} or to restrict a state power or activity merely because state activity might prejudicially affect some activity within federal power.\textsuperscript{87}

Though the Australian courts interpreted in favour of the state’s legislative powers there were occasions when the Australian courts gave an expansive interpretation of the Commonwealth’s legislative powers. As observed by Edward Mc Whinney the Australian courts applied the American doctrine of the immunity of instrumentalities (though for a brief period) or gave an expansive interpretation during war–times of the Commonwealth legislative powers.\textsuperscript{88}

Like the Australian courts, the Indian Supreme Court had applied the doctrine of pith and substance to determine the legislative competence of a particular legislature which enacted it. The doctrine of pith and substance was applied as early in 1947 by the Privy Council in \textit{Profulla Kumara Mukherjee v. Bank of Khulna} \textsuperscript{89} to determine the constitutionality validity of the Bengal Money Lenders Act, 1946. Post–constitution, the doctrine was applied by the Indian Supreme Court in \textit{State of Bombay v. F. N. Balsara} \textsuperscript{90} to determine the constitutional validity of the Bombay Prohibition Act.

\textsuperscript{85} \textit{Fairfax v. Commr. Of Taxation}, (1965) 114 CLR 1(7)  
\textsuperscript{86} \textit{Fairfax v. Commr. Of Taxation}, (1965) 114 CLR 1(7)  
\textit{Huddart Parker v. Moorehead}, (1908) 8 CLR 330  
\textsuperscript{87} \textit{Airlines of N.S.W. v. N.S.W.}, 113 CLR 54  
\textsuperscript{88} Edward Mc Whinney, \textit{Judicial Review in the English Speaking World}, 2\textsuperscript{nd} ed., (Toronto, Canada: University of Toronto Press, 1960), p. 78  
\textsuperscript{89} AIR 1947 PC 60  
\textsuperscript{90} AIR 1951 SC 318
B. With a Bill of Rights – The discussion under this heading shall be confined to the constitutions of America, Ireland and the post World War – II constitutions of Japan and Germany.

**America (US) - Judicial activism through implied judicial review** - Judicial activism was observed for the second time sometime in the year 1893 under the American Constitution of 1787. Adopting an activist attitude, the American Supreme Court claimed the power of judicial review in the historic decision in *Marbury v. Madison*.\(^91\) Acknowledging the doctrine of judicial review in the above case, Chief Justice Marshall observed that the constitution forms the fundamental and paramount law in countries with written constitutions “Consequently, the theory of every such Government must be that an Act of the legislature repugnant to the Constitution is void.”\(^92\)

Interestingly, the original American Constitution of 1787 did not contain an express provision for judicial review. However, judicial activism implied such power through a harmonious construction of Article III and VI. The supremacy of the American Constitution was implied by reading Section 2 of Article VI whereas the power of judicial review of the American Supreme Court was implied by reading Section 2 of Article III. These judicial implications were clearly in tune with the intention of the framers of the American Constitution. The majority of the Constitution framers in the Philadelphia Convention, 1786 believed that a specific

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\(^91\) (1801) 1 Cr 137  
\(^92\) AIR 1951 SC 318
provision was not required because the power of judicial review was clearly implied in the language of Article III and VI. 93

Like the American Supreme Court the Indian Supreme Court had asserted its power of judicial power but unlike the U.S. Constitution the Constitution of India contains express provisions for judicial review.

Judicial Review of Legislations - While British judicial activism was directed against the executive, American judicial activism was directed mainly against the legislature. Judicial review of Congressional legislations was not used by the American Supreme Court till 1857. In 1857, in Dred Scott v. Stanford 94 the Supreme Court for the first time used its power to review and strike down a Congressional legislation, the Missouri Compromise of 1820 as unconstitutional. Judicial activism, however, was restricted during the American Civil War of 1861. After the American Civil War of 1861, the Supreme Court assumed an aggressive form of activism as it struck down twenty-four Congressional legislations as unconstitutional either wholly or partially.95

Unlike the American Supreme Court, the Indian Supreme Court had adopted a positivist attitude in invalidating the legislations passed by the Indian Parliament. This was particularly during the pre–emergency Nehruvian period.

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94 (1857) 29 How 393
95 Vishnoo Bhagwan & Vidya Bhushan, (eds.), op. cit., p. 269
The New Deal period of 1930 saw another phase of the Supreme Court’s aggressive activism. The Government’s socio-economic reforms during the New Deal period served as the main catalyst for the Court’s activism.\textsuperscript{96} In one such decision in \textit{Perry v. U.S}\textsuperscript{97} the Supreme Court declared “the Congress cannot invoke the sovereign power of the people to override their will as thus declared.” Not only the Congressional laws of far-reaching importance struck down in quick succession but the Government was criticized for its New Deal measures on the ground that it represented bad economies and bad government.\textsuperscript{98} Such form of judicial activism was unacceptable. In order to implement the New Deal programme President Roosevelt after getting reelected for the second term in 1936 decided to reorganize the federal judiciary.\textsuperscript{99} However, rejuvenation of the Supreme Court could not take place but the President was able to get his nominees elected to the Supreme Court. The Supreme Court remained subdued as it reversed its previous decisions by upholding the New Deal statutes.

Judicial review of Congressional statutes continued even after the New Deal period but it never aroused the same controversy and indignation which had stirred during the New Deal period.\textsuperscript{100} According to Justice D.P Madon:

\textsuperscript{96} W. Friedmann, \textit{Law In A Changing Society}, 2\textsuperscript{nd} ed., (Delhi: Universal Law Publishing, 4\textsuperscript{th} reprint, 2008), p.62
\textsuperscript{97} (1934) 214 U.S. 330 (353)
\textsuperscript{99} Ibid at p.269
\textsuperscript{100} Vishnoo Bhagwan & Vidya Bhushan (eds.), \textit{World Constitutions}, loc. cit.
“The Dred Scott and the New Deal decisions all undoubtedly invalidated legislative measures but this was not judicial activism in real reason – rather it was judicial retro-activism. It was judicial activism in reverse gear for it was an attempt to turn the clock back.”

“The essence of true judicial activism is not invalidation of statutes but the rendering of decisions which are in tune with temper and tempo of times”, reminded Justice Madon.

A situation similar to New Deal period of 1930’s in the US happened during the pre–emergency post–Nehruvian period during the tenure of Mrs. Indira as the Prime Minister of India. During the post–Nehruvian period, the Supreme Court of India actively invalidated the laws and policies of the Indira Gandhi government relating to property rights of the people through the formulation of the theory of basic structure. Rejuvenation of the Indian Supreme Court took place through supersession of senior most judges of the Court. Like President Roosevelt, Mrs. Indira Gandhi was able to get a court acceptable to her policies.

**Unenumerated Fundamental Rights** - The original American Constitution of 1787 did not contain a Bill of Rights. Fundamental rights and freedoms were later guaranteed in the year 1791 through the First and the Fifth Amendments to the American Constitution. Once the fundamental rights were incorporated the American judges showed a keen interest in protecting and promoting these fundamental rights and freedoms.

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\(^{102}\) Ibid at p.254
“In the United States, the problem of adjusting the short enumeration of the Bill of Rights with the advancing demands of human values arose as early as in the year 1937.”

The American Courts through application of the theory of emanation solved the problem.

“Judicial activism relating to the determination of unenumerated rights was a mere emanation from existing enumerated rights”. In this context two decisions may be cited. In Brown v. Board of Education the Warren Court condemned:

“… the system of separate public schools for Whites and Negroes, prevalent in the South and with it, specifically overruled its own previous decision of ‘equal but separate facilities’ doctrine in Plessy v. Ferguson”

In yet another decision in Roe v. Wade the American Supreme Court has held that the right to privacy includes the constitutional right of a pregnant woman to commit abortion even though it kills the foetus. The right to privacy had itself emanated from the harmonious construction of the rights mentioned in 4th, 5th and the 14th Amendments.

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103 In Cf. N.L.R.B. v. Jones, (1937) 301 U.S. 1
104 Ibid at p.256
105 (1954) 347 U.S. 483 (495)
106 (1896) 163 U.S. 537
107 (1973) 410 U.S. 113
108 4th Amendment provides the right against unreasonable searches and seizures, 5th Amendment provides the right against self-incrimination, 14th Amendment provides that no person shall be deprived of his life, liberty or property without due process of law.
Like the American Supreme Court, the Indian Supreme Court had also applied the theory of emanation to derive positive as well as negative rights from Article 21 which provides the right to life and liberty except according to the procedure established by law.

**Preferred Freedoms** – American judicial activism has advocated the doctrine of ‘preferred freedoms’. The doctrine first mooted by late Chief Justice Stone proposes that certain freedoms in the United States Constitution i.e. those guaranteeing the basic personal liberties might be more fundamental than any concerned with changing processes of economic and social organization.\(^{109}\)

This approach has been supported by Justice Black, Douglas and Warren. In a number of decisions or dissents, Chief Justice Stone upheld freedom of speech and expression against the encroachments of national–security legislation or of other legislative efforts.\(^{110}\) One such glaring illustration is the decision cited in *New York Times v. United States*.\(^{111}\) The New York Times had obtained copies of a highly confidential government document concerning the history of US involvement in Vietnam War by improper disclosure. The Government restrained the publication of those copies. The majority of the court led by Black J. held that the First Amendment unconditionally prohibited the abridgement of ‘the freedom of speech’ or ‘of the press’ and that no considerations of national security empowered the Executive to restrain publication. But a dissenting judgement was given by three

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\(^{110}\) Ibid at p. 69

\(^{111}\) 403 U.S. 713 (1971)
judges including the Chief Justice “In the dissenting judgement of Harlan J, the court was probably over-stepping the boundaries of judicial restraint in matters of national security, which were primarily the responsibility of the Executive”.112 “Another Justice Frankfurter has regarded any ‘preferred freedom’ philosophy as a dangerous over-simplification of a complex process of legislative experimentation.”113 However, Jurist Raoul Berger believes that a democratic system rests on full access to information and accountability to the people.114 Speaking on the executive refusal to disclose matters relating to Vietnam war Justice Potter Stewart commented that “when the people and the representatives are reduced to ignorance the democratic process is paralyzed.”115

It is surprising to find that American judicial activism has received criticisms among the judicial circle. The American Supreme Court’s preference to the doctrine of ‘preferred freedoms’ has been found incompatible with the need for self-restraint by a non-elected court.116 A non-elected court had no business to interfere either with policy-making or policy-execution.

The doctrine of ‘preferred freedoms’ is not applicable in India since the Constitution of India describes the specific freedoms guaranteed by the Constitution and the restrictions that can be imposed on it.

112 In Kovacs v. Cooper, (1949) 336 U.S. 77, 95
115 In Environmental Protection Agency v. Mink, 410 U.S. 73, 95 (1973) cited in Raoul Berger, Executive Privilege: A Constitutional Myth, loc. cit.,
Ireland – Judicial activism through the Preamble

It was thought that judicial activism would be natural under the Constitution of Eire (Free State), 1937 which lays down express provisions for a Chapter on a Bill of Rights\textsuperscript{117} and the Directive Principles of State Policy borrowed from Spanish Republican Constitution of 1931.

However, in the absence of an express provision for judicial review, the role of the Supreme Court of Ireland had been rather less daring and innovatory than one might have expected, suggests Edward Mc Whinney.\textsuperscript{118} Unlike the American Supreme Court, judicial activism in Ireland has been an assertion of what was already provided under the Constitution. The Irish courts have purported to follow a strictly legalistic approach to constitutional interpretation.\textsuperscript{119}

Under the Constitution of Ireland the fundamental rights are described in Chapter XII. These fundamental rights are classified into five categories: (1) Personal rights,\textsuperscript{120} (2) Family rights,\textsuperscript{121} (3) Education rights,\textsuperscript{122} (4) Property rights and (5) Religious rights.\textsuperscript{123} These rights are broadly classified as personal rights, property and economic rights and social rights comprising the family, education and


\textsuperscript{119} Ibid

\textsuperscript{120} Article 40 of the Constitution of Ireland, 1937

\textsuperscript{121} Article 41 of the Constitution of Ireland, 1937

\textsuperscript{122} Article 42 of the Constitution of Ireland, 1937

\textsuperscript{123} Article 43 of the Constitution of Ireland, 1937

\textsuperscript{124} Article 44 of the Constitution of Ireland, 1937
religious rights. In case of personal rights, the Irish courts have given a literal interpretation, particularly during the war–emergency. *In re Art 26 of the Constitution and the Offences against the State (Amendment) Bill, 1940,* the Court declined to accept that there was any violation of any ‘personal liberty’ “save in accordance with law”. The word “law” meant as it exists at that time passed by the Oireachtas. Edward Mc Whinney suggests that the Supreme Court of Ireland showed judicial restraint similar to English courts during the emergency created by World War II. This was despite the similarity in the language of Article 40.4 of the Irish Constitution and the ‘Due process’ clause in the Fifth and Fourteenth amendments of the United States Constitution. Instead the decisions of the Supreme Court of Ireland showed judicial restraint similar to the ones showed by English courts during World War II.

Similarly, in *re Mc Grath and Harte* the Supreme Court of Ireland validated a law passed by the Oireachtas in 1940 establishing a Military Court which could exercise special emergency powers and impose sentence of death.

However, during normal times the Supreme Court of Ireland had invalidated a law which deprived a citizen of his personal rights. This was done in *National Union of Railwaymen and others v. Sullivan and others* where the Trade Union Act of 1941 was invalidated on the ground that it prohibited the forming of

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125 [1940] Ir. R. 470
126 [1941] Ir. R. 68
127 [1942] Ir. R. 112
128 [1947] Ir. R. 77
associations and unions, and allowed the citizen only to join prescribed associations and unions.

According to Durga Das Basu, there has been an occasion when the Irish courts have appealed to the spirit of the Constitution in interpreting the express provisions of the Constitution and such liberal interpretation has been possible due to the presence of certain vague expressions in the Constitution itself.\(^{129}\) For example, The Preamble uses the nebulous expressions such as “to promote the common good” with due observance of “prudence, justice and charity”. The Irish courts have looked to the Preamble to deduce ‘unenumerated natural rights’ from the sphere of fundamental rights. In *Mc Gee v. A.G.*\(^{130}\) the Supreme Court annulled Section 17 (3) of the Criminal Law Amendment Act which prohibited the importation of contraceptives on the ground of contravention of Articles 41 and 40(3) as interpreted in the light of natural rights and the Preamble.

The theory of unenumerated natural rights was further developed in the *Contraceptive case*\(^ {131}\) where the Supreme Court of Ireland through Walsh J. deduced the natural right of a married woman to martial and sexual privacy from the right to family guaranteed by Article 41. The impugned law was held to be an unreasonable restriction which made an unjustified invasion of the sexual privacy of married couples in the absence of a demonstrable ‘common good’ to justify such restriction. In determining the ‘common good’ the Court refer to the terms

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\(^{130}\) (1974) IR 284

\(^{131}\) In *Mc Gee v. A.G. & Revenue Commrs.*, (1974) IR 284
‘Prudence’ ‘Justice’ and ‘Charity’ mentioned in the Preamble to assure the dignity and freedom of the individual.

The theory of natural rights was also developed in case of property and economic rights. In the case of *Buckley and Others (Sinn Fein) v. Attorney General and Another*, the Supreme Court acknowledged the right to property as a natural right antecedent to all positive law. In the opinion of the Court, man as an attribute of his human personality was so entitled to the right to property that no positive law was competent to deprive him of it.

Thus, the Supreme Court of Ireland mainly assumed the role of a literal interpreter though on certain occasions it assumed the role of a liberal interpreter by referring to the Preamble. However, such a judicial approach on the part of the Irish judges sustained less than the Supreme Court of U.S.  

Like the Supreme Court of Ireland, the Indian Supreme Court has referred to the Preamble in giving a harmonious construction to the Directive Principles of State Policy and to the Fundamental Rights. The Court had held that fundamental rights are the goals while the directive principles are the means to achieve objectives laid down in the Preamble.

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132 (1950) IR 67  
Japan – Limited Judicial Activism

With a specific Chapter on a Bill of Rights, the Japanese Supreme Court often look forward to American precedents in interpreting the fundamental rights of its citizens. As such, the principles of natural justice were promoted by liberally interpreting the ‘due process’ clause. In one such decision, the Japanese Supreme Court has held that to confiscate a person’s property for a statutory offence without giving an opportunity to defend his property rights infringed on his property rights without ‘due process’ thus violating Article 31. In a previous judgement, a concurring judge had included even ‘substantive due process within the fold of Article 31. There were, however, cases relating to penal deprivation of property.

In case of death penalty on the other hand, the Supreme Court resisted the importation of ‘American due process’ to challenge death penalties. The Japanese Supreme Court has held that death penalty as such is not a cruel punishment if the method of execution be ‘cruel’ such as ‘burning at the stake’, ‘crucifixion’, ‘giggeting’ or boiling in a cauldron. But execution by hanging has been upheld as not being a cruel method of execution.

Like the Japanese Supreme Court the Indian Supreme Court promoted the principles of natural justice by equating ‘procedure established by law’ in Article 21 with ‘due process clause’ of American Constitution in Maneka Gandhi v. Union of India.

135 In Yoshida v. Japan, (1965)
137 In Death Penalty Case, (1948) Hanreishu II, 3(191)
138 In Ichikawa v. Japan, (1961) 15 Keishu 7 (1106)
**Principle of Reasonable Classification** - The principle of reasonable classification has been deduced by the Japanese Supreme Court from Art 14 (4). Though there was a difference of judicial opinion as to whether the classification made in a particular case was reasonable or not Japanese judges acknowledge that differential treatment can be allowed for rational reasons.\(^{139}\)

Thus, though based on the American model, Japanese judicial activism was much more subtle than its counterpart. Like the Japanese Supreme Court, the Indian Supreme Court in its various pronouncements applied the theory of reasonable classification to determine as to whether a particular classification made by a legislature is reasonable or not.

**Germany – Judicial Activism through the Basic Law Theory**

“The German Basic law or Constitution in affirming the principles of human dignity,\(^{140}\) liberty,\(^{141}\) equality,\(^{142}\) the Rechtstrtat or rule of law, democracy and the social state\(^{143}\) has incorporated into the German legal system, as principles of positive law, the basic principles of modern natural law and the law of reason and thereby the basic principles of modern legal and state morality.”\(^{144}\)

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\(^{139}\) In *Parricide Case*, (1973) Grand Bench No 697

\(^{140}\) Article 1, para 1

\(^{141}\) Article 2, para 1

\(^{142}\) Article 3, para 1

\(^{143}\) Article 20, paras 1 – 3

Constitution operates as the Basic Law - In Germany, judicial activism mainly operates on the principle of ‘basic law’. The Federal Constitutional Court (the highest Court of Germany) looks upon the Constitution as the ‘basic law’. The Federal Constitutional Court applies the ‘basic law’ theory either to decide questions relating to the basic rights and the basic federal features of the German Constitution. Thus, in one such decision, the Constitutional Court held a State law as ‘null and void’ if it was inconsistent with the provisions of the ‘Basic Law’ i.e. the Constitution.145

Protection of Basic Rights – The Federal Constitutional Council ensures that the basic rights146 of the German citizens incorporated in the basic law147 are not violated.148 One example may be cited in this behalf. The right to human dignity is a basic right under the Constitution of United German people, 1990. German decisions have held that this right to dignity entitles a prisoner, even after conviction for an offence, to a minimum standard of decent living as distinguished from a degrading one. Hence, a convict could not be put into a one-man cell with two others, having a toilet, which was not partitioned for privacy.149

145 In Southwest case, (1951) 1 B VerfGe 14
146 Fundamental Rights are described as ‘Basic Rights’ under the Constitution of United German People, 1990
147 The Basic Law for Federal Republic of Germany became the Constitution of United German People
148 Art 100 of the Constitution of United German People 1990
Like the Japanese Supreme Court, the German Constitutional Court has deduced the principle of ‘reasonable classification’ from the basic right of ‘equality before law.’

**Amendment of ‘Basic Law’** – The basic law theory was also applied by the German Constitutional Court to annul an amendment of Article 10 of the ‘Basic Law’. The Court held that the Federal Parliament could not permit restrictions on communications without the obligation to inform the person affected by any such restriction in the interest of order and security. Like the German Constitutional Court, the Indian Supreme Court had developed the theory of basic structure in *Kesavananda Bharati v. State of Kerala* to invalidate an amendment which destroys the basic structure of the Indian Constitution.

**Concluding Observations:** Thus from the above discussion, it can be concluded that judicial activism has taken place under most constitutions of the world, if not all, definitely under those constitutions mentioned in this Chapter.

Judicial activism was not a strait-jacket formula. It had varied from constitution to constitution in respect of form, period and also the source from where it derived its existence. With respect to form it was subtle under one constitution whereas it was aggressive in form under another. The uniformity was also not observed in respect of period. During one period it was limited like during pre-Charter Canadian period and post New-Deal American period whereas it was

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150 In *Volkswagen Denationalization case*, (1961) 12 B VerGE 354
151 In *Privacy of Communications Case* (1970) B VerfGE 1
over-activism during another period like post-Charter Canadian period and pre-New Deal American Period. Even the sources of judicial activism were different. If it was Rule of Law under one Constitution, it was the Preamble under another Constitution. Again, if it was the Bill of Rights under one Constitution, it was Federalism under another Constitution.

Whatever may be the variation, judicial activism was and shall be present, if the supreme law of the land has to be safeguarded from its arbitrary violation by the other two organs. Judicial activism has to be there if the fundamental rights and freedoms of the citizens are to be protected from its arbitrary invasion by the State.

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