CHAPTER SEVEN

CHAPTER VII

Judicial Review-Judicial Activism- Judicial Restraint

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In the last two chapters we have observed and evaluated the working of the doctrine of judicial review in India and U.S.A. and in this process, incidents also come across in the evaluation process which compel us to think that whether in the expansion of judicial review power the delicate balance between judiciary, executive and legislature has been disturbed?

7.1 Expansion of judicial Review Power

There is a great need for caution while expanding the parameters of judicial review. Under our Constitution distribution of legislative powers between the Parliament and the legislatures of the state is defined. Various heads of the legislations are contained in the three lists-union, state and concurrent-contained in the seventh Schedule to the Constitution. The enactments of legislatures can be challenged on the ground that they are in conflict with Chapter III of the Constitution or otherwise ultra vires the Constitution. The necessity of empowering the courts to declare a statute unconstitutional may arise not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other provides the means by which mistakes committed by one are corrected by the other and vice versa. The function of the

judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the letter and spirit of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the provisions of the Constitution and make a declaration accordingly.

The legislature, the executive and the judiciary are three co-ordinate organs of the state. All the three are creatures of the Constitution. The ministers representing the executive, the elected members as members of Parliament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take the oaths prescribed by the third Schedule to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. The judiciary has been entrusted the task of interpreting the Constitution and to keep the other two organs within their limits. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony.

A judicial decision either stigmatizes or legitimizes a decision of the legislature or of the executive, but generally speaking it is not concerned with its wisdom or expediency. Its primary concern is merely to determine whether the legislation is in conformity with or contrary to the provisions of the Constitution. It often includes consideration of the rationality of a statute. Similarly, where the court strikes down an executive order, it does so not in a spirit of confrontation or to assert its superiority

but in discharge of its constitutional duties and the majesty of the law.[521] In all those cases, the court discharges its duty as a judicial sentinel.

When the validity of an Act is challenged before a court of law, the judiciary is required to consider the constitutionality of the statute on the touchstone of the parameters fixed by the Constitution. It is no reflection either on the government or on the Parliament that their views as to constitutionality are again being reviewed by the judiciary. In interpreting the existing law, that is to say, what the law is, the courts are required to keep the particular situation in view and interpret the law so as to provide a solution to the particular problem to the extent possible. This is a legitimate exercise by the judiciary of its constitutional obligation by virtue of the role assigned to it in the Constitution scheme. The gaps in the existing law, which are filled by updating the law, result in the evolution of juristic principles, which in due course of time get incorporated in the law of the land and thereby promote the growth of law.

Judicial review is an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every state action has to be tested on the anvil of the rule of law and that exercise is performed, when occasions arise by reason of doubt raised in that behalf in the courts. The well-established constitutional principle of the existence of the power of judicial

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[521] In Madras v. Row, (AIR 1952 SC 196; 199) the Supreme Court stated that the Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts face up to such important and none too easy task not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them y the Constitution.

review and its need was indicated by Chief Justice Marshall in *Marbury v. Madison*[522]:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So if law be in position to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to law; disregarding the Constitution; or conformably to the Constitution' disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of very essence of judicial duty. If, then, the Courts are regard to the Constitution, and the Constitution is superior to any ordinary Act of the legislature, the Constitution, and no such ordinary act, must govern the case to which they both apply...Why otherwise does it direct the judges to take an oath to support it?"

Judicial institutions have a vital role to play not only for resolving inter-se disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the state enshrined therein. Their function is to administer justice according to the law and in doing so, they have to

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[522] 2 L Ed. 60 Cranch 137 (1803)

respond to the hopes and aspirations of the people because the people of this country in uncertain terms, have committed themselves to secure justice-social, economic and political—besides equality to all, and dignity of the individual.

Traditionally the Indian Supreme Court interpreted the law as it is and confined itself strictly to the bare text of the law and did not comment on the areas, which were not covered expressly by the provisions of law. Its role, in earlier years after the commencement of the Constitution was passive and positivist but in post-*Maneka era* its role changed that of the activist court. However, *post-Maneka era* has witnessed a change in the attitude of the judiciary and we find the passive Indian Supreme Court transforming itself into the positivist and activist role as a policy maker and law maker which are the traditionally assigned roles of the executive and the legislature.

Now the million-dollar question is whether this is permissible for the judiciary to enter into the area which does not legitimately belong to them. To answer this question it becomes necessary to trace the origin and different kinds of judicial activism. Initially the Indian Supreme court started functioning as technocratic court in which judges acted merely as technocrats to hold a law invalid, if it was ultra virus the power of legislature. And later on it started interpreting the provision of the Supreme Court liberally in socio-legalcratic manner. This changed the entire nature of judicial process and thereby the traditional paradigm was replaced by a new paradigm that was polycentric and even legislative.

7.2 Judicial Activism

Activism indicates a deflection from the normal area of action, possibly in an area, which does not belong to the doer. And presently the Indian Supreme Court is charged with the allegation of over activism. In this regard, we have witnessed a long tussle between executive and legislature on the one hand, and judiciary on the other. There are several instances in the constitutional history of the country wherein, we find judgments of the judiciary being nullified by the legislatures by resorting to the amendments of the Constitution. In this process conflict between the legislature and judiciary to establish supremacy over the other became endless. So, although the textual supremacy lies with the Constitution, it is the power of judicial review that makes the Indian Supreme Court the most powerful body in the country. So, we could witness the power of judicial review under the Indian Constitution becoming powerful instrument for the expansion of the jurisdiction of the higher judiciary.

We observed in recent past that like the American Supreme Court, the Indian Supreme Court too has expanded its role by transcending the received notion of separation of powers and has created altogether new kind of criminal jurisprudence, prison jurisprudence, compensatory jurisprudence, and has created new kind of rights for the citizens, and has also created new kind of remedies thereto against the governmental lawlessness. And one can easily trace the journey of the Supreme Court of India from a passive, positivist court into an activist institution, articulating counter-majoritarian checks on democracy. And in

India, this process has started by the most humanist judge of the century; justice Krishna Iyer, and he injected sensitivity towards judicial Activism in the judicial anatomy.

In India judicial Activism has become a buzzword amongst the legal jargons. Judicial activism can be coined as judicial creativity, judicial craftsmanship, judicial law making, imaginative sharing of passion, look beyond the law, activist justicing, etc. However, in recent years judiciary is criticized in respect of its activist role. This criticism voices against the increasing tendency on the part of the judiciary to transgress into the fields of other organs such as the legislatures and the executive.

In this regard it can be said that the Indian Supreme Court not only makes the law, as understood in the sense of the realist jurisprudence, but also exactly has started legislating in the way in which a legislature legislates. Expansion of the meaning of the words "personal liberty" is the instance of judicial law making in its realist sense, liberal interpretation of "freedom of speech and expression" including the commercial advertisement within the purview of this is the instance of judicial law making. Similarly, the basic structure doctrine, or the parameters for reviewing the President's action under Art.356, or even the back door entry of "due process of law" in Article 21 are the instances of judicial law making in the realist sense. However one can say that laying down guide lines by the Supreme Court for inter-country adoption, guidelines against sexual harassment of women at workplaces, guidelines for the abolition of child labour etc. is not the judicial law making in the realist sense but amounts to legislate like a legislature. Actually these are the instances of

judicial excessivisim that fly in the face of the doctrine of separation of powers. Judicial lawmaking through wide interpretation and expansion of the meaning of 'equal protection of law', or 'freedom of speech and expression' can be held as legitimate judicial function, but, the making of an entirely new law, which the Supreme Court has been doing through directions in the above mentioned cases, is not a legitimate judicial function, though the Court has not supplanted but has supplemented the legislature through these directions.

In all these cases, the Supreme Court said that it legislated through directions only because no law existed to deal with the situations such as inter-country adoptions, sexual harassment of women at work places etc. The study of all these decisional law of the Indian Supreme Court has brought us to the conclusion that the Court has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Not only this, from the working of the Indian Supreme Court in the last 55 years we can very well opine that the Supreme Court of India became the most powerful Apex Court in the world. Unlike the U.S. Supreme Court and the House of Lords in England and for that matter even the highest Courts in Canada and Australia, the Supreme Court of India can review even a Constitutional Amendment and strike it down if it undermines the basic structure of the Constitution. These lead us to ask several questions like:

- What kind of role the Supreme Court was envisaged to play by the makers of the Constitution of India?

- What is the role of the court in interpretation of the process under a written constitution?
- Whether a new approach of judicial law making adopted by the judiciary is within the permissible limits of the Indian Constitution?
- Whether the Indian court can be considered to be a major partner in the policy planning process undertaken by the State?
- Why the judiciary is dealing with the matters, which are policy making-seemingly legislative in nature?

The policy-making role for judiciary in the overall context of Indian political system is such an issue, which cannot be dealt with easily. But one thing is very apparent that activism can easily transcend the border of judicial review and turn into populism and execessivism.

At this juncture the question arises that whether the policy making role of the Supreme Court was inconsistent with the basic philosophy of our Constitution, namely, justice-social, economic and political and liberty of thought, expression, belief, faith and worship and dignity of the individual? There are many cases wherein, the failure or neglect on the part of the legislatures or the executive compelled the judiciary to step in. What would have happened if the judiciary has not come forward to protect the basic human rights of the prisoners, children, women and down-trodden? After the bitter experiences of 1975 emergency, the judiciary got entered the 'due process clause' in Article 21 to put a curb on legislators and executive tyranny.

Thus, judicial activism in India encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the 'rule of law'. The judiciary, however, can act only as an alarm clock but not as a timekeeper. After giving their alarm call it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution. Judicial activism has its admires and antagonists. But the irony is that they keep on changing sides. When activism suits our tests, we are an admirer; when it does not, you are against it. In order to evaluate judicial activism, one does certainly need a yardstick which unfortunately is not easily found.

The Supreme Court of India started off as a positivist and technocratic court in 1950s but slowly started acquiring more power through constitutional interpretation. (eg.) Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial activism are to be seen in the Court's assertion regarding the nature of judicial review.

There are two models of judicial review. One is technocratic model in which judges act merely as technocrats-interprets the law literally and holds a law invalid, if it is ultra vires the power of legislature. In the second model, a court interprets the provisions of the Constitution liberally and in the light of the spirit underlying it keeps the constitution abreast of the times through dynamic interpretation. A Court creating new provision so as to suit the changing social or economic conditions or for expanding the horizons of fundamental or human rights of the individual is said to be an activist court. Judicial activism can be positive as well as negative. A court engaged in alerting the

power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist. Activism is related to change in power relations. A judicial interpretation that furthers the rights of the disadvantaged sections or imposes curbs on absolute power of the State or facilitates access to justice is positive activism.

Judicial Activism is inherent in judicial review. Whether it is positive or negative activism depends upon one's own vision for social change. Judicial activism is not an aberration but is a normal phenomenon and judicial review is bound to mature into judicial activism. Judicial activism has to operate within limits. These limits are drawn by the limits of institutional viability, legitimacy of judicial intervention and resources of the court. Since, through judicial activism, the court changes the existing power relations, judicial activism is bound to be political in nature. Through judicial activism, the constitutional court becomes an important power center of democracy.[523]

The Indian Supreme Court has evolved from a positivist court[524] into an activist court[525] over the last fifty years. It has not, as is generally believed, become suddenly activist during the last decades. It has taken longer than that for the Court to acquire its present position and it has had to go through many stresses and strains. The Court had to change its self-perceptions before it could change its equations with other organs of the

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[523] S. P. Sathe, " Judicial activism in India" p. 6, Oxford University Press

[524] A. K. Gopalan v. State (A.I.R. 1950 SC 27); Keshav Madhav Menon v. State of Bombay (AIR 1951 SC 128); A. D. M. Jabalpur v. Shiv Kant Shukla (AIR 1978 SC 1207)

[525] Golaknath v. State of Punjab(); Kechavananda Bharati v. Union of India(A. I. R. 1973 Sc 1461); Maneka Gandhi v. Union of India(A.I.R. 1978 SC 597)

government. The journey towards activism has been slow and imperceptible. This transformation in the role of the Court has synchronized with the political change that came about in India during the last fifty years. The increased role of the court was legitimized by the increasing pluralization of the Indian polity, the need to have counter-majoritarian check on democracy, and relative erosion of the high profile of the political leadership that prevailed before independence.

It would be seen that judicial activism which is the search for the spirit of law, has been profitably used by powerless minorities, such as bonded labour, prison inmates, under trial prisoners, sex workers and such other powerless minority groups as are crusading for protection of human rights of women and children or seeking redressal against governmental lawlessness, or relief against developmental policies which benefit the haves at the cost of the have-nots.

Perception of judicial activism is subjective depending upon the social philosophy and conception of judicial function held by a person. If judicial activism is to be conceptualized as interpretation of the law or the Constitution from the perspective of not only law but justice, any interpretation that tends to perpetuate the existing class domination is negative judicial activism and interpretation that expands the rights of the disadvantaged sections as against the dominant sections or the individual against the State is positive judicial activism. Positive judicial activism being in tune with the philosophy of the constitution is permissible while the judiciary needs to exercise self-restraint in other cases thereby preventing judicial activism turning into judicial oligarchy.

So, it must always be remembered that the judges in exercise of their power of judicial review are not expected to decide a dispute or controversy which is purely theoretical or for which there are no judicially manageable standards available with them. The courts do not, generally speaking, interfere with the policy matters of the executive unless the policy is either against the Constitution or some statute or is actuated by mala fides. Policy matters, fiscal or otherwise, are thus best left to the judgement of the executive. The danger of judiciary creating a multiplicity of rights without the possibility of adequate enforcement will in the ultimate analysis be counter productive and undermine the credibility of the institution. Courts cannot 'create rights' where none exist nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles.

7.2.1 Judicial Activism And Constitutional Amendments

The tussle between Supreme Court and Parliament has its long-standing history, from the period of the commencement of the Constitution in India. In the first round of cases the government could silence the Supreme Court through the device of the constitutional amendments. The Nehru government was supported by the large majority in each House of Parliament. Therefore, Parliament could easily get the Constitution amended by a special majority prescribed by article 368. During Nehru's tenure as Prime Minister, the Constitution underwent Seventeen Amendments.

Three of these Amendments, namely, First, Fourth and Seventeenth, removed various property rights from the purview of judicial review. Therefore, a debate on the scope of Parliament's power to amend the Constitution started. A question was raised before the Supreme Court in 1951 whether parliament could use its constituent power under article 368 so as to take away or abridge a fundamental right. The Court held that constituent power is not subject to any restrictions. This was the unanimous decision of the five-judge bench.[526] This question was raised again in 1965 after Nehru's death and this time two judges expressed minority view.[527] In 1967, however in *Golak Nath case*[528], this minority view became the majority view. In this case[529], by majority of six against minority of five, it was held that Parliament could not amend the Constitution so as to take away or abridge the fundamental rights. In *Keshavananda Bharati v. State of Kerala*[530], eleven out of thirteen judges held that Golaknath had been wrongly decided. However, while conceding that the Constituent power under Article 368 extended to every article of Constitution, the majority of seven against minority of six judges held that such power could not be exercised so as to destroy or temper with the basic features or basic structure of the Constitution. What is basic structure would be articulated by the Court from time to time through cases. This virtually meant that the Court would have the last say in respect of the Constitution. This was a revolutionary decision and belied all theoretical assumptions held till then.[531]

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[526] Shankari Prasad v. Union of India, A.I.R. 1951 SC 458

[527] Sajjan Singh v. State of Rajsthan, A. I. R., 1965 SC 845, Justice Hidaytullah and Justice Madholakar dissented.

[528] L. C. Golak Nath v. State of Punjab, A. I. R. 1967 SC 1643

[529] *ibid*

[530] AIR 1973 SC 1461

[531] S. P. Sathe, " Judicial activism in India" p. 8, Oxford University Press

This decision in *Keshavananda Bharati* appeared revolting to the basic tenets of democracy. How could an unelected court decide what the sensitive body such as Parliament desires to decide? Even the US Supreme Court did not have such power. When that decision was given, it was not much appreciated, but it acquired legitimacy over a period of time, as some undemocratic, unjust and dictatorial steps were taken by the Government during 1975 emergency unjustly imposed.

The first event that helped it gain legitimacy was the emergency of 1975. During this time, The Indira Gandhi government took recourse to the constituent power under article 368 and made sweeping changes in the Constitution that sought to whittle down the checks upon the power of executive. During this time, the powers of the court were also severally curtailed. The Indira Gandhi government passed the Constitution (Thirty ninth Amendment) act, which sought to validate her election, which had been held invalid by the High Court of Allahabad. This amendment was challenged before the Supreme Court on the ground that it tempered with the basic structure of the Constitution. The Court struck down the unconstitutional part of the amendment on the ground of its inconsistency with the basic structure of the Constitution. However, the Court upheld the election of Mrs. Gandhi on merits. The decision of the Court upholding Mrs. Gandhi's election pleased the political establishment because it provided legitimacy for her continuance as Prime minister. In this case the government did not challenge

the validity of the doctrine of basic structure and *Keshavananda* decision.

It clearly accepted and approved the validity of the theory of Basic Structure. The basic structure doctrine, despite its weak theoretical base, acquired legitimacy. The Court has used that power with maximum restraint and that power remains as an ultimate counter-majoritarian check upon democracy. The sustenance of that doctrine will depend upon the sustenance of its legitimacy. The Court may sustain its legitimacy by conservative use. Maximum judicial restraint will be needed to prevent the Court from becoming a super legislature. The Court must exercise this power with great tact, vision and circumspection. It is essentially a political power and the Court has to use political judgement while defining the limits of the constituent power of Parliament. The doctrine has, however, acted as a counter-majoritarian check on the exercise of constituent power. When the court held in *S. R. Bommai v. Union of India*[532] that dismissal of three state governments headed by the BJP, a party known to its commitment to Hindu India, was constitutionally valid because those governments were not likely to abide by the ideology of secularism, and that secularism is an aspect of the basic structure of the Constitution, it sent the signals that an amendment of the Constitution to do away with the secularism could be struck down on the ground of its compatibility with the basic structure of the Constitution.

We know that such signals are meaningful only when public opinion is behind them, but they also generate public opinion

[532] AIR 1994 SC 1918

against authoritarian use of constituent power. No democracy survives because of judicial review but judicial review can certainly help to strengthen people's desire for democracy. This kind of doctrine can survive only as long as the Court observes maximum restraint and is not seen as a defender of the status quo and vested interest. If a large number of people genuinely feel that amendment to the constitution is necessary and desirable, and the Court stands up against it, the legitimacy of the doctrine will erode.[533]

So, various constitutional amendments made in the Constitution from time to time, except 39th Amendment emphasizes the fact that Parliament of India proceeded to amend the Constitution only when it found that the judicial decisions interpreted the intention behind the relevant provisions either erroneously or improperly. It is the paramount duty of the Parliament to keep the Constitution in the tune with the needs and aspirations of the people and to prevent its interpretation which obstructs socio-economic progress.

Hon'ble former Chief Justice P.B. Gajendragadkar has said[534]:

> "The process of the democracy is really based on the doctrine that you make progress on the strength of reason and test the validity of your steps in the light of experience. If experience shows that words used in the Constitution were inadequate or inappropriate or have been erroneously interpreted, reason requires that

[533] S. P. Sathe, " Judicial activism in India" p. 10, Oxford University Press

[534] P. B. Gajendragadkar, "The Constitution OF India", p. 78-79 London, 1972

amendment should be made in the relevant words and the constitutional process allowed to function in aid of the basic objectives of the Constitution."

In a democracy it is the people who are supreme and sovereign and the Constitution is a valuable means to save their interests. The Constitution has no inherent sanctity but only with reference to the people whose welfare and happiness it advances. Therefore, each provision of the Constitution should be amendable. The Parliament and the State Legislatures have been given power by the architects of he Constitution under Article 368 to amend Article 368 itself. The Constitution which was drafted and enacted by one generation may not be completely suitable in the next generation. Amendability of the Constitution obviously is justifiable when an amendment is made to change political democracy into social democracy.

It cannot be said that the successive governments inn India, during the first two decades after independence, did not strive to remove various kinds of impediments in the path of welfare state and egalitarian society through the process of amendment. For example, The Constitution (First Amendment) Act, 1951, nullified the effect of judicial decisions in *Kameshwar Prasad Singh v. State of Bihar*[535], *State of Madras v. Champakram Dorairajan*[536] and the Constitution (Fourth Amendment) Act, 1955 made ineffective the Supreme Court's decisions in *State of West Bengal v. Bela Banerajee*[537], *Dwarkadas v. Sholapur*

[535] AIR 1951 Pat. 91
[536] AIR 1951 SC 226
[537] AIR 1954 SC 170

Spinning and Weaving Mills[538], *State of West Bengal v. Subodh Gopal*[539], *Sagir Ahmed v. State of U.P.*[540] and the Constitution (Seventeenth Amendment) Act, 1964 nullified the judicial decisions in *K. K. Koman v. State of Kerala*[541] and *Krishnaswami Naidu v. State of Madras*[542]. The Constitution (Twenty Fourth Amendment) Act, 1971 annihilated trhe most remarkable decision of the Supreme Court in *Golak Nath v. State of Punjab*[543]. The Constitution (Twenty Fifth Amendment) Act, 1971 was enacted to make ineffective the judicial decision in *Bank Nationalization case.*[544] The Constitution (Twenty Sixth Amendment) Act, 1971 made ineffective the decision in *Madhav Rao Scindia v. Union of India.*[545] The Constitution (Thirty Ninth Amendment) Act, 1975 was enacted to overrule the Allahabad High Court's decision in Prime Minister Indira Gandhi's election case known as *Smt. Indira Nehru Gandhi v. Raj Narain*[546]. The Constitution (Forty Second Amendment) Act, 1976 was enacted after the Supreme Court's decision in *Keshavananda Bharati's case*[547] and it sought to curtail the power of judicial review by amending, inserting and substituting many provisions of the Constitution.

Narration of the constitutional development as mentioned above reveals at least two things. Firstly, there has been serious conflicts between the Parliament and the judiciary in India and

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[538] AIR 1954 SC 119
[539] AIR 1954 SC 92
[540] AIR 1954 SC 728
[541] AIR 1962 SC 723
[542] AIR 1964 SC 1515
[543] AIR 1967 SC 1643
[544] AIR 1970 SC 564
[545] AIR 1971 SC 530
[546] AIR 1975 SC 2299
[547] AIR 1973 SC 1461

Secondly, the exercise of judicial review power by the judiciary has made it a political institution.

Further the Supreme Court did not give similar decisions in identical cases but went on shifting its perspective on the relavant provisions of the Constitution, amking it imperative for the Parliament to resort to constitutional amendments. For example in *Golak Nath case*, the Supreme Court went back on its own decisions in *Shankari Prasad* case and *Sajjan Singh case* and denied Parliament the power to amend the Constitution to abridge any of the Fundamental Rights. Again, in the *Bank Nationalization case*, in spite of the Fourth Amendment Act, 1955 and the decisions in *Vajravelu case (1965)* and the *Shantilal mangaldas Case (1969)*, the Supreme Court chose to go all the way back to the *Bela Banerjee case (1954)* to interpret the word "compensation" as "full indemnification". It is to be noted that when *Bela Banerjee case* was decided, there was no Fourth Amendment; therefore the decision In *Bela Banerjee case* had lost its relevancy after the Fourth Amendment in 1955. By handing down the starting decision in the *Bank Nationalization case*, the Supreme Court had shown unfair inconsistency in nits approach and had ignored the rule of stare decisis and openly invalidated, in effect, the Fourth Amendment, 1955.

In 1973, In *Keshavananda Case*, the Supreme Court advanced the doctrine of "basic Structure" to have a final say in the matter of every constitutional amendment made by the Parliament, and it invalidated a portion of Twenty Fifth Amendment Act. In *Keshavananda Case*, the Supreme Court the greater and heavier limitations on the Parliament's power to amend the Constitution

than in *Golak Nath case*. In fact the *Keshavananda decision* is a bigger edition of Golak Nath decision. As a counter-move, the Parliament asserted its unlimited power to amend the Constitution through Forty Second Amendment in 1976 and in 1980 in *Minerva Mills case*[548] the supreme Court reaffirmed its faith in the *Keshavananda ratio* and annulled Sec. 55 of the 42nd Amendment Act and dethroned the Directive Principles from the primacy which they have acquired through Section 4 of the said Act.

7.3 Judicial Restraint And The Basic Structure Doctrine

Several attempts have been made by the government to reverse the basic structure doctrine.[549] The Constitution (Forty Second Amendment) Act 1976 was one of these attempts, which inserted clause (4) and (5) to Article 368 of the Constitution. In *Minerva Mills v. Union of India*[550], the Court unanimously held that clause (4) and (5), inserted by 42nd Amendment, violative of the basic structure of the Constitution. In this case, the Supreme Court has exercised maximum restraint in using the basic structure doctrine against constitutional amendments. Since then, no effort was made on behalf of the government to overturn the basic structure doctrine. The Court has also been most reticent in using the basic structure doctrine to strike down a constitutional amendment. Although the Court asserted that it would review constitutional amendments that added new Acts to the Ninth Schedule, it has not held any of the additions invalid.

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[548] Air 1980 SC

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[550] AIR 1980 SC

In the last twenty-five years, the court has turned down constitutional amendments only twice. In *P. Sambamurthy v. Andhra Pradesh*[551], the Supreme Court struck down clause 95) of Article 371 D, which was inserted by the constitution (Thirty Second Amendment) Act, 1973. As a result of this amendment, tribunal had been set up to deal with all disputes regarding the services and excluded the jurisdiction of the High Court; it was held that unless it was an independent as a High court, the basic structure of the Constitution could not remain intact. *In S. P. Sampath Kumar v. Union of India*[552], the Supreme Court had upheld articles 323 A and 323 B of the Constitution inserted by the Constitution (Forty Second Amendment) Act, 1976. These articles gave power to parliament to pass laws providing for tribunals to deal with matters mentioned in those articles and to exclude the jurisdiction of the High courts over matters entrusted to the tribunals. This question reopened in *L. Chandra Kumar v. Union of India,* and Supreme court overruled its earlier decision in *S. P. Sampath Kumar's* case and held that article 323 A (2)(d) of the constitution in so far as it permitted Parliament to exclude the jurisdiction of the high court under Article 226 over Administrative tribunals was violative of the basic structure of the Constitution. The Court held:

> "We, therefore, hold that the power of judicial review over legislative action vested in the High court under Article 226 and in this Court under Article 32 of the constitution is an integral and essential feature of the Constitution, constituting part of the basic structure. Ordinarily,

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[551] AIR 1987 SC 663
[552] AIR 1987 SC 386

therefore, the power of High courts and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded.

Judicial restraint became manifest in *Kihota Holohon v. Zachilhu and Others.*[553] In this case, the Supreme Court was asked to examine the constitutional validity of the constitution (Fifty-Second Amendment) Act, 1985. This amendment inserted the tenth Schedule, which contained deterrent provisions against defection of members of legislatures. The Court did not express any opinion about the validity of the provisions that imposed several curbs on the freedom of a member to express himself in a House. These restrictions were the most objectionable one. But the Court did not find these objections strong enough to make amendment invalid.

So, basic structure doctrine has been used sparingly by the Supreme Court. It is supposed to invoke only against an amendment that strikes at one of the vital aspects of the constitution. What is vital aspect will depend upon the judge's perception and value predilection. A court should never appear to be acting as a super legislature, but it should also not appear to be trivializing the basic structure doctrine. It must act as censure of the exercise of the constituent power to preserve the most enduring values of the Constitution. Judicial invalidation of a constitutional amendment on the ground of alleged violation of basic structure of the Constitution must remain as a rare phenomenon. If the court tries to rob the Constitution of its flexibility by making any provision as part of the basic structure,

[553] (1992) 1 SCC 309

judicial review on the ground of basic structure will lose its legitimacy.

From the above discussion one may conclude that the concept of basic structure was many times used to determine the validity of those acts which had an adverse effect on the independence of judiciary or on the access to the judicial remedies merely to describe their importance in the scheme of the Constitution. The words, 'basic structure' were not used always in the same sense in which they are used in determining the validity of a constitutional amendment.[554]

The basic structure doctrine is the high water mark of judicial activism. The Indian Supreme Court alone enjoys such power and at the same time such power imposes a heavy burden on the Court. The court has to allow legitimate changes in the Constitution but prevent the erosion of those enduring values that constitute the essence of constitutionalism.[555]

7.4 Judicial Activism And Judicial Restraint: Pre-emergency Era

The activism of the Supreme Court of India during the first decades of its working was confined to a few cases on right to property. During these decades of the working of the judiciary, judicial activism rarely took up cudgels against the legislature except on the question of right to property. The courts deferred the will of the legislature on matters concerning economic

[554] S. P. Sathe, " Judicial activism in India" p. 98, Oxford University Press

[555] ibid at p. 99

regulation. On matters such as freedom of speech and protective discrimination, it legislated interstitially. On personal liberty, it adopted various techniques of administrative law to protect the liberty of the individual. Also, in the matters of interpreting the provisions of Art. 22nnd Preventive Detention Laws, the Supreme Court has exhibited highest skill in order to protect individual liberty.

In those days, judicial activism that favoured State intervention was welcomed. Since 1950s, we find that the Court began to perceive that it had a large role to play as an umpire in Indian democracy.

7.5 Judicial Activism And Judicial Restraint: Post-Emergency Era

The post-emergency era is known as the period of judicial activism because it was during this period that the Court's jurisprudence blossomed with doctrinal creativity as well as processual innovations.

Background

There were two main factors behind this post-emergency judicial activism. Firstly, the Supreme Court realized that its decision in the Fundamental Rights case had cost it the public esteem that it enjoyed. Secondly, it grew out of the realization that the narrow construction of constitutional provisions such as Article 21 in *A. K. Gopalan v. State of Madras*[556] was contradictory to its

[556] AIR 1950 SC 27

liberal stance in the *Keshavananda case.*[557] The main factor responsible for post 1975 emergency judicial activism was the dictatorial approach adopted by the Prime Minister Indira Gandhi in imposing emergency unnecessary and suspending Fundamental Rights and arbitrarily arresting political opponents under MISA and resorting to police atrocities on innocent people and enacting 39th Amendment to win her appeal pending in the Supreme Court in her election case. The Supreme Court which lost his image in *A.D.M. Jabalpur case,* tried to regain its prestige by causing 'Due Process of Law' to enact through backdoor in Article 21 by way of judicial interpretation of Arts. 14, 19 and 21 in *Maneka Gandhi case.*[558] Another reason can be given that the post-judicial activism was probably inspired by the Court's realization that its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment. Therefore, consciously or unconsciously the Court moved closer to the people.

Therefore, twenty eight years after the judgement in *Gopalan case,* in 1978 the Supreme Court in *Maneka Gandhi's case,* pronounced that the procedure contemplated by Article 21 must be "right, just and fair" and not arbitrary; it must pass the test of reasonableness of procedure otherwise the requirement of Article 21 would not be satisfied.

Responding to the changing times and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the down-trodden and the under-privileged classes, pronounced in

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[557] AIR 1973 SC 1641
[558] AIR 1978 SC

Madhav Haskot's case[559] that providing free legal service to the poor and needy was an essential element of the 'reasonable, fair and just procedure.' Again, in *Hussainara Khatoon's*[560] case while considering the plight of the under trials in jail. There after, in number of cases[561], the judiciary has developed a new type of prison jurisprudence. All these judgments provided new contents to the criminal justice system which resulted into prison reform and humanitarian treatment of the prisoners and of the under trials. Apart from this, ecology, public health and environment have been receiving attention of the courts. Exploitation of children, women and labour is receiving the concern it deserves. The executive is being made more and more to realize its responsibilities.

In view of the operation by the courts on a wider canvas of judicial review, a potent weapon was forged by the Supreme Court by way of public Interest Litigation. PIL secured access to court for under privileged and down trodden through public-spirited person or organization. This weapon was effectively used by the Supreme Court and the High Courts, being constitutional courts, to a large extent from 1980s onwards.

Thus it is crystal clear that judicial activism which is the search for the spirit of law, has been profitably used by powerless minorities, such as bonded labour, prison inmates, under trial

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560 AIR 1979 SC 1369

561 Nadini Satpadthy v. P. L. Dani, A. I. R. 1978 SC 1025, Shella Barse v. State of Maharashtra, (1983) 1 SCC 96, Bandhua Mukti Morcha case, A. I. R. 1984 SC 802, Sunil Batra v. Delhi Administration, (1978) 4 SCC 494, Charls Shobharaj v. Supt. Central Jail, (1978) 4 SCC 104, T. V. Vatheeswaran v. Stater of Tamil Nadu, (1983) 2 SCC 68(1983) 2 SCC 68, Nilabati Behra v. State of Orissa, (1993) 2 SCC 476, D. K. Basu v. State of West Bengal, (1997) 1 SCC 426, Rudal Shal v. State of Bihar, AIR 1983 SC 1086.

prisoners, sex workers and such other powerless minority groups as are crusading for protection of human rights of women and children or seeking redressal against governmental lawlessness.

However in recent years a good deal of criticism is levelled against the judiciary in respect of its active role. There is a common apprehension that there has been an increasing tendency on the part of judiciary to transgress into the fields of other organs such as the legislature and the executive. It is said:

> "...the Courts be not charging the windmills like Don Quixote in quest of opportunities of valour and chivalry. If they thwart the legislature and the executive in their functioning, it is likely to be at the cost of the nation."[562]

It is assumed that the judges have to operate within a framework of constraining factors of rules and principles; still in the interest of a clearer understanding of the whole problem, some pertinent issue required to be clarified and looked into. These issues could be categorized as follows:

i. What is the role of the Court in interpretation process under a written Constitution?
ii. What role of the Court was envisaged by the Constitution-makers in India?
iii. Whether a 'New Approach' is expected of judiciary under the impact of social change, and if so, what are its principal jurisprudential dimensions?

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[562] See J. C. Pande, "Judges thwarting constituent power of the Parliament", p. 135 JCPS, Vol. XIV, No. 2 1980

iv. Whether Court in India could be considered a major partner in the policy planning process undertaken by the State?

The answer of all these questions leads us to think about the limit of the judicial review power.

7.6 Limits Of Judicial Review

There are various self-imposed limitations, which have been formulated by the Supreme Court of the U.S.A. and India in View of the very nature of judicial function. These self-imposed limits emerging from the concept judicial restraints which were summed up by *Brander's J. in the Tennessee valley Case*[563], have also been adopted in India. They are so much well established in India and in the U.S.A., that a judge who deliberately ignores them runs the risk of being criticized as having abused his power of judicial review.

- The legislature lays down a general rule of conduct irrespective of and in anticipation of the facts of particular cases, but a court can pronounce a judgment only if a case is properly presented before it by an aggrieved party.
- Some matters excluded from the purview of judicial review on the ground that they are non-justiciable. In the U. S. A., they are called political questions, meaning thereby that they are fit for determination by the political agencies of the State, and not by the Courts.

[563] Ashwander v. Tennessee Valley Authority (1936) 297 U.S. 288

- In exercise of the function of judicial review a Court has to go through a two-fold process of interpretation, namely that of the Constitution and the impugned statute. On the one hand, it has to determine what true scope is and implication of the relevant provisions of the Constitution, the transgression of which is alleged by the aggrieved party. On the other hand, Court has to find out substance and effect of impugned statute on its true construction. The Court has therefore to see in the first instance, if the impugned statute is capable of a construction consistent with the constitutional provision, if it can be so construed, the question of violation of the Constitution does not arise.
- If two interpretations of the language used by a statute to be possible, that interpretation should be given which will save the statute rather than invalidate it?[564] This rule may be well expressed in the words of Brandies J. I *the Tennessee's Valley Case:*

> "When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether construction of the statute is possible by which the question may be avoided."

Hence if possible, a statute should not be so interpreted that it might offend against a fundamental right or other mandatory constitutional prohibition, for no such

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[564] Vide Prof. H. C. Dholakia, "Studies in Constitutional law" M. S. University of Baroda, p. 12 , U..S. v. Delware (1909) 213 U.S. 336

intention can be imputed to the legislature.[565] This principle is applied even where a part of the same statute has already been held to be unconstitutional.[566]

- However, this principle has its limitations, which should be carefully borne in mind by the Courts, to restraint them from assuming the role of the legislature. The basic principle of statutory construction is that the court should try to ascertain the intention of legislature or the object behind the statute and then to adopt, if possible, such construction as will carry out the intention of the legislature, and not that would defeat the very object of the statute.[567] It is also known as the principle of avoidance of absurdity. This principle means liberal construction should be put upon the written instruments so as to uphold them, if possible, and carry into effect the intention of the parties. In the case of statute, this limitation means that the Court cannot go so far as to pose as a legislature and take upon itself the power of rewriting the statute.
- The principle of avoidance of absurdity or avoidance of constitutional invalidity can be applied only where two alternative constructions of the impugned statute are possible, or the language is ambiguous.[568] But if the words of the statute are clear and unambiguous and only one construction is possible, the Court must adopt the construction only even though it may lead to a manifest absurdity or injustice.

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[565] Kannaiyalal v. Indumati A.I.R. 1958 SC 447

[566] Vide Prof. H. C. Dholakia, "Studies in Constitutional law" M. S. University of Baroda, p. 12, Sully v. American National Bank (1900) 178 U.S. 289

[567] Vide Prof. H. C. Dholakia, "Studies in Constitutional law" M. S. University of Baroda, p. 12, R. D.C. v. Newport Corp. (1951) 2 All E.R. 841 H.L.

[568] Kannaiyalal v. Sadhu Khan, A.I.R. 1957 SC 910

- The Court may also avoid striking down a statutory provision, which is apparently wide enough to come within a constitutional prohibition by interpreting the provision, if possible, in a narrow sense so that it may not violate or transgress the line of action prohibited by the Constitution.[569]
- It may also be observed that the doctrine of avoidance of constitutional question by statutory interpretation should not be confused with the doctrine of severability. The various rules relating to severability have been summed up by the Supreme Court in R. M. D. C. v. Union of India.[570]
- Further it is well established from the days of Lord Bacon that judges ought to remember that their office is to interpret law and not to make law. In short, the wisdom of the policy behind a statute is no concern of the judges, and to reform of the law is a function of the Legislature and not of the Judges.

Thus it has been laid down by the Supreme Court all along that even when the court declares the law applicable to the case before it, it merely declares the law, which is already supposed to exist. It never professes to make new rules for the future, which is a business of Legislature.

The following propositions seem to be well established:

- The only concern of the Courts it to see that the constitutional limitations are not violated by the State.

[569] As applied in Kedarnath v. State of Punjab, A. I.R. 1967 SC 969
[570] A. I. R. 1957 SC 628

- Where the Court cannot come to a clear finding that some constitutional limitation has been transgressed by the legislature, a court cannot strike down a statute on the mere ground that it does not agree with the legislative policy behind the impugned legislation.
- On the other hand, once a constitutional limitation is found to have been violated, the court is bound to interfere irrespective of any considerations of inconvenience that might be caused by the annulment of the legislation.
- Whether a constitutional limitation has been violated is a legal question, to be determined by the established norms of legal interpretation in so far as they require to be modified in view of the special nature of an organic instrument.

7.7 Self Imposed Limitation On The Exercise Of The Power Of Judicial Review

The self-imposed limitations on the scope of judicial review, it may be mentioned that the following have been listed by Basu:[571]

1. The question must be raised in adversary litigation.
2. The question must not be hypothetical and the controversy must be real.
3. The Court will not entertain challenge to the constitutionality of a law unless the constitutional question involved is substantial.
4. The question of constitutionality will be determined only in last resort.

[571] Durga Das Basu, " Commentary on the Constitution of India", 5th Edition, Vol. I p. 173

5. The Court will not pass upon a constitutional question further than what is necessary for the disposal of the particular case before it.
6. The petitioner must have a standing to challenge the constitutionality of the law. This is now liberally interpreted.
7. The injury that the plaintiff complains of must be an injury to himself.
8. The pleading must be adequate.
9. The challenge of unconstitutionality must be specific.
10. The question must be raised at the proper stage.
11. The question must be justiciable.
12. The presumption of constitutionality.
13. Respect for legislative determination.
14. Respect for long-standing legislative practice.
15. The doctrine of stare decisis.
16. The doctrine of severability.

The foregoing discussion has attempted to analyse various types of limitations on judicial decision making and the judicial reaction to such limitations. The inquiry was mainly concerned with the questions whether:

- The judiciary has confined itself within the limitations imposed by the legal system; and
- It has adopted a consistent and wise policy in relation to auto-limitations.

7.8 Judicial Self Restraint

In a wide sense any limitations on judicial decision-making, other than those expressly imposed by the Constitution or a statute, is the product of judicial self-restraint. There are areas where judiciary professedly adopts an attitude of self-restraint. These areas are in relation to (i) political questions; (ii) legislative powers; and (iii) discretionary powers of the administration.

However, two American jurists have identified six assumptions on which the concept self-restraint is based:[572]

1. The Court is basically undemocratic because it is non-elective and presumably non-responsive to the popular will. Because of its alleged oligarchic composition the court should defer wherever possible to the 'more' democratic breaches of the government.
2. The questionable origins of the great power of judicial review, a power not specifically granted by the Constitution.
3. The doctrine of separation of powers.
4. The concept of federalism, dividing powers between the nation an the State requires of the Court difference towards the action of states government and officials.
5. The norm is ideological but pragmatic assumption that since the court is dependant on the Congress for its jurisdiction and resources, and dependant on public

[572] Joel B. Grossman & Richard S. Wells (ed.) Constitutional law and judicial policy making, p. 56, 1972

acceptance for its effectiveness, it ought not to overstep its boundaries without consideration of risk involved.

6. The aristocratic notion that, being the court of law, inheritor and custodian of the Anglo-American legal tradition, it ought not be dissent to far to the mere level of politics law being the process of reason and judgment and politics being concerned only with the power of influence.

One may observe that all the above assumptions, with the exception of the second, are relevant in the Indian context. These assumptions, it may be seen, spring from a consciousness of the institutional limitations of the judiciary as also from the urge to maintain its dignity and to keep it free from controversies.

An awareness of the limitations of the judicial process may be seen in many judicial pronouncements. As Justice Dwivedi emphatically observed:[573]

> "Structural socio-political value choices involved a complex and complicated political process. The Court is hardly fitted for performing that function. In the absence of any explicit constitutional norms and for want of complete evidence, the court's structural value choices will be largely subjective. Our personal predilections will unavoidably enter in to the scale and give colour to our judgment. Subjectivism is calculated to undermine legal certainly, an essential element of the rule of law."

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[573] Keshvananda Bharati v. State of Kerala, AIR 1973 SC 1461, 2008

The above observation reveal another assumption to support an attitude of self-restraint, viz., the element of subjectiveness in judicial decisions on issues having socio-political significance. While stressing the need for judicial self-restraint, one may not lose sight of the dangers of extending the doctrine of restraint to undesirable lengths. Such extension may amount to abdications of the legitimate functions vested in courts. It has been rightly observed:[574]

> "To insist in all or most cases that the people should appeal to the ballot and not to the courts for the removal of unwise or foolish legislations could very easily lead to the tyranny of the majority, and would tend to jeopardize the rights of the majority, whose access to the ballot or the political process of the democracy may be extremely limited or non-existent."

Between too much restraint and the total lack of restraint lies the golden mean. In the analysis that follows an attempt is made to examine how far the Indian judicial process has success in applying the doctrine of restraint within the permissible boundaries of the golden mean.

What is suggested here is that choice between activism and restraint should not be an impulsive or unconscious ad hoc process but should be on the basis of a deliberate and clear policy. The relevant consideration which should make the judicial choice on favour of activism and restraint are the policy and scheme of the statute, the object of conferring discretionary

[574] Arthur, A. North, "The Supreme Court: Judicial process and judicial politics, p. 201, 1966

powers, the nature and scope of discretion, and finally, the nature of right and interest affected by the decision. Any impulsive move to activism without serious considerations of these factors may only be viewed as undesirable. Judicial activism, being an exception, not the rule, in relation to control of discretionary powers needs the strong reasons to justify it. In the absence of strong reasons of support the interventionist strategy may provoke the other branches government to retaliate and impose further limitations on the scope of judicial review.[575]

So, judicial activism is not an unguided missile. It has to be controlled and properly channelised. Courts have to function within established parameters and constitutional bounds. Decision should have a jurisprudential base so as to make them irrelevant. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. People of this country have more faith and trust in the courts than in politicians and, the judges have acted more or less as reliable trustees. Betrayal of such trust may result in judicial despotism.

So, the judiciary, which has been described as the weakest of three organs of government, obviously functions under severe limitations, some of which are externally imposed and others are either self-imposed or inherent. The degree of activism or restraint depends on an individual judge's perception of these limitations. A creative judge, though conscious of the limitations, is always able to make an imaginative use of the lee ways available.

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[575] Cf. Griffith J. A. G., "Publiv rights and private interests", p. 43, 1981

It must always be remembered that the judges in exercise of their power of judicial review are not expected to decide a dispute or controversy which is purely theoretical or for which there are no judicially manageable standards available with them. The Courts do not, generally speaking, interfere with the policy matters of the executive unless the policy matter is either against the Constitution or some statute or is actuated by mala fides. However, the danger of judiciary creating a multiplicity of rights without the possibility of adequate enforcement will in the ultimate analysis be counter productive and will undermine the credibility of the institution.

So, 'judicial whistle' needs to be blown for a limited purpose and with caution. It needs to be remembered that courts cannot run the government nor the administration indulge in abuse or non-use of power and get away with it. While exercising the power of judicial review, the courts have the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation.[576]

Judges are expected to be circumspect and self-disciplined in the discharge of their judicial function. Judiciary has to go for the principle of judicial self-restraint while exercising and expanding the power of judicial review.

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[576] " Justice A. S. Anand, "judicial review-judicial activism: Need for caution" JILI, Vol. 24, p. 159 `