# Judicial Activism to Judicial Outburst: Contemporary Analysis of Indian Judicial System

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**Introduction**

Two distinct words- "*niti"* and "*nyaya"*- both stand for Justice in Sanskrit. While the former, means organizational propriety and behavioral correctedness. The latter meant justice in reality and undoubtedly a wrong niti will give a wrong result i.e. nyaya. The Indian judicature is an instrumentality with grand stature and sober splendor. It has antique value and implicit heritage in its culture. It enjoys vast authority; it has disciplined dignity and decorum having meticulously chosen personnel having a luminous social philosophy.

There is a well-known adage in MEASURE FOR MEASURE that *"…it is excellent to have a giant's strength, but tyrannous to use it like a giant*". Unfortunately, the last decade witnessed the degree of "**Judicial Outburst**" which smacked off intemperate, sweeping and undignified comments by judges. There are several cases where some remarks were made, one of the cases is the VIP's Bungalow case. Another is Ghaziabad Judges Scam Case where a senior counsel was accused of behaving like a ***street urchin- three times***. Another case concerning cops who refuse to register F.I.R.'s, the court suggested huntering to make them work {*When you need to use the rod, authority is already lost}*. That's not all; the judges usually advise media "*to maintain fairness and accuracy*". Bowdlerizing press reports of court proceedings violates these values. Judges who feel besieged become intolerant of criticism. The generalization made by the judges that "*We are always under attack" & "judge-bashing and using derogatory and contemptuous language against judges has become a favorite pastime of some people.*" Was unwarranted. In the Godhra Bail case, the remark of the then Chief Justice shows that critics are shown scant fairness.

On the other side, the numbers of delinquents are on the rise. The passive assurances of integrity that judges are answerable to their conscience and the law are losing. [1] The standards of "**ROBED BRETHREN"** are suffering. Huge backlogs are eroding public faith; there are the instances of mob justice. The emergence of **banyan tree justice systems** like for eg. Lok Adalats, ADR'S etc. are claimed by some as reflections of failing faith in the judiciary at least in the lower courts.[2]. Allegations of corruption and wrong-doing surfacing in the case of judges in West Bengal, Uttar Pradesh Punjab & Haryana and Delhi and when the functioning of the institution is itself suspected and seen as unfair, it is a problem and what makes this crisis more upsetting is the fact that judiciary owns and claims so much power over its own affairs on the grounds that all other institutions in the country are corrupt. The

[1] Garry, Sturges., & Philip, Chub., (1988). Judging the World: Law and politics in the world's leading courts. (W. Heinemann).

[2] Marc Galanter, Kirpal B.N. Desai. H, *Fifty Years On, Supreme But Not Infallible*, Oxford, 2004.

exercise of this power is in itself a matter of great mystery. The virility of these allegations might not be in question, the point is that they do cast a shadow over the legitimacy. This opaqueness has been compounded by a sense of double standards.

It is one thing if a few judges are found involved in corruption but when the functioning of the whole institution is seen as skeptical, it is a serious matter altogether. "True or not, there is an unfortunate impression that even the judiciary, their oaths notwithstanding, and generally commanding esteem, have a social philosophy which is alien to the people's democracy. It is not uncommon that we find judges who do not write judgments- at all or dawdle or delay unpardonably in hearing cases and pronouncing judgments- arbitrarily on and off the bench, dubious on perquisites and forgetful of transparency, accountability and social justice." [3] This remark of KRISHNAIYER J. is a reflection of the sorry state the Judiciary has reached and also the high expectation of the people from the Judiciary who view it as a, "last post of hope" by the people. In today's outlook of transparency and accountability in government the Judiciary cannot escape scrutiny of its performance and conduct and the conceptual argument that Judiciary should be independent is untenable [4]. In fact, the two notions should be perceived as complimentary rather than antithetical.[5]

The journey of the courts in India has been from "Judicial Self-restraint" to "Judicial Activism" to "Judicial Outburst" which as feared by some might well end up in judicial imperialism. The notions of SEPERATION OF POWERS are crumbling with claims that the judiciary is indeed usurping the functions of other branches, whereas it reacts sharply to any criticism of that. Instead, what the paper attempts to claim is that the notion of separation of power is a myth and what is intended is that the three organs must work in their respective domains to uphold the cardinal constitutional principles only.

This paper identifies and discusses two problem areas:

*The Power of Contempt*: Whether the power of contempt has been stretched too far?

The stature of judiciary is high enough that any action to denigrate the dignity and the integrity of the court is bound to fall. But whether the court in India is very touchy and forgotten that they hold the power in the public trust which is the sovereign under the Constitution of India? Had they also forgotten that they are also the creation of the law that is the Constitution of India which expressly provide for their removal? And what happens if judges themselves commit crimes or the Judiciary as an Institution commits any act which is extravagant, excessive, unfair, authoritarian or corrupt? Or that is permissible under their oath or by the independence they claim?

With these questions in mind the paper will examine the proper extent of the power of contempt?

[3] Justice V.R. KrishnaIyer. (2008) Judge's Potpourri. Universal Law Publishing.
[4] Venkatesan, V. (2004, August 27). For Judicial Transparency, *The Frontline*, 32.
[5] R.D. Nicholson. (1993). Judicial Independence and Accountability: Can They Co-exist?. 67 ALJ 404

*The Judicial Outburst:* Whether the Judiciary in the name of Judicial Activism is running counter to the Constitutional framework?

All the three important pillars in democracy are undoubtedly the creation of the Constitution of India and it's the Constitution from which they derive their powers. The constitution envisages the Doctrine of Separation of Powers in the form of checks and balances. The process of judicial activism often is running counter to that leading to charges of usurpation of power by the judiciary. This problem is undoubtedly exacerbated by the strong language in which judge sometimes express themselves. This paper will examine the concepts of review, activism, kinds of the same, the Indian experience and the way forward. The paper will attempt to establish that the judicial self-restraint is the best way out in the light of the fact that they have moved away from what they were originally supposed to do and their claim that they are acting as buffer as the other organs are not doing their functions properly falls on the face in the light of the arrears and huge backlogs, the justice is actually not reaching the lowest strata which is causing dissatisfaction and delusion of the same degree which is used to justify the activism and where does the separation of power goes which the court had themselves held to be a part of the basic structure.

**The Separation of Powers**

***Meaning, Reason, Limits and the Proper Course***

The main criticism of the Judicial Activism is on the ground that it runs counter to the cherished principles of the Separation of Powers. *Black's law Dictionary* defines the doctrine as, "*The division of governmental authority into three branches of government each with specified duties on which neither of the other branches can encroach*." [6] Putting simply, it means that in an ideal state the Legislature makes, the Executive executes and the Judiciary construes the law. It depicts the general meaning of the expression and also indicates that it is not as simple as it looks.

Though, the French philosopher, *Montesquieu*[7], is credited for the development of this concept but according to *C. K. Allen* it was '*Locke*' who propounded this theory for the first time. The importance of these philosophers lies in the fact that their influential writings sowed the seeds of the doctrine of "*Separation of Powers*" and helped it to attain fruition in the American Constitution. And, it was not without a good reason based on experience, that Americans, almost at the moment of independence was declared, began to set up written Constitution and put the Separation of Powers at their foundation. The 19th century, Philosophical jurists deduced the Separation of Powers from the idea of Liberty[8], and took it to be a necessary dogma for a state ruled by law. This statement of *Montesquieu* captures the idea, "*There is no liberty if the power of Judiciary be not separated from the Legislative and Executive. Were it joined with the Legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the Executive power, the Judge might behave with violence and*

[6] Black's Law Dictionary 6th Ed.-19.
[7] Montesquieu. (1748) The Spirit of Laws.
[8] Roscoe Pound. (1951). Justice. Yale University Press, (Chapter 3)

*oppression.*"[9] The theory aimed at the removal of arbitrariness and promotion of liberty as it is quite common sensual that where all the powers are vested in one body there can be no liberty and things will lead into arbitrariness, tyranny and autocracy, as *Blackstone* and *Ivory Jenning* also agrees to that [10]. It would be apt to give the quote of *Lord Acton* here that, "*Power corrupts, and absolute power corrupts absolutely*."

The traditional approach of this theory was in the form of division of the power of the state in three separate organs, viz, the Legislature, Executive and the Judiciary. The question is whether the Judicial Activism results into the betrayal from this solemn theory of Separation of Power. If we take into account only one aspect, then yes, but that will be a hasty conclusion. And if we fail to take into account the practical realities then the truth might be converted into wrong hood. In practice, it is impossible to separate the three organs completely in watertight compartments as that situation will also lead to tyranny by making the Constitution unworkable. Our framers also recognized this and introduced a system of checks and balances, a system of overlapping and intermingled powers. However, that does not imply that one is free to do anything- the caution must be taken so, "***THAT THE OVERLAPPING DOES NOT BECOME ENCROACHMENTS***".

This leads us to another important question, as to what are the limits? Does that mean that the respective organs know their powers? However, that will be a misconception, as there may be certain exceptional cases where a common man after giving unsuccessful knocks at the doors of the Legislature and the Executive comes to Judiciary, demanding justice. Now if the Judiciary will say that, "*Oh look, I can't help you*!" under the pretext of this doctrine and shut the door on him is that the separation of power…certainly not and whether it should be stretch to that limits, the answer is very clear. That is the notion of this doctrine and as long as the Judiciary responds to his knocks, without prevarication or procrastination- it is acting as a buffer between various wings. That's the reason why the Montesquian genome has to give way to the bigger cause of justice as justice is the *supreme virtue.*

However, the respective powers had their limits and if stretched beyond that it would lead to collapse of the system as *Spencer's Law* says that action and reaction are in an equal and opposite direction, it might give rise to a snowball effect that will soon lead to an avalanche. The proper course may aptly be put into the words of *Abraham Lincoln*, "*Have we not lived enough to know that two men may honestly differ about a question, but both be right? In this paradox lies the secret of judicial process. There are areas where judges must be activist and there are areas where they must be passivists. In which area they must be activist and in which area they must be passivists can be gathered from the knowledge we*

[9] Baron de Montesquieu, The Spirit of Laws, 152 (T.N.T., Hafner Pub. Co. 1949) (1750).

[10] Justice Louis Brandies in Roscoe Pound's, *The Development of Constitutional Guarantees of Liberty"*, that, "*The doctrine of separation of power was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incidental to the distribution of the governmental powers among these departments, to save the country from autocracy*."

*get by experience*." Thus, the judges must be guided by the experience in setting out their limits.

INDIAN JUDICIAL PRACTICE:

The notion of the Separation of Power is not so deeply rooted in the Indian Constitution as in the United States Constitution. Our Constitution has system of check and balances which require all the three wings to work harmoniously. In re Delhi Laws [11], Supreme Court pointed the absence of explicit provisions in the Constitution specifically vesting legislative powers in the legislature and judicial power in the judiciary. The question than arises; did the Constitution, thus, envisage the doctrine of separation of powers at all? The majority opinion, however, imported the "essence" of the doctrine of Separation of Powers and the doctrine of constitutional limitation and trust implicit in the constitutional scheme. A necessary corollary of this principle, as later predicted in Chandra Mohan v. State of Uttar Pradesh [12] was the separation and independence of the judicial branch of the state[13]. In the famous case of Indira Gandhi v Raj Narain[14] the doctrine of Separation of Powers was equated as basic feature. Though, that in itself appears contrary to the doctrine of Separation of Power. This decision seemed to be most adverse to the theory of judicial review. It seemed to wrestle supremacy to a non-elected court and against the elected parliament. The LORD SCARMAN'S advice must be observed here, that the separation of powers must be adhered if the judicial independence is not to be put to risk.[15]

**Justification and Desirability of Judicial Activism**

"*…the purpose of the law, and the purpose of the judiciary, is not merely to sit in wig and gown for a number of hours a day and look very learned. They supply a social purpose that is, to bring about justice, to deliver justice to the people*"

The social purpose of delivering justice to the people could not have been fulfilled without the brooding omnipresence of Judicial Review in the form of Judicial Activism. The rhetoric expressions like, "jardem das seine" and "fiat justitia et pereat mundus" would be no more than a wasted eloquence, sans the willingness of a judge to regard letter of law as nobody and to venerate the sense and reason of law as the sole. They are expected to give the constitution, "a continuity of life and experience"[16] and must be "vocal and audible" [17] for the ideals that may otherwise remain silent to put it in the words of the revered Justice Benjamin Cardozo. They argue that the original intention of the constitution makers does not bind a constitutional court and if they failed to give the interpretation according to contemporary notions there is danger that the constitution will be stultified and devoid of strength necessary to provide the normative order for the changing times.[18] As the constitution is an organic law and this requires that

[11] A.I.R. 1951 S.C. 747
[12] A.I.R. 1966 S.C.1987, at p.1993
[13] Justice S.B. Sinha. (2006). Judicial Independence, Financial Autonomy and Accountability Justice. NYAYADEEP, Vol. VII, Issue 1.
[14] A.I.R. 1975 S.C. 2299
[15] LORD SCARMAN in DUPORT STEEL LTD. V SIRS [1980] 1 AllER 529 AT 551.
[16] Benjamin N. Cardozo. (1927). The Nature of Judicial Process, 92-94.
[17] Ibid 16
[18] S.P. Sathe. (2001). Judicial Activism: The Indian Experience, Washington University Journal of Law & Policy, 6, 29.

the courts interpreting should be creative rather than mechanistic in their interpretations. According to Justice Cardozo, a written constitution "states or ought to state not rules for the passing hour but principles for an expanding future." [19] It was the doctrine of ultra vires that enabled the judiciary to, and not the elected parliament to have the last say on the validity of the laws. The critics call it undemocratic and violation of the principles of majoritarianism, however, this judicial function has heightened the tension between the judiciary and other branches of government opening the judiciary to charges of over-reaching itself.

**Reasons:**

***Philosophical basis:***

There are two cardinal principles inherent in the things; these are the spirit of change and the spirit of conservation. Nothing can be real without the presence of both. Mere conservation without change can't conserve and mere change without conservation is a passage from nothing to nothing. Now the change is not necessarily to be bought about by the statute. Judiciary has also a role to play. In fact, no court can interpret a statute, much less a Constitution, in a mechanistic manner[20]. A court has to sustain its relevance to the contemporary needs and situations which arise in the ever changing social, economic and political scenarios and to quote BENJAMIN CARDOZO, give to its words, "a continuity of life and expression." [21] DEAN ROSCOE POUND has also observed that it is not about the maintenance of status quo. And for that little friction is bound to happen but friction is necessary in law as in motion.

**Jurisprudential aspects:**

There are many diverse conceptions regarding the growth of law. However, two of them are peculiar. They are:

- One that the essence of the law is that it is imposed upon society by a sovereign will. The first is the essential attribute of the Austinian Jurisprudence it is argued that it fails to capture the true nature of judicial function.
- In the other one the essence of law is that it develops within the society of its own vitality though it does not discard the notion of sanction or enforcement by a supreme authority established by law and that itself is a creation of law. It explains the jurisprudence of the judicial activism.

The superiority of the other theory becomes clear from the celebrated decisions in the Marbury v. Madison, [22] Brown v Board of Education [23] , Donoghue v Stevenson, Rylands v Fletcher, Keshavanand Bharati[24] and M.C.Mehta[25] cases.

Further, the process can be regarded as either-

- DEDUCTIVE i.e. a priori. The first theory assumes that the legal rule applicable to any case is fixed and certain from the beginning,

[19] Supra note 16, at 83.
[20] J. Marshall in the Maryland case of 1819 remarked that," the *constitution was intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs*".
[21] Supra note 16.
[22] 5 U.S.(I (Cranch) 137 (1803))
[23] 360 U.S. 201 (1964).
[24] AIR 1973 SC 1461.
[25] AIR 1988 SC 1037.

and all that is required of the judge is to apply this rule. In this way this follows the legal positivism and seems to be intimately attached to the BLACK LETTER LAW TRADITION which has been defined by Rajeev Dhavan as one which seek to interpret law as a distinct, relatively autonomous reality. Within this tradition law is separated from morality. It is understood and interpreted by esoteric rules known only to the initiated and critiqued on the basis of self-constituted legal principles and concepts. The literal or mechanistic view, this is the Austinian or Positivist approach, according to which the Judges do not make laws, as said by Blackstone that, "the duty of the court is not to pronounce a new law, but to maintain and expand the old one."[26]

- INDUCTIVE or a posteriori: The latter conceives that the judge is always reasoning inductively. Its basic application is from particular to general and in adherence to the precedents, but it leaves scope for the courts to interpret the law not strictly according to its letter but in the light of its spirit taking into account the changing situations. Thus, it is the inductive approach which provides the better understanding of judicial review in the form of proper judicial activism. The other view is the liberal, purposive interpretation which involves the creative function of the Judiciary with insight into social values and with suppleness of adoption to changing needs. It adheres to the Realist School.

The idea underlying Judicial Review can be traced to the Natural Law Doctrines which says that a man-made law was susceptible to correction and invalidation by reference to a higher law.[27]

**Indian pecularity:**

In India, Judicial Review is a constitutional command. There need is proper Judicial Activism can be justified, in fact fortified, when we take into account the growing hiatus between the expectations and the reality, the promises and the performances, the enactments and their implementation. The net difference is so vast that it had resulted into despair, disenchantment and disillusion and consequently developed a feeling of helplessness, deception, alienation and anger. It is now clear to prudence that it was meant to fill the yawning gap and it should not be doubted that it is required as a measure to keep the instrumentalities on the course or to provide justice through law-in-action. It explains the reasons and the basis of the constitutional commands and the need of Judicial Activism.

**Judicial Review, Judicial Activism**

***Meaning and Relation***

JUDICIAL REVIEW: The Black's Law Dictionary, defines Judicial Review as, "A court's power to review the actions of other branches or levels of government; especially the court's power to

[26] Blackstone. (1808) Commentaries, 69

[27] M.J. Harmon. (1964). Political Thought: From Plato to the Present. New York: McGraw Hill, Also refer to DR. BONHAM'S CASE, 8 Coke's Report, 114 at 48.

invalidate legislative and executive actions as being unconstitutional."[28]

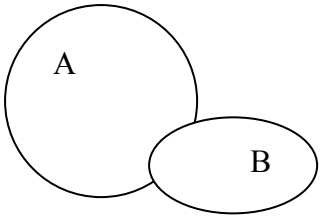
The power of judicial review is a constitutional mandate in India. The scope of Judicial Review in India is somewhat circumscribed to that in the U.S.A., while in India, the Fundamental Rights are not exhaustively defined as in the U.S. and limitation thereon has been stated in the Constitution itself. The Constitution Framers also felt that the Judiciary should not be raised to the level of "super-legislature." Professor Ramaswami suggested that precise framing of the declaration of rights would avoid large scale invalidation of laws by the courts.[29] That seems to me the reason why the Directive Principles of State Policy were not made justifiable.[30] The reason de attire for Judicial Review can be seen in the following argument that Constitution is not a self-executing document and in order to prevent a horrible situation where the Constitution is a plaything of the politicians it becomes an imperative. Little doubt Dr. Ambedkar called Article 32 the heart and the soul of the Constitution. Federalism and Fundamental Rights add new dimensions to the significance of judicial role. And lastly, the judiciary is politically neutral hence eligible for unbiased analysis.

**Judicial Activism**: Judge Frank Easterbook once said that, "Everyone scorns Judicial Activism, that Notoriously Slippery term."[31] The Black's Law Dictionary defines, "Judicial Activism" as, "a judicial philosophy which motivates judges to depart from the strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the existing accepted by the appellate courts."[32]

Judicial activism has became a subject of controversy in India for pro-activists it is merely a legitimate function of the courts[33], while for its critics it amounts to usurpation of powers allotted to others organs of the government and a miserable sophistry. The justification that is provided in the Indian Perspective is that it is the Constitutional mandate to the judiciary to keep in mind the social and economic objectives which the Constitution seeks to protect, promote and provide as embodied in the law. When the practical organs fails to discharge their obligations effectively or show an attitude of indifference to them. Then, the judiciary comes in for rendering the social, economic and political justice to the people at large. In such case the behavior of Judiciary can be rightly and legitimately be summarized as Judicial Activism. Dr. B. R. Ambedkar, defended the Article 32 as being necessary in fact he defined the writ jurisdiction as the very heart and the soul of the constitution.[34]

RELATION: Judicial Review and Judicial Activism are related to each other in a way that the latter is inherent in the former and the former is sometimes bound to mature in the latter.

[28] Black's law dictionary, 6th ed. at p.849.
[29] Ramaswami, M. (1946). Fundamental Rights. Oxford University Press.
[30] Article 37, The Constitution of India.
[31] Frank H. Easterbook. (2002). Do Liberals and Conservatives Differ in Judicial Activism? 73 U. COL. L.REV. 1401.
[32] Supra note16 at p.847
[33] As remarked by Justice A. H. Ahmadi that it is a necessary adjunct of the judicial function because the protection of the public interest, as opposed to private interest is the main concern. In A.H. Ahmadi, Judicial Process: Social Legitimacy and Institutional Validity, 4 SCCJ, VOL.1, 1-10 (1996).
[34] C.A.D. Vol. 7. 700 & 953.




I) A = Judicial Review.

II) B = Judicial Activism.

III) A  B = Where courts acquires the role of activist while performing Judicial Review.

IV) B – (A  B) = Where courts does not review but is still acts as an activist.

It is all right until B is the sub-set of A, when the last situation grows out of proportion which has happened in today's context.

**Other forms of so-called judicial activism**

***An overview of the judicial practice in India***

Though, the use of the expression Judicial Activism can be traced back to the time of ABRAHAM LINCOLN, it was the Article of the ARTHUR SCHLESINGER Jr. published in Fortune Magazine in 1947 which explored its dimensions in various ways.

**Broadly speaking:**

The inductive method of judicial review gave rise to the NEGATIVE MODEL OF ACTIVISM, which prescribed the path for certainty.[35]

The deductive method gave rise to the POSITIVE MODEL OF ACTIVISM, wherein the court was engaged in changing the power relations to be more equitable.[36]

The expression has been qualified as reactionary, progressive, eclectic, opportunistic and at other times it has been identified with expressions such as judicial excessiveness, passivism, authoritarianism, overreach, adventurism, romanticism and populism.

- REACTIONARY JUDICIAL ACTIVISM: much of the Nehruvian era activism on issue of land reform, and the activism typified in SHIVAKANT SHUKLA.
- PROGRESSIVE JUDICIAL ACTIVISM: commenced with the cases of GOLAKNATH[37] and KESVANAND BHARATI CASE [38] and culminated into a wholly different genre guided by the PIL's.[39]
- OPPORTUNISTIC JUDICIAL ACTIVISM: Indira Gandhi used to describe certain Judges as GANGADAS and YAMUNADAS though it was not always unreasonable.
- ECLECTIC ACTIVISM: it may be progressive or reactionary; it refers to situations where Judges pick and choose contexts of social action litigation to perform adjudicatory wonders. Eg. it was the AGRA HOME CASE that marked the inception of broadening standing but the radical enunciation of public interest standing took much later in THE JUDGE'S CASE.

[35] Gopalan Case, Habeas Corpus Case.
[36] Supra note 23
[37] AIR 1967 SC 1643.
[38] Supra note 24.
[39] Starting with the Judge, s case

'*Judicial Passivism'* and '*Judicial Excessivism'* represented the ends of the two extreme poles and both are equally preposterous as too little would signify un-enforcement of constitutional notions and too much will result in over-enforcement of these ideals, imperiling the legitimacy and efficacy of the judicial power.

- JUDICIAL PASSIVISM: the times when the Judiciary shrugged of its responsibilities when the people expected it to shoulder their troubles for some the NARMADA DAM CASE and BALCO CASE are an example of such passivism. This leads us to the question that how to draw a clear boundary between the two concepts. To many KESVANAND BHARATI discourses on the Basic Structure Doctrine and the emancipation of constitutional Secularism in S.R. BOMMAI v UNION OF INDIA CASE[40], smack of excessivism.
- JUDICIAL POPULISM: This has infectious qualities and the court is required to be cautioned against it as it stands for self-indulgent judicial behavior. It is often disguised in spurious appeals to the people as a justification for the decision. Upendra Baxi regarded PIL as a form of such populism. And the AIIMS episode was such incident in my humble opinion.
- JUDICIAL AUTHORITARIANISM/ OVERREACH/ ADVENTURISM- These expressions are more or less regarded as synonyms and they are not recommended as they might turn the guided missile of legitimate activism into an unguided one and the court must show restrain and try to remain within the bounds. For me the case of SAMYUKT NAGRIK SAMITI decision by the Patna High Court, the VEERASWAMI JUDGEMENT, JAGDAMBIKA PAL CASE, JHARKAND ASSEMBLY CASE were examples of such activism.
- JUDICIAL ROMANTICISM: It is a habit that results from the habit of the mind that courts are a solution of the problem in fact the previously discussed overreach is a result of this only and it may be rooted in part in the flattery of public faith and in the frequent resort to the judiciary. It has resulted into mushrooming of litigants especially in the form of PIL's, and is a cause of discomfort among the politicians, analysts and even the Supreme Court itself, as it has burdened the courts to do something which they are not well fitted to do and thus they are embarrassed by the public expectations. This in part explains the growth of the "BANYAN TREE JUSTICE SYSTEM".
- JUDICIAL SELF-RESTRAINT: The Black's law dictionary defines judicial self-restraint as, "self-imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be inconsistent with existing decisional or statutory laws."[41] The present trend.

**Judicial Review and Judicial Activism**

***The Practice of Indian Supreme Court***

***Pre-independence:***

[40] AIR 1994 SC 1918.

[41] Supra note 2.

In fact, Judicial Review is an integral feature of the Rule of Law, which is a Basic Feature of the Constitution of India.[42] Every state action must be verified and tested on the anvil of the Rule of Law. Unlike the U.S. Constitution which emphasizes on the point that it is the supreme law of the land, the Indian Constitution explicitly provided for the doctrine of judicial Review. It has its roots in the principles that a system originated from a written constitution can hardly be efficacious in practice without an authoritative and independent arbiter and also that it is necessary to restrain government organs from exercising powers which may not be sanctioned by the Constitution. The constitution of India explicitly establishes the doctrine of Judicial Review under Article 13, 32, 131-136, 143, 226 and 246. Thus, doctrine of Judicial Review is firmly routed in the Indian Constitution and was the explicit mandate of the Constitution. The judicial review originated in England. The courts in India began exercising it with the very first act of the British Parliament in 1858.[43] The Privy Council established that although the Indian Legislatures powers were circumscribed by the restrictions of the constituent act, within its limited sphere it was a sovereign as the imperial parliament.[44] In King Emperor v. Benorari Lal Sharma[45], "The question raised was whether the ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act." The courts struck down very few statutes during the colonial period. Professor Alen Gledhill remark will be well placed that, "even the Indian lawyer generally regarded the legislature as sovereign and it was not until the Government of India Act of 1935 came into force that avoidance of law by judicial pronouncements was commonly contemplated." [46] However, the courts continue to both construe the legislative acts strictly and to apply the English Common Law method for safeguarding individual liberties.

***Post-independence:***

The Supreme Court Continued its policy of observing maximum judicial restraint which was prevailing in the countries ruled by Britain. The Supreme Court of India stated as a technocratic court in the 1950's. in fact, for the first two decades the court rarely took up the cudgels against the Legislature. The best example of this was the A.K. GOPALAN CASE, the literal approach was followed in Chiranjit lal Sahu's case[47] , Mukherjee J. remarked that, "in interpreting the provisions of our constitution, we should go by the plain words used in the constitution."

Literal approach was followed in, Anand Bihari v. Ram Sahay, [48] Pradyut Kumar v. Chief Justice, Calcutta High Court[49], Bijoy Ranjan v. B.C. Das Gupta[50], Jwala Ram v. Pepsu[51] and many others. however in that case a whimper of activism was

[42] Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299 at para 320.
[43] Empress v. Burah and Book Book Singh I.L.R. 3 (Cal.)63, 87-88.
[44] Queen V burah, [1878] 3 A.C. 889.
[45] (1945) 72 IA 57.
[46] Alen Gledhill, Unconstitutional Legislation, in 9 Indian Yearbook of International Affairs 40 (Madras ed., 1952).
[47] AIR 1951 S.C.at 58.
[48] AIR 1952 MB 31.
[49] AIR 1956 S.C. 285 L.
[50] AIR 1953 Cal. 289
[51] AIR 1962 S.C. 1246.

heard in the words of J. SUBBARAO. There was certain epoch of activism in the words of SUBBARAO J. in K.K.KOCHURI CASE, and in the words of J. P. SHASTRI in the cases of RAMESH THAPPAR and CHAMPAKAM DORAIRAJAN.

By the end of 60's there were certain visible signs as clear from the decisions in K.T.MOOPIL NAIR V STATE OF KERELA and in the KHARAK SINGH CASE. The court was however bold in upholding the freedom of press and speech as clear from the decisions in the cases of BRIJBHUSHAN'S CASE, EXPRESSNEWSPAPER CASE, SAKAL NEWSPAPER CASE, RAM MANOHAR LOHAI CASE In Puthamma v. State of Kerela [52] the Supreme Court emphasized that judicial approach should be dynamic.The activism reached its pinnacle in the case of Golaknath to undo the melancholy of Sajjan Singh and Shankari Prasad. Subsequently came the Bank Nationalization Case and the Madhav rao Scindia Case.. However, the revolutionary change came with the decision in the Keshvananda Bharati Case. in 1973 in which the Supreme court envisaged the Basic Structure Doctrine Which was severely criticized by various scholars including Prof. B.k. Tripathi, and Seervai. Cases like golaknath, bank nationalization, or keshvanand bharati have raised passionate controversies in India. However, judiciary set certain wrong examples by adhering to the strict interpretation in the Gopalan case, Keshav Madhav Menon case, Saka Venkata Rao case, Habeas Corpus case

**Criticism:**

This was conceptually unsound as if Parliament in its constituent capacity does not have a plenary power to amend, the Constitution get reduced to the status of the removal of the difficulty clause. Mr. Raju Ram Chandran observed that this doctrine stifles a Democracy. Prof. Upendra Baxi observed that the Constituent Power was shared between the Parliament and the Supreme Court.

However, from here came the trough of the Habeas Corpus Case, then came the Indira Gandhi V. Raj Narain IN 1975 thereafter came various landmarks judgments like Meneka Gandhi, Ajay Hasia, M.C.Mehta anda plethora of cases under the leadership of the J. KrishnaIyer and J. Bhagwati Judicial Activism earned a Human face. In 90's we witnessed a phenomenal exercise of judicial power. The Supreme Court has been deeply conscious of the morass created by the politicians, corruptions, administrative and legislative nepotism etc. there were examples of clear overreach like when the Supreme Court incorporated the Directive Principles of State Policy within the Fundamental right to life and personal liberty and made them enforceable indirectly.

**Judicial Activism in United States**

***The Experience and the Lesson from AIIMS Controversy***

The Constitution of United States did not expressly mention that the U.S. Supreme Court had the power to invalidate acts of Congress that are contrary to the Constitution, Chief *Justice Marshall* held in

[52] AIR1978 S.C. 771, ALSO SEE India Cement Ltd. V. State of Tamil Nadu, AIR 1990 S.C. 85, LIC OF India V. Munnabhai D. Shah AIR 1993 S.C., S.R. Chaudhari v. State of Punjab AIR 2001 S.C. 2707.

*Marbury v Madison*[53] that such power was implied. This assertion of power was severely criticized as a usurpation of power by an unelected court. However, both *Thomas Jefferson* and *Alexander Hamilton* on the basis that fundamental law should regulate court decisions[54] assumed that the court would have such power. This assertion of power became controversial but eventually was accepted as desirable and legitimate. One writer acknowledged judicial review of legislative acts as a "*product of American law*"[55]

However, the power of the court to decide issues of policy always evoked a vehement debate. Be it the reaction of Liberals who called the court, "*reactionary*" to the objection of courts to *President Roosevelt's* regulation of the economy in 1930's or the Conservatives who called the court, "*adventurist*" when the Warren Court expanded the Rights of African-Americans[56]. After the decision in *Brown V Board of Education*[57] the conservatives threaten to impeach the judges. Various American scholars have, however, raised objections to the decision of the Warren court on the ground that it tended to legislate.[58] Just to mention that how divided the United States was in response to the activism shown by the Judiciary, the Conservatives approved the, "*former*", while, the liberals approved the, "*latter"*. Thus, there were disapprovals by different sort of activism by different group of peoples.

LESSON: This shows the probable danger of politicization of the Judiciary by the political forces. If we go through the speech of *Justice Learned Hand*, it becomes clear that what he was at pains to emphasize that Judges must not play with power, political forces establish a stable society based on a balance of power under which an independent judiciary works and flourishes their rulings might affect power. They must not avoid judging legal issues because they would have political consequences, but they must not settle political controversies in the garb of legal issues. They are immune to political control but- *the price of that immunity* is their abstinence from politics.[59] the attitude of the Judiciary that, "*Come to us, we will save you*." becomes particularly disturbing in the light of the fact that we had a very fractured nature of polity and if these new forces who are least bothered about Constitutional norms conclude that the Judiciary decided to become a partisan voice, the very legitimacy and the responsibility of the constitutional arrangements would come into challenge and the example of *Pakistan* is well before us.[60]

**Indian Judiciary: Powerful Stature**

The Supreme Court of India has become the most powerful court in the world today. It fortified the independence of Judiciary by upholding that it will have the last word in the appointment of Judges of

[53] 5 U.S. (1 (Cranch) 137(1803).
[54] Alexander Hamilton. (1837). The Federalist, No. 78, 102.
[55] Westel Woodbury Willoughby. (2d ed. 1929). The Constitutional Law of the United States. New York: Cambridge University Press.
[56] Prof. Bickel attacked the Warren Court as, over interventionist in purpose, sloppy in reasoning and mistaken in result.
[57] 360 U.S. 201 (1964).
[58] Alexander M. Bickel, (1986). The Least Dangerous Branch. (2nd ed.) United Kingdom: Yale University Press.
[59] A.G. Noorani. (2008, July 18). Army with a Nation. *Frontline*.
[60] Supra note 57.

the Supreme Court and the High Court. The enunciation of Basic Structure Doctrine and its unsettled boundaries with the Judiciary being the lone arbiter and the judgment in the I.R. COHELO'S CASE has only added to its omni potency.[61]

However, the higher the esteem and power of the Judiciary the more is its obligations. As people expect the Judge's to be Ceaser's Wife, because they may tolerate very wrong decision but they will not tolerate the dishonest intentions.

Thus, it appears that there have been numerous troughs and crests in the path of the Judiciary and it had adopted a variety of approaches from SAJJAN KUMAR to GOLAKNATH and finally to KESHVANAND BHARATI, from GOPALAN to MENEKA GANDHI has ended in various mazes like for example the human right activists and environmentalist's are always searching something. The journey of Judiciary has despite all bravados the lopsidedness in judicial approach has rendered Judicial Activism fading a bit partly due to the inaction of the other organs and partly due to its own faults.

**Judges and Law Making**

There are few who will agree with Montesquieu that, "The judges are mere mouthpiece of the law."[62] The issue here is not only of keeping the judicial power in the Judiciary but also of keeping the law-making power in the Legislature.

Somebody may ask what lawmakers does is the they take an idea or a policy and turns it into law than why can't judges who are well versed in Administration of Justice can not make law. The reasons are:

- It amounts to usurpation of powers.[63]
- The answer lies in the difference between the activist and dynamic law making. In the former, the idea is taken from consensus and demands at most sympathy from the lawmaker. In the latter, the idea is created before it can be formulated; it needs to be propagated, which needs enthusiasm. Enthusiasm can't be a judicial virtue as it means taking sides which will run counter to the impartiality of the judiciary. And it will be a calamity to risk the asset in the form of impartiality in the name of judicial creativity which is an embryo with a doubtful future.
- The judges are the keepers of the boundaries between the rulers and those who are ruled thus essential to maintain a free and a stable society, and for that they need not to be creative lawmaker, better leave that to a social reformer.
- Activism in controversial areas will smack of impartiality. Undoubtedly this is an argument for judicial self-restraint.
- Judges came from a narrow profession and represent only one profession.[64]

[61] M.C. Seetalvad, "The Indian Constitution", 1950-65, wherein he observed that it is difficult to conceive of a higher Judiciary in a federated state more entrenched more independent and with larger powers than we have under our constitution.

[62] Montesquieu, Esprit de Lois, XI 6.

[63] Louis B. Boudin, Government by Judiciary. Journal of American History, Volume 19, Issue 4, March 1933, Page 630.

[64] Prof. Michael Freeman, "Standard of Adjudication, Judicial Law making and Prospective Overruling", 36 Current Legal Problems, 1973, p.166.

- It is undemocratic as unelected judges do not have the legitimate authority as they are not democratically answerable to the electorate.[65] Undemocratic as the judges who declare statutes unconstitutional are neither elected by people nor responsible to the people.[66]
- The attempt to set up new premises for legal reasoning on a large scale by judicial law-making impairs the stability of the legal and the economic order. Judicial development of the law proceeds by analogical reasoning that is in effect by choice between competing analogies in the authoritative body of legal percepts. New premises suggesting new analogies may more or less unsettle the legal system. It is pertinent to mention here the decision of the Supreme court in Jaisinghani v. Union of India[67], where it pointed to the Dicey that the rule of law means that decisions should be made by the application of the known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. New starts, therefore, are better made by Legislation which can be fitted into the system judicially by experience without unsettling the past. As, MARIAM GILLES, in her article suggest waiting for reform of the criminal law as it creates as many problems as the other and is additionally objectionable[68], so its better be left on the Legislature to make a headway.

The bypassing of the judiciary of the traffic-laden ways of a democratic system would be a journey on the road that will never return to highway but would definitely lead to a totalitarian state. If the judicial role is widened too much they will not be believed to be the keepers of the Constitution.

**Whether The Contempt Power Enforced Too Strong?**

***Setting the limits***

*JUSTICE V.R. KRISHNAIYER* in one of his articles, observed that the contempt power is a case of survival after death; a vague, vagarious and jejune branch of jurisprudence, which is of ancient British vintage [69] . To begin with, *LORD ATKIN* once remarked that, "*JUSTICE IS NOT A CLOISTERED VIRTUE*", and must suffer the scrutiny and the outspoken comments of the general public. The constitution of India starts, with the words, "WE, THE PEOPLE OF INDIA"[70] this stood testimony to the fact that it's the people who are sovereign masters and not the institutions (including the Judiciary); rather they serve the people in our democratic set up which the constitution has envisaged. And a master has a right to criticize its servant if the latter did not perform its function properly or commit misbehavior.[71] It's the citizenry

[65] Patrick Atiyah, "Judges and Policy", Israel Law Review, 1980, pp.346,360-70.
[66] Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law", 7 Harv. L.R. 129 (1889).
[67] 1967 (2) SCR 703 at718.
[68] Judicial law-making in the Criminal Courts: The Case of Marital Rape, (1992) Crim L.R.
[69] V.R. KrishnaIyer, Contempt Power and Some Questions, The Hindu.
[70] The Preamble, The Constitution of India, Bare Act, S. Sarkar, J,J, Munir, 2008 Alia Law Agency.
[71] Markandey Katju J., Contempt of Court: The Need for a Fresh Look, 2007 AIR Jour./3 III.

at whose service only the system of justice must work.[72]

Judiciary discharges an important function of maintaining peace in society by acting as a forum where disputes between people can be resolved. Thus, the need for the power of contempt so as to enable the courts to function and it was not meant to prevent the people from criticizing it if it failed to perform its obligations. The power to punish for contempt is much of a British legacy, but it must be remembered that India was not free at that time, and it was the rulers who were supreme. Now we are a democratic setup where the judge gets authority from the Constitution (i.e. the people) and not the King. The power of contempt was included to secure the Independence of the Judiciary, and that need was felt because during the British rule executive and judicial function were combined in the Collector-Magistrate in a district, making him a local dictator, it was to avoid this- that means it was basically meant to prevent tyranny to the people and the unbridled exercise of the contempt power would as a corollary lead the Judiciary to the same situation. In fact, public and media criticism of judges is a common feature throughout the common law world today. *SIR ANTHONY MASON* says, "*Like all other public institutions, the judiciary must be subject to fair criticism and, if the occasion demands it, trenchant criticism. What I am concerned with is response to criticism, particularly criticism that is illegitimate and irresponsible.*" [73] However, the response differs in different countries there is common agreement that such criticism subverts judicial independence, precisely because if decisions would be made under fear of criticism then it would undermine the independence of Judiciary. [74] However, the contempt offence of scandalizing the Judiciary had fallen in desuetude in Britain and it has been increasingly recognized there that, the object of contempt as not to protect the dignity of the courts, but to protect the administration of justice.[75]

The courts at home doesn't seem ready yet to fully adopt U.S. Attorney General *JANET RENO'S* advice that judges, "*must have thick skins*"[76], but they do recognize the right of the public to criticize judgments as an important feature of free speech and for the judiciary to be accountable as an public institution. [77] Our constitution provides the, "*freedom of speech and expression*" under Article 19(1)(a)[78] whereas Article 129[79] and 215[80] gives the "*power of contempt*" to courts. Now, the question which arises is how to reconcile these two provisions?

[72] Mauro Cappilletti (1983). Judicial Responsibility. 31 AJCL 1.
[73] Anthony Mason. (1997). The Judiciary, The Community and The Media, 12 CJJ 4.
[74] Justice P.N. Bhagwati. (April-July, 1997). Independence of the Judiciary in a Democracy, Human Rights Solidarity- AHRC Newsletter- Vol.7, No.2, p.34
[75] See the observation of Lord Solomon in AG v. BBB (1981) AC303.
[76] As Quoted in Hon. Justice Michael Kirby, "*Attack on Judges- A Universal Phenomenon*", 72 ALJ 599 at 601 (1998) n.24 at p.607.
[77] Refer to paras 34 and 43 in D. C. SAXENA v. HON'BLE THE CHIEF JUSTICE OF INDIA, AIR 1996 SC 2481.
[78] ARTICLE 19(1)(a): PROTECTION OF CERTAIN RIGHTS REGARDING FREEDOM OF SPEECH, ETC.: (1) All citizens shall have the right – (a) to freedom of speech and expression." Supra note 1 at p.23.
[79] ARTICLE 129: SUPREME COURT TO BE A COURT OF RECORD: The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt for itself." Supra note 1 at p.66.
[80] ARTICLE 215: HIGH COURT TO BE COURT OF RECORD; Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself." Supra note 1 at p.97.

There is yet another problem that there are no rules, no constraints- no precise circumstance when the administration of justice is brought into contempt. It suffers from uncertainty and is unpredictable- capable of being exercised in different ways by different judges in a same case[81]. That can be seen in the judgments in the *MOHD. YOUNIS CASE*[82], *MOHD. ZAHIR KHAN CASE*[83] and when we compare the decisions in the *DUDA'S CASE*[84] and the *NAMBOODRIPAD CASE.*[85] It is pertinent here to took up the MID-DAY CASE, in which Delhi High Court imposed a severe sentence of 4 months imprisonment of media for scandalizing the court without considering the defense of truth where it writ large in the mottos of the "YATHO DHARMASTHATHO JAYAH"[86] and "SATYAMEVE JAYATE"[87] and it is written outside the Supreme Court "SATYAMEVODHARAMYAHAM"[88]. The cases of ARUNDHATI ROY and NAMBOODODRIPAD[89] are also examples of errors. In the light of the decisions of the court which regard Constitution as supreme and sovereign in the cases of SPECIAL REFERENCE NO.1 OF 1964 CASE(KESHAV SINGH CASE)[90] and more recently in PEOPLE'S UNION FOR CIVIL LIBERTIES CASE.[91] Notably, as far as Judges are concerned I would like to mention that in antiquity as well the judges were bound by the command, "Ne Vile Fano" i.e. do not defile the temple of justice. And if we look at the work of KAUTILYA In ARTHASHATRA it emerges that any variation of the sanctity of the Administration of Justice, either by those who administer it or for whose benefit it is administered, was visited with a penalty, the penalty being the highest where the offence is by those who administer the law[92].

In a democratic setup the people are free but there freedom should not be stretched to a point that renders functioning of the Judiciary impossible or extremely difficult and this should be the touchstone to decide whether an act amounts to contempt or not. In fact, outspoken exposure to the fair criticism only strengthens the judiciary far from weakening it. As it is not the criticism which weakens it but its own conduct, and that alone will upheld the majesty and dignity of the court not the threat of contempt[93]. The court authority principally flow from the respect its performance would gain which will instill public confidence, and that in turn will be an outcome of their integrity, conduct, impartiality, learning and simplicity. The point can be aptly captured from the statement of *LORD DENNING*, "… *We must rely on our conduct itself to be its own vindication*"[94] The answer lie in a balance between the two competing

[81] In fact A.G.Noorani attributed bias to the contempt power in his, "*Constitutional Questions and Citizen's Rights*" Second Impression 2006, Oxford University Press.
[82] VIDE CONSCIENTIOUS GROUP v. MOHD. YOUNIS & ORS. AIR 1987 SC 1451.
[83] MOHD. ZAHIR KHAN v VIJAI SINGH & ORS. 1992 Supp. (2) SCC 72.
[84] P.N. DUDA v. P. SHIV SHANKAR AIR 1988 SC 1208.
[85] AIR 1970 SC 2015.
[86] Meaning thereby, "*truth is where the dharma, or the right order, is*".
[87] Meaning thereby, "*truth is always victorious*".
[88] Meaning thereby, "truth alone I uphold".
[89] AIR 1970 SC 2015.
[90] 1965 (1) SCR 413.
[91] P.U.C.L. v U.O.I. A.I.R. 2003 S.C. 2363 at Para 53.
[92] Shama Shastri's, Translation of Kautilya's Arthashastra,. 5th Ed. p.252.
[93] French writer Alexis de Toqueville describes the power wielded by the judges as, "*the power of public opinion*" as quoted in M.V.Pylee (Ed.), "*Our Constitution, Government and Politics*", 2nd Ed., Universal Publishing Co. Pvt. Ltd., at p.199.
[94] In R v POLICE COMMISSIONER (1968) 2QB 150.

interests with a strong slant in the favor of free expression and accountability coupled with the rider that the contempt power should only be invoked against the very wrong headed keeping in mind that the contempt jurisdiction is a discretionary jurisdiction that is a Judge is not bound to take action for contempt. A fresh approach is necessary to do away with the old anachronistic view and the judiciary should not be very touchy to every criticism it must remember to put it in the words of the learned *J. MARKANDEY KATJU* that the court must realize that the contempt power is a *BRAHMASTRA* to be used only on a *PATRA.*[95] The BRAHMASTRA should be used cautiously, wisely and with circumspection[96] against a PATRA who is- *the very wrong headed*.

**Why the courts should move towards self-restraint**

The judges exercise choices, not the license.[97] The quality of the justice, when access to the court is largely granted by the integrity, impartiality and independence of the judges but there are many cracks in the image of the ideal. The whole court has in fact lost touch with its goal. The question is that aren't we committing a grave error in the sense that we are missing the basic question of the justice being felt by the lowest strata of the society. The backlog and huge arrears stand in contradiction to the PIL justice. Which give only a sense of justice but not in reality. This is the basic notion of law that justice must be done and it in this case only appears to be done. This is the basic notion the delayed justice amounts to the denial of justice, recognizable since the time of Magna Carta. Whether access to Justice has been secured to everyone? The statement that, "judicial activism gets its highest bonus when it wipes some tears from some eyes."[98] Whether that is true?

There are areas on which the judges should be circumspect in the use of his powers to declare the law, not because the principles adopted by Parliament are more satisfactory or more enlightened than those which would commend to his mind, but because it is unacceptable constitutionally that there should be two independent sources of law-making at work at the same time.[99]

Judicial law is always a reinterpretation of principles in the light of new combination of facts. In so far, as the judicial role can be purely declaratory has a clear advantage for the law as the very definition of law demands an element of certainty and predictability.

to my mind we should choose LORD DEVLIN over the two extremes of LORD SIMONDS and LORD DENNING the former give preference to the view that the judge's role is passive [100] while at the opposite end of the spectrum, was LORD DENNING, for him certainty in the law was an overstated virtue and the true function of the judge was to be active in reforming the law. Between them was LORD DEVLIN who was against a Judiciary which was dynamically active, but on the other hand he also saw a useful purpose in shaping the common

[95] Supra note 2.
[96] See the opinion of Gajendragadkar J. in 1965 SC 745.
[97] Joseph M. Steiner. (1976). Judicial discretion and The Concept of Law, 35 Cambridge Law Journal, , p.135 at 139.
[98] Punjab Rickshaw Puller's Case.
[99] Lord Redcliffe. (1968). Not in Feather Beds pp.212-16, 314.
[100] LORD SIMONDS in MIDLAND SILICONS LTD V SCRUTTONS LIMITED [1962] A.C. 446, 467-9

law. The reality today is closer to Lord Devlin's remark, "the judiciary like the navy tends to be admired to excess"[101]

Whether the unelected judges should have the power to undermine the considered judgments of policy approved by a significant majority in the legislature? Generally, people do want the Judiciary to respond to violations of fundamental rights. But on the issue reflecting deep controversy within society like matters of social and economic policy, it is not at all clear that the courts have a relative advantage over the legislature or that they enjoy the legitimacy required to make authoritative decisions for the society at large.

**Conclusion**

"a revolt of the judiciary is more dangerous than any other, even a military revolt, not because it uses the military to suppress disorder, but it defends itself everyday by means of the courts"- Alexis de Tocqueville.

Undoubtedly there are times when judicial aberrations had happened, but this cannot be avoided because infallibility has not been divinely granted to them. Benjamin N. Cardozzo, said, "Judges have, of course the power, though not the mandate, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set by precedent and customs. None the less, by the abuse of power they violate the law." There are traits that can help judges maintain public confidence:

1. the judges ought to recognize that the power is limited to recognize the proper judicial role.
2. a judge must recognize his mistakes.
3. Judges must display modesty and an absence of arrogance in his writing and thinking; and
4. The judges should be honest and if they create new law they should say so.[102]

Surely that can't be a reason for clipping down the Judiciary. We often assume that every problem has a legal or institutional remedy {in fact the courts own powers were founded on this illusion}. We have reached a stage where there is need to define limits of the judicial conduct by the judiciary itself as remarked by **LORD MACMILLAN** that *"courtesy and patience …are essential if the courts are to enjoy public confidence*". The judiciary should itself draft a code for itself that blends integrity, ability, impartiality and generous compassion ensuring tolerance of criticism. The best course can be found in the words of Justice Stone of the U.S. Supreme Court, that which is considered the home of Judicial Review, "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decisions…one is that courts are concerned only with the power to enact statutes, not with their wisdoms, the other is that while unconstitutional exercise of power by the Executive and Legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power

[101] Patrick Devlin. (1981). The Judge, 25 Oxford University Press.

[102] Justice K.G. Balakrishnan. (2007). Judicial Accountability, Journal of Indian Legal Thought, Vol.5, at p.11.

is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic Government." [103] That is the road to judicial self-regulation.

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[103] U.S. v Butler, 297 U.S. 1 (1935).

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