JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT

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Judicial activism or judicial restraint by itself is neither a virtue nor a vice. It all depends on the context. Few developments in the superior courts of India in recent times have evoked such enthusiasm and interest and also some criticism as judicial activism.

The power of judicial review is exercised through the agency of courts. The court is no doubt an institution, but it is composed of persons who with all their diversities of outlook, talent and experience determine the course of its destiny. If most judges are more law abiding than kings were, it is, perhaps, because the appellate process achieves what it is supposed to achieve. But what of those at the judicial summit whose decisions are not subject to appellate review and correction? We cannot forget Justice Jackson's profound observation, "We are not final because we are infallible, but we are infallible because we are final."

Law including constitutional law cannot and does not provide for every contingency and the vagaries and varieties of human conduct. Many times it is open ended. The majestic vagueness of the Constitution, remarked Learned Hand, leaves room for doubt and disagreement. It is therefore said by critics and scholars that this also leaves room for, and so invites, government by judges- especially those who are free not only of appellate review, but of elections as well and have an assured tenure.

In this imperfect setting judges are expected to clear endless dockets and uphold the rule of law. Judges must be sometimes cautious and sometimes bold. They must respect both the traditions of the past and the convenience of the present. They must reconcile liberty and authority, individual freedom (human rights) and State/national security, environment and development, socio-economic rights of particularly the weaker sections of society and development; the whole and its parts, the letter and the spirit. "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without

which liberty becomes licence; and the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever shifting tangle of human affairs.

All this throws up matters of great moment and in a way summarizes the contemporary issues and challenges for judicial review. These challenges and issues have always been there but they have acquired new dimensions and poignancy. Imbuing all acts of all authorities with constitutionalism and constitutional culture, entrenching the constitutional vision of justice -making it real and meaningful for the people, vitalizing democracy and achieving all this within the framework of separation of powers and democratic functioning is the real challenge for and the goal of judicial review in a constitutional democracy. It is also essential to ensure consistency and continuity in judicial functioning and determination. Continuity is to judicial law what prospectivity is to legislation: the means by which men know their legal obligations before they act. Both stability and change are indispensible for a healthy, vibrant society. We have to distinguish the Constitution and law in general from those passionate, personal commitments that are called justice. The courts, in our scheme of things, administer justice according to law.

The judicial role in protecting human rights, particularly life and liberty and upholding the rule of law has to be robust and activist. Judicial restraint is expected in matters of policy and legislation. The protection and enforcement of fundamental rights and freedoms is both the power and duty of the courts and the grant of appropriate remedy is not discretionary but obligatory. Even in England with no Bill of Rights it was said over a century ago: “To remit the maintenance of constitutional rights to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.”(*Scott* v. *Scott* [1913]AC 417,477)

It is universally recognized that the range of judicial power exercised by the superior courts in India is perhaps the widest and the most extensive known to the world of law. The years since the late 1970s witnessed the growth of public interest litigation (PIL). PIL which was initially meant for voicing and redressing the grievances of the large sections of the society who could not themselves voice their grievances and seek their remedy in courts developed new dimensions and complexion. It became an instrument to correct inadequacies and slothfulness of

the establishment. The Court stepped in to fill the vacuum left by the legislature and the executive.

One cannot miss to notice that there is a strong relationship between judicial review and the courts' positivist stance on the one hand and the contemporary political situation and events on the other. It may be said that the judiciary has become the arbiter of the entire corpus of rights which determines the quality of living. It is an enormous responsibility. The Court undertook the exercise and duty of legal control of government and fashioned the tools and techniques for such legal control. The law regarding locus standi has been liberalized and procedural requirements relaxed and made flexible. Access to justice has been rendered easier. It was held that the courts cannot countenance a situation where observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. Over the years PIL has notched up several achievements to its credit and has matured over an extensive canvas. Judicial activism in the area of human rights has been facilitated in a large measure by PIL; so also in the area of environmental law. Another area of judicial activism is regarding good governance and accountability of public authorities.

Judicial activism/intervention cannot be personalized, it must be institutional. It is a basic postulate that the law must be certain and not become vulnerable to the predilections of individual judges, however well meaning. For this, the decision ought to be based on well recognized judicial principles which should be capable of uniform application to different situations. It is this which gives legitimacy to the Court's rulings and commands respect and allegiance to the law.

However, there are occasions when the divide between law and policy is almost obliterated. Judicial activism has the potential of involving political choices and imparting a political flavour to the judicial process. It is important to recognize that there are various areas and situations which do not admit of adjudicative disposition and are not judicially manageable, that judicial power also has its limitations and that the Court is not a panacea for all problems of society and the failure of other branches of Government. PIL is not a pill for every ill. It is necessary to remind ourselves that the people have no more wish to be governed by judges that to be judged by administrators. Otherwise judicial activism might well incur the criticism of having become judicial despotism. Legal control of

government should not become judges' control. If it is believed that law is only policy made by courts then it carries the dangers of what Thomas Jefferson called the despotism of the oligarchy. Professor Robert McClosky said that the expression 'judicial activism' is a slippery word and it may mean the Court's propensity to intervene in the governing process. In many ways PIL imposes a burden on as well as poses a temptation for the judge. It has been said in a lighter vein that PIL is something like a child discovering a hammer and trying to pound everything.

Dr. A.S. Anand, C.J. warned that judicial activism is not an unguided missile, that Courts must be careful to see that by their over-zealousness they do not consciously or unconsciously cause uncertainty or confusion in the law in which event the law will not develop along straight and consistent path and the image of the judiciary may get tarnished and its respectability eroded. It cannot be forgotten that both certainty of substance and direction are indispensable for the development of the law and invest it with the credibility which commands public confidence in its legitimacy.

Constitutional choices have to be made, so also policy initiatives and choices and legislation consequential to or supportive thereof. Whose right is it to choose and experiment and may be err? Should judges exercise the 'sovereign prerogative of choice'? That should belong to and be exercised by the executive and legislative branches of government. Only in case of illegality or unconstitutionality should the court intervene, ie, only in cases that leave no room for reasonable doubt. The Constitution outlines principles rather than engraving details and offers a wide range for legislative discretion and choice. And whatever choice is rational and not forbidden is constitutional. Governmental power to experiment and meet the changing needs of society must be recognized. To stay experimentation may be fraught with adverse consequences. In the exercise of the high power of judicial review, judges must ever be on the guard not to elevate their prejudices and predilections into legal principles and constitutional doctrines. It has been rightly remarked "How easy the job of activist judges….. No great effort, intelligence or integrity is required to read one's merely personal preferences into the Constitution; a great deal is required to keep them out." No one does this perfectly; some are more capable of objectivity and detachment.

Judicial activism and judicial restraint arise and are relevant only in the area where judicial discretion exists and that is, as Aharon Barak cautions, only where there is a choice between more than one reasonable and legal alternative.

"The task of accommodating judicial review with democratic governance is inherently problematic…. Within a system of free government the Court fulfills an important though limited role as an auxiliary precaution against both the abuse of governmental power by a tyrannical minority and the excesses of majoritarian democracy. Judicial review becomes controversial only when the Court thwarts popular will or goes too far and too fast with its construction of the Constitution. Judicial aggression in constitutional politics is lamentable and objectionable. Yet far from being antithetical judicial review is essential to the promise and performance of free government."

The power of judicial review extends over a broad range of public issues. The court touches many aspects of public life. But as has been said it would be intolerable for the court finally to govern all that it touches, for, that would turn us into a Platonic kingdom contrary to the morality of self government.

One cannot forget or overlook the criticism that judicial activism will sometimes result in democratic debilitation. When a society leaves all or its important decisions to the judiciary it is a weak society which misses the excitement of democracy and of sorting out things by the democratic process. The exact limits of the adjudicative methods cannot be fixed and rigid. But if they are totally forsaken the judge loses credibility as a judge. The courts' activism nurtures great hopes and arouses great expectations which may remain unfulfilled and engender a critical sense of disenchantment and desperation. When a people despair of their institutions, force may get ahead masquerading as ideology.

There is no doubt that "in the exercise of their powers of judicial review, courts should be as wise and statesmanlike as their capacities and temperaments permit-wise as judges, wise in their concern the effectiveness of their interventions into public affairs, and wise too in adapting the Constitution to changing conditions…." Justice Stone's admonition-"the only check upon our own exercise of power is our own sense of self restraint" bears constant recall. But he made clear that self restraint is not an excuse for inaction; it is rooted in a respect for the dignity and

high purpose of the other branches of government and a sympathetic understanding of the problems they must try to resolve.

If judicial modesty and restraint are not accepted and if judicial activism or aggression is to be the rule in matters of policy and law making, some basic issues remain. Is government by judges legitimate? Democratic processes envisage a 'wide margin of considerations which address themselves only to the practical judgment' of a legislative body representing a gamut of needs and aspirations.

The legislative process, it is trite, is a major ingredient of freedom under government. Politics and legislation are not matters of inflexible principles or unattainable ideals. As John Morley acutely observed, politics is a field where action is one long second best and the choice constantly lies between two blunders. Legislation is necessarily political requiring accommodation, compromise and consensus. The legislative process does not seek the final truth, but an acceptable balance of community interests. To intrude upon such pragmatic adjustments by judicial fiat may frustrate our chief instrument of social peace and political stability.

If the Court is to be the ultimate policy making body, that would indeed be judicial imperialism without political accountability. The inputs that the judiciary can get would be inadequate and not reflecting the diversity of interests and "inadequate or misleading information invites unsound decisions." Moreover, such a system will train and produce citizens to look not to themselves for the solution to their problems but to a small and most elite group of lawyers who are neither representative nor accountable. This cannot be the democracy or the rule of law to which we are wedded. Maybe it is not unrealistic to doubt or despise the political processes and it may also be that the people cannot be fully trusted with self government. But it would be naïve to believe that guardianship is synonymous with democracy.

These days, however, it is not uncommon for the Court to undertake virtually an exercise of full fledged legislative power as also executive power and travel into domain clearly not its own. In the process of this new found tendency to legislate or issue directions touching matters of law and policy, many constitutional limitations are breached. Actions, legislative and executive, are tested and

corrected and remedied by the judiciary. But judicial action which partakes of both executive and legislative character leaves one aghast. If the salt has lost its savour wherewith can it be salted?

Government is man's unending adventure. No system is perfect. Some free play in the joints is necessary and legitimate. The actual unfolding of democracy and the working of a democratic constitution and institutions under it may suffer from inadequacies and imperfections. But all that cannot be sought to be addressed and redressed by judicial drafting or re-drafting of legislative provisions or formulating policy. There is valid reason and justification as to why law making, formulation of policy and laying down principles and guidelines for exercise of rights and imposition of liabilities should be left to where it rightly belongs- the legislatures consisting of elected representatives of the people.

Quite a few instances of what may be called judicial expansionism or judicial overreach or even judicial despotism come to mind. Apart from the *Second Judges'* case (1993)4 SCC 441 and the *NJAC* case (2016) 5 SCC 1, *Jagadambika Pal* (1999) 9 SCC 95, *Jharkhand Assembly* (2005) 3 SCC 150, *CBI* case (2010) 3 SCC 571, *Salwa Judum* (2011) 7 SCC 547, *Black money judgment* (2011) 8 SCC 1, *Sahara* case (2014) 8 SCC 470, *BCCI* case (2015) 3 SCC 251 are some of the telling examples. It is interesting that in many of these judgments the court refers to earlier decisions recognizing and emphasizing the importance of the doctrine of separation of powers in our constitutional scheme. And yet in giving its verdict the Court sidesteps the principle of restraint inherent in the doctrine and enlarges the field of checks and balances. *BCCI* is an instance of the Court assuming power and also one of abdicating its essential power and function. The Court observed that it was not proper to clutch at the jurisdiction of BCCI to impose a suitable punishment, yet it directed a committee to do that and declared that the order of the committee shall be final and binding upon BCCI and the parties concerned. It delegated and out- sourced its power to adjudicate, pronounce definitive binding judgments and impose punishment which it is not competent to do. Such delegation is unknown to law. Jurisdiction cannot be conferred except by law.

The Court appears to view its expanding role as a natural corollary of its obligation regarding justiciabilty and enforcement of socio- economic rights and good governance. While in some ways this may be heartening in the present context of

failure of the other wings, the more vital question is about the propriety of and legal support for such action of the Court overriding express constitutional and statutory prohibitions and diluting or even obliterating the doctrine of separation of powers under the guise of judicial review of executive action or inaction.

To ensure constitutional governance is part of the duty and function of the judiciary. In that sense judicial review and judicial activism is a duty. But this should not degenerate into private benevolence and the judges' personal opinions and preferences should not be raised to constitutional principles. It is to be remembered that it is for the government to govern; it is for the judiciary to check and ensure that the government is governing lawfully, but not whether it is governing wisely and well. Courts are concerned only with the legality and constitutionality of any action-legislative or executive-not with its wisdom and efficacy. 'Unconstitutionality and not unwisdom is the narrow area of judicial review.' For the removal of unwise measures appeal lies to the ballot box and the process of democratic government, not to the court. This idea has been very effectively and elegantly articulated in many judgments by Justice Krishna Iyer, perhaps the most radical and activist judge. He also observed that courts adopt a policy of restrained review when the situation is complex and intertwined with social, historical and other substantially human factors. If the courts were to test not only the legality of any action, but also its correctness and wisdom, then the law maker and the administrator would have to be endowed with the power of prophecy to foresee what the courts are likely to uphold at a future date. For the removal of unwise measures appeal lies to the ballot box and the process of democratic government, not to the court.

"It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it."[*Anwar Ali* Sarkar AIR 1952 SC 75, para 83 @ 103]

PIL was originally conceived as a jurisdiction firmly grounded in the enforcement of basic human rights of the disadvantaged unable to reach the court on their own. This judicial activism in dispensing social justice has, over the years, metamorphosed into a correctional jurisdiction that the superior courts now exercise over governments and public authorities. The people of India seem to have become accustomed to seeing the Supreme Court correcting government action in even trifling matters which should not be its concern. These micro managing exercises are hung on the tenuous jurisdictional peg of Art 32 read with Arts 21 or 14 and Art 142. No legal issues are really involved in such matters. The Court is only moved for better governance and administration and it does not involve the exercise of any judicial function. Art 142, it should never be forgotten, is a source of power only for doing complete justice in the cause or matter before it. That power is bounded by the requirement that the Court act within its jurisdiction and it should be exercised in accordance with law. It is not a source of unlimited power, not a carte blanche for the Supreme Court to implement what it considers its vision of justice, regardless of concerns of legitimacy and institutional competence and prestige.

In regard to the exercise of the power of judicial review in policing governance, we may usefully refer to what the Supreme Court enunciated recently: Jurisdiction of the Court under Art 32 is not a panacea for all ills but a remedy for the violation of fundamental rights. The judicial process provides remedies for constitutional or legal infractions. The Court must abide by the parameters governing a nuanced exercise of judicial power. When issues of governance are brought before the Court, the invocation and exercise of jurisdiction must depend upon whether such issue can be addressed within the constitutional or legal framework. Matters of policy are committed to the executive. The Court is concerned with the preservation of the rule of law. It is unrealistic for the Court to assume that it can provide solutions to vexed issues which involve drawing balances between conflicting dimensions that travel beyond the legal plane. Matters to which solutions may traverse different fields cannot be regulated by the Court by issuing mandamus. Courts are concerned with issues of constitutionality and legality. Every good perceived to be in societal interest cannot be mandated by the Court. An issue whose solution does not lie in a legal or constitutional framework is incapable of being dealt with in terms of judicially manageable standards. The

remedies for perceived grievances regarding matters of policy and governance lie with those who have the competence and the constitutional duty in that behalf. [*Santosh Singh* vs *Union of India* (2016) 8 SCC 253].

The authority of the courts rests upon the public belief that courts apply law and not emotion or passion. But when judicial activism spans into areas not marked for courts, judges try to frame doctrine to dispose of matters on what sound as legal grounds. The case gets over, the doctrine remains. Lawyers and lower courts will rely upon it and new cases will be decided in accordance with it. As the doctrine was created in the first place to achieve something that the existing law or legal principles did not permit, judicial power will have expanded to yet new area. Decisions are precedents; doctrines created are applied to new cases and what may very likely begin as an attitude of 'let us do it this one time' grows into and becomes a distortion of constitutional government. That indeed is the danger of unbridled judicial activism or expansionism which will tend to become judicial despotism undermining the neat but delicate constitutional balance. And that is what courts must wisely avoid and resolutely set their face against.

Thus, while one might agree that in the contemporary Indian context principled judicial activism is a necessary constitutional obligation, the decisions arrived at and the directions/redress given have to be on a principled, institutionalized basis, always bearing in mind that judicial response to various fact situations should be guided by wise discretion; and that even the cause of reform is best served by a sense of restraint and moderation. As held by the Supreme Court the essential identity of the institution as a court should be preserved, and if its contribution to the jurisprudential ethos of society is to advance our constitutional objectives, it must function in accord with only those principles which enter into the composition of judicial action and give to it its essential quality.

Legislative determination of disputes/ rights has been held to be illegal and impermissible. *Ameerunnisa* (AIR 1953 SC 91), *Ram Prasad Narayan Sahi* (AIR 1953 SC 215), and *Indira Gandhi* (AIR 1975 SC 2299) are some of the telling cases. By the same logic and reasoning judicial legislation which is judicial determination of policy and law is difficult to be sustained and justified jurisprudentially. Indeed the profound observation in *Indira Gandhi's* case puts the matter in the proper perspective. "It is one of the basic constitutional principles

that just as courts are not constitutionally competent to legislate under the guise of interpretation so also neither Parliament nor State Legislatures perform an essentially judicial function. .....None of the three constitutionally separate wings of the State can, according to the basic scheme of our Constitution today, leap outside the boundaries of its constitutionally assigned sphere or orbit of authority into that of the other. This is the logical meaning of the supremacy of the Constitution."

All claims by the court regarding the power to make plenary legislation appear to be nothing more than mere ipse-dixit. It is really begging the question. There is no support for this in the Constitution or the law, there is no jurisprudential foundation for the exercise of such power. One recalls Sydney Harris' statement: Once we assuage our conscience by calling something a 'necessary evil', it begins to look more and more necessary, and less and less evil.

This is nothing to say about the need and the desirability of such measures. The question is one of legitimacy and propriety. Robert Bork's profound statement comes to mind: "... the desire to do justice whose nature seems obvious is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem; and a faint crack develops in the American foundation. A judge has begun to rule where a legislator should."

Any support or justification for a constitutional adjudication and even more for judicial legislation will have to be premised on sound legal reasoning. It cannot be sought to be justified for the reason that it produces welcome and desirable results. If that is done, law will cease to be what Justice Holmes named it, the calling for thinkers, and become merely the province of emoters and sensitives. Then naturally there are no rules, only passions. Legal reasoning rooted in a concern for legitimate process rather than desired results restricts judges to their proper role in a constitutional democracy. That marks off the line between judicial power and legislative power.

The summons to a better understanding of all this presses for an answer.

The judiciary fulfils an important role acting as an auxiliary precaution against the abuse of governmental power and excesses of majoritarian democracy. Judicial

review provides the sober second thought of the community – that firm base on which all law should rest. But there is need to recognize that judicial power and process also have their limitations. "The Courts' deference to those who have the affirmative responsibility of making laws and to those whose function is to implement them has great relevance in the context and when to this is added the number of times that judges have been over ruled by events, self limitation can be seen to be the path to judicial wisdom and institutional prestige and stability. The attitude of judicial humility and restraint is not an abdication of the judicial function; it is a due observance of its limits."

The courts will have to win public acceptability and esteem by exacting high standards of professional competence and moral integrity. As the late lamented Justice Khanna always reminded us, echoing the sentiment of Justice Holmes, the courts like every other human institution must earn reverence through the test of truth. The best and complete answer is the self imposed discipline of enlightened judicial restraint. The rarest kind of power in our troubled world, it is said, is one recognized but not exercised. Yet that is the sort of example we have a right to expect from the organ of the State that must define the limits of all organs including its own.

The last word may belong to the Supreme Court: "In a democracy based on the rule of law, the Government is accountable to the legislature and, through it, to the people. The powers ....are wide to reach out to injustice.....But the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, Judges walk the path on a road well travelled. When judicial creativity leads Judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system based on the rule of law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of Government.

Judgments are enforced, above all, because of the belief which society and arms of governance of a democratic society hold in the sanctity of the judicial process. This sanctity is based on institutional prestige. Institutional authority is established over long years, by a steadfast commitment to a calibrated exercise of judicial power. Fear of consequences is one reason why citizens obey the law as well as judicial decisions. But there are far stronger reasons why they do so and the foundation for that must be carefully preserved. That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or the Constitution." [*Union of India* vs *Rajasthan High Court* (2017) 2 SCC 599].

These are very telling and profound words, the idea so wisely and neatly articulated. But the problem always is in its application, even by the highest court. It can only be hoped that the judiciary and particularly the Supreme Court is always conscious of this principle and its decisions are informed by this attitude and it adheres to it in letter and spirit. That alone will give the institution and its work both legitimacy and respectability.

But the difficulty always has been that more often than not there is complete mismatch between what the Court lays down and what it practises. It is difficult to find an answer as to how the nation has to cope with such unconstitutional assumption of power. Any suggested remedy is perhaps worse than the malady. The problem with all suggestions to counter the Court if and when it behaves unconstitutionally is that they would create a power which may tend to destroy the Court's essential work which is vital in a constitutional democracy. The only safeguard against the excesses or abuse of power is the building of a consensus of how judges should behave and conduct themselves in their work, a consensus which by its intellectual and moral force, disciplines those who are subject, and rightly so, to no other discipline.

Under no Constitution can the power of the Court go so far to save the people from their own failure. "The essence of self-government after all, is self-government- not a nursemaid who lets the children play, if they behave. Freedom includes freedom to make mistakes- a far too important function to be exercised by guardians. To rely upon others to save us from our faults is to repudiate the moral foundations of freedom. Surely all this is implicit in democracy. …" And democracy is a beckoning goal, not a safe harbour. Buddha's last words to his

disciples, “Look not for refuge to anyone besides yourselves”, come home with a strange poignancy.

The oft quoted observation of Hughes, CJ ‘that the Constitution is what the judges say it is’, made much before his appointment as a judge, is clarified by his pronouncement in *Carter* vs *Carter Coal Co* (1936) 298 US 238(318) that it is not the function of the Court “to amend the Constitution by judicial decisions.” It is significant that Frankfurter, J. posited in *Graves* vs *New York* 306 U S 466,491-92(1939) (concurred by the other judges) that “the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.” Our Supreme Court also cautioned judges to solemnly remind themselves of the statement of the historian of the U S Supreme Court, Charles Warren that however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court. And Bhagwati, J. said in *S. P. Gupta* vs *Union of India*: “We (the Judges) can always find some reason for mending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation”(AIR 1982 SC 149 para 1). Equally profound is what Hugo Black, J. said: “The public welfare demands that constitutional cases must be decided according to the terms of the Constitution itself, and not according to judges’ view of fairness, reasonableness or justice. I have no fear of constitutional amendments properly adopted, but I do fear the rewriting of the Constitution by judges under the guise of interpretation.” These are telling reminders to the judiciary.

Power is of an encroaching nature, wrote Madison in *The Federalist*. Judicial power is no exception to this truism. Public law ought to, in principle, respect conventional limitations on judicial activism, they are critical to the functioning of a democratic state. Two recent decisions, one of our Supreme Court-*Dr. Ashwani Kumar* vs *Union of India* (2019 SCC Online SC 1144) cautioning restraint and how separation of powers and restraint ensure the rule of law and give legitimacy to the working of all wings and the other of the UK Supreme Court-*R(on the application of Miller*) v *The Prime Minister*[2019] UKSC 41 exercising the power of judicial review to uphold fundamental constitutional principles, provide typical examples of commendable judicial restraint and healthy judicial activism.

“Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision making, just as there are to decision making by the courts.”(Lord Bingham) Bridging the gap between law and society is a central task of a judge. This calls for balancing different values. As Aharon Barak points out, “A judge must maintain the delicate balance, something that requires some measure of activism and some measure of restraint.”

The theory of separation of powers has been envisaged and adopted basically to preclude the exercise of arbitrary power. Some friction and tension between the three wings of government is inevitable. The churning process largely ensures that the people are saved from autocracy. What is essential is for all to appreciate this truism and function accordingly.

The exercise of the power of judicial review has to be robust and balanced. What is of utmost importance is that “in the last analysis, the people for whom the Constitution is meant, should not turn their faces away from it in disillusionment for fear that justice is a will-o’-the wisp.”

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