DEVELOPMENT DIALOGUE IN GLOBALISED INDIA: ROLE OF THE JUDICIARY

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I. Introduction

The members of the Indian Constituent Assembly brought to the framing of the judicial provisions of the Constitution an idealism equaled only by that shown towards the Fundamental Rights. Indeed, the Judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force. The Judiciary was to be an arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained-not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule. The courts were idealized because, as guardians of the Constitution, they would be the expression of the new law created by Indians for Indians. The courts were, therefore, widely considered one of the most tangible evidences of independence.[2] As remarked by Chief Justice Marshall in *Marbury* v. *Maddison*[3], "it is for the Court to say what the law is".

It was realized that democracy cannot survive without an independent judiciary assisted by an independent legal profession. There are inevitable conflicts of view between an executive taking action which ministers deem to be in the public interest and an independent judiciary charged with ensuring that executive action does not exceed the powers conferred by the Constitution or infringes the rule of law. The Supreme Court has also to be vigilant to protect the integrity of the Constitution from an impatient Parliament asserting total supremacy through the operation of the express power contained in the Constitution for the amendment of the Constitution. It was aptly remarked by M. Ananthasayanam Ayyangar during the Constituent Assembly Debates that the Supreme Court is the supreme guardian of the citizen's rights in any democracy[4].

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2 Granville Williams, *The Indian Constitution-Cornerstone of a Nation*, p.164 (5th Edition 2002)

3 (1803) 2 L Ed 60 quoted by Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts*, AIR 2005 Journal 177

4 Constituent Assembly Debates, Vol. VII, pg. 940

Mr. Alladi Krishnaswami Ayyer, during the Constituent Assembly Debates, had remarked on the importance of the Supreme Court while interpretation of the Constitution of India-

> The future evolution of Indian Constitution will thus depend to a large extent upon the work of the Supreme Court and the direction given to it by the Court. While its function may be one of interpreting the Constitution, it cannot in the discharge of its duties afford to ignore the social, economic and work tendencies of the time, which furnish the necessary background.[5]

However, the framers of the Indian Constitution did not incorporate a strict doctrine of separation of powers but envisaged a system of checks and balances. Policy-making and implementation of policy are conventionally regarded as the exclusive domain of the executive and the legislature, with judiciary enforcing the law.

As early as in 1951, the Supreme Court noted that though there are no specific provisions in the Constitution vesting legislative powers exclusively in the legislature and the judicial power in the judiciary, the essence of the doctrine of separation of powers was implicit in the constitutional scheme.[6] The Supreme Court has itself recognized that the 'Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another'.[7]

Chief Justice S.M. Sikri observed in *Keshavananda Bharati* v. *State of Kerala*[8] that-

> Separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution.

Chief Justice A.N. Ray[9] is of the opinion that in the Indian Constitution, there is separation of powers in a broad sense only. A rigid separation as under the American Constitution or under the Australian Constitution does not apply to India.

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5 Justice R.C.Lahoti, *Judicial Activism-Constitutional Obligation of the Courts,* AIR 2005 Journal 177

6 *In re Delhi Laws Act* AIR 1951 SC 332

7 *Ram Jawaya Kapur* v. *State of Punjab* AIR 1955 SC 549 at 556

8 AIR 1973 SC 1461

9 *Indira Nehru Gandhi* v. *Raj Narain* AIR 1975 SC 2299

The observations of the Supreme Court in *Asif Hameed* v. *State of J & K* [10] are-

> Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs.

Justice Markandey Katju has observed in *Indian Drugs & Pharmaceutical Ltd.* v. *Workmen* [11] that "there is broad separation of powers under the Constitution". Justice Markandey Katju has also remarked that, "it is true that there is no rigid separation of powers under our Constitution but there is broad separation of powers, and it is not proper for one organ of the State to encroach into the domain of others".[12]

Pandit Thakur Das Bhargava during the Constituent Assembly Debates had opined, "Every constitution provides for three basic requirements, *viz*., firstly, an independent judiciary: secondly, a legislature, and thirdly an executive. It would be a mistake for one to ask as to which of the three is of greater or lesser importance, because all the three, though independent in their respective spheres are component parts of the body politic of the State".[13]

The working of the three organs has been explained by Justice A.S.Anand[14] as follows-

> The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and

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[10] AIR 1989 SC 1899 at 1905. This line of demarcation between the three organs of the State was later followed in *Supreme Court Employees' Welfare Association* v. *Union of India* AIR 1990 SC 334 and *Mallikarjuna Rao* v. *State of A.P.* AIR 1990 SC 1251

[11] (2007) 1 SCC 408 at 426

[12] *State of U.P.* v. *Jeet S. Bisht* (2007) 6 SCC 586. He followed the same view in *Divisional Manager, Aravali Golf Club* v. *Chander Hass* (2008) 1 SCC 683 at 689

[13] Constituent Assembly Debates, Vol. VIII, pg. 393

[14] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a Caution*, 42 JILI (2000) Page 149

> balances between the legislature and the executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by on are corrected by the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords of conflicts with the Constitution and make a declaration accordingly….When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony.

At the time of inauguration of the Supreme Court, our first Chief Justice H.C. Kania said-

> The people make the laws through their Legislature. It is not for the Court to supervise or correct the laws as superior authority. Only function is to point out, while examining the lacuna or loop-holes solely with the view to rectify them by the legislative authority, if necessary.[15]

The Constitution of India has recognized the two modes of law making. Article 141 of the Constitution of India lays down that the law as declared by the Supreme Court of India shall be binding on all courts within the territory of India. Article 142 further gives the Supreme Court in exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India.

The verdict of Supreme Court has a command of a law having binding force on all the Courts within the territory. One may *prima facie* understand the term, which has been known in a common parlance as well as referring to that the Supreme Court has laid down the law. However, it is felt that the Supreme Court merely declares the position of law on a statute, which is in vogue and does not legislate. The view is founded on the basis that the words of the Supreme Court are not the solemn will of the people

[15] Justice Ashok A. Desai, *Justice Versus Justice*, p. 100 (2000)

and is not akin to a legislative enactment. The law of the Legislature, which is in conformity with the Constitution, always has an upper edge.[16]

II. Activist Role of the Judiciary

The judiciary has always remained active. It cannot afford to be passive. While the other two wings of the government, i.e. executive and legislature sometimes remain passive and sometimes become overactive, but judiciary functions within its framework and is bound to work within its parameters because of constitutional device of division of powers. The main and prior function of the judiciary is to deliver justice to all without fear or favour. The judiciary endeavours to protect the oppressed, powerless, poor and helpless people against the injustice committed by omnipotent persons, authority or body. Judiciary protects the weakest persons from the oppressive acts of either executive or legislatures. When judiciary protects and provides justice to the poorest people against oppressive acts of a private persons, authority or body, there is no hue and cry but when it protects against tyranny of the Government, everyone thinks about judicial activism.

In several *pro bono public* litigations the Supreme Court is attracting judicial attention in almost every aspect of human life including simplification of judicial procedure. This initiative of the Supreme Court followed by the High Courts was backed by the Parliament to some extent. In this regard, the incorporation of Article 39A in the Constitution which enjoined upon the State to secure that the operation of legal system promotes justice on the basis of equal opportunity, and to provide free legal aid to ensure that the opportunities for securing justice are not denied to any citizen by reason of economic and other disability, has strengthened the hands of the judiciary in its quest to impart justice to every common man. The initiative of the judiciary and the use of its judicial mind in various public interest litigation's and other regular cases relating to environment, education, electoral reforms, women atrocities, child exploitation, etc. has resulted in adding new legislations to our statute books. It is the endeavor of the judiciary which has made the Indian society more aware about their legal rights and remedies and has resulted in the judiciary 'legislating' exactly in the way in which a legislature legislates.

It has been said that Justices, bound by solemn oaths to uphold the Constitution, without fear or favour, the Indian Constitution must remain the sacrosanct text.[17]

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[16] *Ibid* at 63

[17] Upendra Baxi, *Judicial Activism, Legal Education & Research in a Globalising India*, p. 8 (1996)

The activist[18] role of the judiciary has been explained by Justice P.N.Bhagwati as under-

> The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental rights and in the process has rewritten some parts of the Constitution through a variety of techniques of judicial activism. The Supreme Court judiciary in India has undergone a radical change in the last few years and it is now increasingly being identical by justices as well as by people as "the last resort for the purpose of the bewildered".[19]

Holland has beautifully blended his view with that of Aristotle while explaining about the duty of a judge. He writes[20]-

> When the balance of justice is distributed by wrong-doing, or even by a threat of it, the law intervenes to restore, as far as possible, the *status quo ante*. 'The judge', says Aristotle, 'equalises'.

In *The Authorised Officer, Thanjavur* v. *S. Naganatha Iyer*[21] it has been observed-

> The judiciary is not a mere umpire, as some assume, but is an active catalyst in the constitutional scheme.

While explaining about the role of an activist judge, Justice V.R.Krishna Iyer has stated that "Judicial activism is no more a serendipity. It is the conscious fulfillment of the obligation implied in the oath of office

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[18] There is a difference between an active and an activist judge. An active judge regards himself a trustee of State regime, power and authority. Accordingly, he usually defers to the executive and legislature; shuns any appearance of policy-making; supports patriarchy and other forms of violent social exclusion; and overall promotes 'stability' over 'change'. In contrast, an activist judge regards himself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, disposed, and the deprived and does not regard adjudicatory power as repository of the reason of the State- See Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice* in *S*.K. Verma and Kusum(ed.), *Fifty Years of the Supreme Court of India-Its Grasp and Reach*, p.165 (2nd Edition 2006)

[19] Justice P.N.Bhagwati, *Enforcement of Fundamental Rights: Role of the Courts*, Indian Bar Review, Vol. 24 (1& 2) 1997 Page 197

[20] Thomas Erskine Holland, *The Elements of Jurisprudence*, p. 325 (13th Edition 1924)

[21] AIR 1979 SC 1487

of a judge. That is his discipline, his ethic, his tryst with the people of India"[22]. He further observed-

> The Indian Constitution is not a neutral document but has a definite slant towards social justice and the weaker sections and, therefore, judges have to share the values of the Supreme Lex. Then alone class actions, test cases, representative litigation and social action proceedings will meet with expected results. Our courts are on trial and judicial performance is under scrutiny. A people-oriented perspective, a dynamic vision and instrumental obligation with a passion to see that the State secures, through the operation of the legal system, social justice on a basis of equal opportunity is the desideratum. It follows that the Constitution fulfills itself in its Preambular pledges only when the right type of judge with activism and imagination capacity for affirmative action and courage to resist proprietariat pressure sits on the bench and commits himself to a constituency which embraces the entire Indian people. [23]

The observations of Justice K. Ramaswamy on the importance of judicial law-making is-

> The judge cannot retain his earlier passive judicial role when he administers the law under the Constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation required him not merely to declare the rights to citizens but also to mould the relief warranted under facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicator process, the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. Therefore, the judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law. Thereby, the society demands active judicial role, which formerly were considered exceptional but not a routine.[24]

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[22] Justice V.R.Krishna Iyer, *Legally Speaking*, p. 215 (2003)

[23] V.R.Krishna Iyer, *Judicial Activism-A Democratic Demand*, Indian Bar Review Vol. XXXI (1 & 2) 2004 Page 1

[24] *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee* (1995) 5 SCC 457 at 471

Justice A.S.Anand has called the duty of the courts as a judicial sentinel. His opinion in regard to judicial institution is worth mentioning. He observed[25]-

> Judicial institutions have a sacrosanct role to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the instrumentalities for fulfilling the ideals enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political-besides equality and dignity to all.

Dr. G.B.Reddy[26] has set a *raison de etre* for the functioning of an active judge as-

> The constitutional mandate to the judiciary is that while exercising its functions and powers, it should keep in view the social and economic objectives which the constitution seeks to protect, promote and provide as embodied in the law. When each of the three organs of the State respects and appreciates the role of the other organs and functions within its own sphere and parameters, the harmony which would be the resultant product would go a long way in bringing about socio-economic changes in the country. However, when the political organs of the state fail to discharge their constitutional obligations effectively or if their indifference to certain constitutional objects especially the object of rendering social, economic and political justice to the people at large, the judiciary can assert its judicial power, to meet the constitutional ends. In the process, the judiciary may assume the role of a policy maker, legislator and even the role of a monitor to oversee the implementation of its directions.

Where a judge interprets the law or the Constitution not merely by giving effect to the literal meaning of the words of the statute, or the

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[25] Dr. Justice A.S.Anand, *Judicial Review-Judicial Activism-Need for a caution*, 42 JILI (2000) Page 149

[26] Quoted in Justice V.R.Krishna Iyer, *Legally Speaking*, p. 218 (2003)

Constitution but, by giving such meaning as he thinks is in consonance with its spirit, he is said to be an activist judge.[27]

In modern democratic society, judge must steer his way between the Scylla of subservience to government and the Charybdis of remoteness from constantly changing social pressures and economic needs.[28] There is little to point out the dangers of complete political subservience which the judiciary has experienced where the administration of law becomes a predominantly political function and an instrument of government policy. The concept of stitching the cloth is the business of the legislature whereas straightening the creases is the province of the judiciary, has long been abandoned as a broken tool.[29]

The judiciary has evolved three contours in its effort to adopt an activist role. The concept of public interest litigation (PIL) being the first contour. Secondly, giving of a wide interpretation to various fundamental rights of Part III of the Constitution and the third is related to the accountability of the officials, who are the trustee of public power, for their misuse of the power. The mission of the judiciary is not merely to decide the case but to secure justice to every citizen of the country and of creating a just democratic order amidst us. As stated by Upendra Baxi, Justices are, explicitly and implicitly, asked to make the Indian Constitution compatible with the sacred texts of globalization[30].

III. Reluctance of the Judiciary

However, the judiciary has not adopted a uniform and consistent approach in dealing with its emerging role as a policy-maker. While in some cases, the Court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy. The former approach was taken by the Supreme Court when dealing with the question of ragging of students in Medical Colleges. The Supreme Court overturned the High Court's direction to the State Government to introduce anti-ragging legislation and observed-

> The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging….It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. The court certainly

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[27] S.P.Sathe, *Judicial Activism in India*, p. 30 (1st Edition 2002)

[28] W. Friedmann, *Law in a Changing Society*, p.88 (2nd Edition 1972)

[29] Justice Pana Chand Jain, *Judges do Make Law*, AIR 2003 Journal 218

[30] Upendra Baxi, *Judicial Activism, Legal Education & Research in a Globalising India*, p. 8 (1996)

> cannot mandate the executive or any member of th legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains public interest litigation…..But at the same time the Court cannot usurp the functions assigned to the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature.[31]

Speaking on the same lines, the Supreme Court has observed in *M.P. Oil Extraction* v. *State of M.P.*[32] as-

> The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State….The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in the respective fields of operation needs to be emphasized.

This attitude was also followed in the Disinvestment case[33] by Justice Kirpal on behalf of a unanimous Court-

> Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so

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31 *State of H.P.* v. *A Parent of a Student of Medical College, Shimla* (1985) 3 SCC 169

32 (1997) 7 SCC 592 at 611

33 *BALCO Employees' Union (Regd.)* v. *Union of India* (2002) 2 SCC 333

> abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority.

These observations might have been prompted by the reasoning given by W. Friedmann[34] wherein he had observed-

> Courts can and indeed are called upon to adjust rights and liabilities in accordance with changing canons of public policy. But because they develop the law on a case-by-case basis they cannot as can the legislature, undertake the establishment of a new legal institution, "an elaborate procedure of investigation and consideration eventuating in the approval of a particular form of words as law".
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> Lord Devlin had said:
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> Judicial law-making power must not be interpreted as implying that judges have the power, let alone the right to make any type of law they wish, some types of legal regulations are inherently and completely outside their powers.[35]

The idea of leaving legislation as the sole authority of the Legislature was also supported by the majority in *P. Ramachandra Rao* v. *State of Karnataka*[36] wherein it was observed-

> The primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation.[37]

This view notwithstanding, the more recent trend, however, is for the judiciary to assert its new role as policy-maker, as the decision in *Visakha*[38] demonstrates wherein the Supreme Court observed-

> Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in

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34 W. Friedmann, *Legal Theory*, p. 503 (5th Edition 1967)

35 Quoted by Justice M.N. Venkatachaliah, *Indian Judges as Law Makers: Some Glimpses of the Past*, (1995) 1 SCC (Journal) 1

36 (2002) 4 SCC 578

37 *Ibid* at 600

38 *Visakha* v. *State of Rajasthan* (1997) 6 SCC 241

> violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.[39]

The same view has been reiterated by the Supreme Court in *Vineet Narain* v. *Union of India*[40] wherein the Court observed-

> It is the duty of the executive to fill the vacuum by executive orders because its field is conterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

Going a step further, the Supreme Court laid down the objectives and the functions of the judiciary as under-

(a) to ensure that all persons are able to live securely under the Rule of Law:

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.[41]

The power and function of the judiciary was explained by the Supreme Court in *Minerva Mills* v. *Union of India*[42] as under-

> Our Constitution is founded on a nice balance of power amongst the three organs of the State namely the Executive, the Legislature and the Judiciary. It is the function of the Judges nay their duty to pronounce upon the validity of laws. If the Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies is a writ in water. A controlled Constitution will become uncontrolled.[43]

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39 *Ibid* at 247
40 (1998) 1 SCC 226
41 *Ibid*
42 AIR 1981 SC 1787
43 *Ibid* at 1799

In *Bandhua Mukti Morcha* v. *Union of India*[44] the Supreme Court explained the role of courts while entertaining public interest litigation as under-

> When the court entertains public interest litigation, it does not do so in a cavaling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive framed for the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive.

A restrictive view was adopted in *Gurudevdatta VKSSS Maryadit* v. *State of Maharashtra*[45] wherein the Supreme Court opined-

> Doctrine of separation of powers have been the basic tenet of our constitutional framework since in terms therewith each of the three organs of the State viz., the judiciary, executive and the legislature would be operating on its own spheres and fields. It is to be noted that there has been a catena of cases wherein this judicial reluctance have been noticed and it is now well-settled both in this country and United States of America as well as in United Kingdom that certainty and finality about the status of a statute, contribute to judicial reluctance to inquire whether it complied with all requisite formalities, but the decisions are not very uncommon which have laid down in no uncertain terms that there is no blanket rule of such a judicial reluctance neither the judiciary would stand impotent before an obvious instance of exercise of a manifestly unauthorised power. The concept of political question doctrine, being basically of American origin, cannot possibly be confidently reached until the matter is considered with special care, upon bestowing proper attention and in the event of a conclusion which lends credence to the question raised viz. as to whether the question is a political question or not, Judicial inclination to interfere cannot be faulted though however not otherwise.

A look at the Constituent Assembly Debates[46] shows that the members of the Assembly were apprehensive in the matter of clothing the

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[44] (1984) 3 SCC 161
[45] AIR 2001 SC 1980; (2001) 4 SCC 534

Supreme Court with a wide jurisdiction in dealing with issues regarding fundamental rights as it may usurp of the powers of the Parliament. The heat of the Constituent Assembly Debates was felt by the judiciary for which it tried to adopt a balance view in matters coming before.

IV. An Assessment

Initially, the judiciary followed a policy of adhering to a narrow doctrine and tended to shy away from the development of law. In *A.K.Gopalan* v. *State of Madras*,[47] the Supreme Court placed a rather narrow and restrictive interpretation upon Article 21 of the Constitution.[48] The Court gave a very restrictive interpretation of 'procedure established by law' and refused to include the principles of natural justice akin to the 'due process of law' under the American Constitution. It remarked-

> In India the position of the judiciary is somewhere in between the Courts in England and the United States....But our Constitution, unlike the American Constitution, does not recognise the absolute supremacy of the Court over the legislative authority in all respects, for outside the restricted field of constitutional limitations our Parliament and the State Legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the Court in India to play the role of the Supreme Court of the United States.[49]

A similar restrictive view was taken in *Romesh Thappar* v. *State of Madras* [50]where the Supreme Court permitted the restriction on freedom of speech in the interest of 'security of State' while invalidating the pre-censorship even if there was danger to public order.

The judiciary was, however violent in smashing the *zamindari* system without paying adequate compensation to the *zamindars*.[51] It struck down the land reforms law which the Parliament felt that the Judges of the Supreme Court were trying to impose their personal philosophy on the nation rather than accepting the national philosophy. Such judgment resulted in a strong criticism of the legal system by the then Prime Minister, Pandit Jawaharlal Nehru. The judgment of the Supreme Court was neutralised by the Parliament by way of amendment under Article 368 of the Constitution. This was done by the Legislature and the Executive on the belief that the

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46 Constituent Assembly Debates, Vol. VIII, p. 930-950
47 AIR 1950 SC 27
48 Dr. Justice A.S.Anand, *Justice for Women*, p.44 (2nd Edition 2003)
49 *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27
50 AIR 1950 SC 124
51 *Kameshwar Prasad* v. *State of Bihar* AIR 1962 SC 1166

Supreme Court was trying to defeat the socio-economic base of the Constitution.

In *Golak Nath* v. *State of Punjab*[52] the Supreme Court laid down that the amendments to the Constitution could not encroach upon the fundamental rights and if they did so, the amendments had to be declared void by reason of Article 13(2) of the Constitution. The Supreme Court applied the doctrine of prospective overruling and did not upset the amendments and the judgments before the *Golak Nath* case. The legislatures were quick to react and passed the Constitution (Twenty-fourth Amendment) Act in 1971 by which Article 13 and Article 368 was amended, clothing the Parliament with unlimited powers to amend all the provisions of the Constitution. The Supreme Court was quick to apply the brakes on such unfettered powers of the Parliament and in *Keshavananda Bharati* v. *State of Kerala*[53] held by a majority of 7 to 6 that the Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the 'basic structure' or 'framework' of the Constitution. The 'basic structure' theory propounded by the Supreme Court was revolutionary and perhaps without a parallel anywhere in the world.

The executive came to enact laws nationalising banks[54], abolishing Privy Purse[55] and imposing restrictions on import of newsprints.[56] The Supreme Court while adopting a balanced approach held that the legislation nationalising banks was unconstitutional due to inadequacy of compensation[57] but upheld the legislation abolishing Privy Purse.[58] The Supreme Court did not permit the government to put pressure on newspapers in the supply of newsprint but permitted the government to have some restraints on the newspapers.[59]

The conflict between the executive and the judiciary resulted in the declaration of the national emergency on 26th June, 1975 and suspension of Articles 14, 19 and 21 of the Constitution of India. The Supreme Court supported the stand of the Parliament by declaring that the right to life and

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52 AIR 1967 SC 1643

53 AIR 1973 SC 1461

54 Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969

55 The Constitution (Twenty Sixth Amendment) Act, 1971 where Article 363A was inserted

56 The Newsprint Policy for 1972-73, The Import Control Order,1955 and the Newsprint Control Order 1962 passed by the Central Government under sec 3 and 4A of the Imports and Exports Control Act, 1947

57 *R.C.Cooper* v. *Union of India* AIR 1970 SC 564

58 *H.H.Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India* AIR 1971 SC 530

59 *Bennet Coleman and Co. Ltd*. v. *Union of India* AIR 1973 SC 106

liberty was automatically suspended during the emergency.[60] The majority (A.N.Ray, M.H.Beg, Chandrachud and Bhagwati,JJ.) held that in view of the Presidential Order dated 27th June, 1975 no person had any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by *mala fides* factual or legal or was based on extraneous consideration. The dissenting opinion was given by Justice H.R.Khanna as he observed-

> More is at stake in these cases than the liberty of a few individuals or the correct construction of the wording of an order. What is at stake is the rule of law...A dissent in a Court of last resort....is an appeal to the brooding spirit of law, to the intelligence of a future day, when a later decision may possibly correct into which the dissenting judge believes the Court to have been betrayed.[61]

The lifting of emergency ushered in an era where the judiciary developed its innovativeness to bring in a social revolution and upholding the rule of law. The passing of the Constitution (Forty fourth Amendment) Act, 1978 tried to restore the lost independence of the judiciary. The epistolary jurisdiction, public interest litigation (PIL), and development of the law in tune with the international developments embracing all aspects of human life has ameliorated the conditions of the people of the Indian society.

Twenty-eight years after the coming into existence of the Constitution of India, the Supreme Court in *Maneka Gandhi* v. *Union of India* [62] pronounced that the 'procedure' as intended by Article 21 must conform to the principles of natural justice. The judgment in *Maneka Gandhi* is a watershed in the history of Indian judiciary. By giving a wide interpretation to Article 21 and interrelating it with Article 14 and 19, the ambit of its application was enhanced to a high pedestal.

The development of the judiciary as a force after the emergency as remarked by S.P.Sathe[63] is-

> Judicial activism of the post-emergency period might have been inspired by the emergency experience. The Court might have realized that its independence and neutrality towards various political formations depended upon the

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60 *A.D.M.Jabalpur* v. *Shivakant Shukla* AIR 1976 SC 1207

61 *Ibid*

62 AIR 1978 SC 597

63 S.P.Sathe, *Judicial Activism in India*, p.12 (1st Edition 2002)

> support of the people. Post-emergency activism clearly marked the Court's distance from legal positivism. The Court took an opportunity to expand the rights of the people through liberal interpretation of the constitutional provisions regarding the right to equality and right to personal liberty.....
>
> Post-emergency judicial activism was inspired by a philosophy of constitutional interpretation that looked at the Constitution not as a mere catalogue of rules but as statements of principles of constitutional governance. The provisions of the Constitution had to read in the light of the principles that were supposed to underline and transcend the formally enacted legal rules.

During the post-emergency period the judiciary came forward with a plethora of judgments to protect a wider range of interests covering almost every field of human rights. The decision in *M.H.Hoskot* v. *State of Maharashtra*[64] for providing free legal service to the poor and needy was an essential element of the 'reasonable, fair and just procedure'. Again in the series of *Hussainara Khatoon* (*I to VI*)[65] cases from 1979 to 1980 the Supreme Court stressed on the right to speedy trial for the under trials languishing in various jails. The judiciary has been making its presence felt by its intervention in cases concerning violation of human rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement[66], the right not to be held in fetters[67], the right against handcuffing[68], the right against custodial violence[69] rights of an arrestee[70], rights of female employees not to be sexually harassed at the place of work[71] are a few examples in this regard.

Over the years an enforceable right to compensation in cases of torture or other injuries inflicted by the State or its agencies has also been crystallized.[72] Starting with decisions like *Rudal Sah*,[73] *Bhim Singh*,[74] etc. it

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64 AIR 1978 SC 1548

65 AIR 1979 SC 1360, (1980) 1 SCC 91, (1980) 1 SCC 93, (1980) 1 SCC 98, (1980) 1 SCC 108, (1980) 1 SCC 115

66 *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1575

67 *Charles Sobraj* v. *Superintendent, Central Jail* (1978) 4 SCC 494

68 *T.V.Vatheeswaran* v. *State of Tamil Nadu* (1983) 2 SCC 68

69 *Nilabati Behara* v. *State of Orissa* (1993) 2 SCC 476

70 *D.K.Basu* v. *State of West Bengal* (1997) 1 SCC 426

71 *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241 and *Apparel Export Promotion Council* v. *A.K.Chopra* AIR 1999 SC 625

72 This is often termed as "Compensatory Jurisprudence"

73 *Rudul Sah* v. *State of Bihar* (1983) 4 SCC 141

74 *Bhim Singh* v. *State of J & K* (1985) 4 SCC 677

was authoritatively laid down in *Nilabati Behara's*[75] case; wherein the Supreme Court had expanded the enforceable right to compensation in cases of custodial death as under-

> The Court, where the infringement of fundamental right is established, therefore cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of citizen. To repair the wrong done and give judicial redress for legal injury is a judicial conscience.

The decisions of the Supreme Court in *Sunil Batra* v. *Delhi Administration*,[76] *Municipal Corporation, Ratlam* v. *Vardichand*,[77] *Akhil Bharitya Soshit Karamchari Sangh* v. *Union of India*,[78] and umpteen number of decisions thereafter by the Supreme Court and more particularly the decision of the Supreme Court in S.P.Gupta's case[79] represent watersheds in the development of public interest litigation and liberalisation of the concept of *locus standi* to make access to the courts easy. The principle underlying Order 1 Rule 8 of the Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of public interest litigation. The appointment of *animus curiae* in these matters ensures objectivity in the proceedings. Judicial creativity of this kin has enabled realisation of the promise of socio-economic justice made in the preamble to the Constitution of India.

During the first phase of public interest litigation, the emphasis was on human rights of the weaker sections of the society which included prisoners, undertrial prisoners, bonded labourers, unorganised labourers, or women in protective homes. During the second phase, the emphasis shifted on governance. Professor Wadhwa petitioned the Court against promulgation of ordinances in Bihar,[80] lawyers petitioned the Court against arbitrary termination of judicial appointments and transfer of judges[81], and M.C.Mehta filed petitions against private corporations' or government's

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75 *Nilabati Behara* v. *State of Orissa* (1993) 2 SCC 476

76 (1978) 4 SCC 494

77 AIR 1980 SC1622

78 AIR 1981 SC 293

79 *S.P.Gupta* v. *President of India* AIR 1982 SC 149. See also *Supreme Court Advocates' on Record Association* v. *Union of India* (1993) 4 SCC 441

80 *D.C.Wadhwa* v. *State of Bihar* AIR 1987 SC 579

81 S.*P.Gupta* v. *President of India* AIR 1982 SC 149. *Supreme Court Advocates' on Record Association* v. *Union of India* (1993) 4 SCC 441

disregard of anti-pollution safeguards,[82] against the erosion of the Taj Mahal,[83] and against pollution of the river Ganges.[84] Common Cause asked the Court to lay down guidelines for the storing and transfusion of blood[85] and appointment of consumer forums in each district to provide quick, cheap and informal delivery of justice to consumers.[86] In the 1990s, the emphasis shifted from governance to environment, education, right to gender justice, election and other related subjects which were the need of the hour.

It was the judgment of the Supreme Court in *Unni Krishnan* v. *State of A.P.*[87] and in *T.M.A. Pai Foundation* v. *State of Karnataka*[88] for which the Parliament had to insert Article 21A[89] providing for free and compulsory education to children below the age of 14 years. The existing Article 45 has also been suitably modified to provide for early childhood care and education for all children until they complete the age of six years. The judgment of the Supreme Court in *Priti Srivastava*[90] of laying down the standard of education in an institution is an example of judicial craftsmanship. Although the decisions in *T.M.A. Pai Foundation*[91] to *P.A.Inamdar*[92] signifies that the Supreme Court in its enthusiasm to set things right in the vital area of higher education created conflicts calling for legislative interference; but usually developmental jurisprudence leading to social change emerges from debates and conflicts.

The decision of the Supreme Court in the field of control of noise pollution,[93] ban on smoking in public places,[94] conversion of diesel vehicles plying in Delhi to convert to CNG (Compressed Natural Gas) to reduce automobile pollution[95] are a few examples of providing reprieve and relief for the public from the menace of the noise, air and sound pollution. The modernisation of the judiciary was felt when the principle of absolute liability[96] was developed by discarding the principle of strict liability.[97]

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82 *M.C.Mehta* v. *Union of India* AIR 1986 SC 965; *M.C.Mehta* v. *Union of India* AIR 1987 SC 1086

83 *M.C.Mehta* v. *Union of India* AIR 1997 SC 734

84 *M.C.Mehta* v. *Union of India* (1997) 2 SCC 411

85 *Common Cause* v. *Union of India* (1996) 1 SCC 753

86 *Common Cause* v. *Union of India* (1992) 1 SCC 707

87 AIR 1993 SC 2178

88 (2002) 8 SCC 481

89 Constitutional (86th Amendment) Act, 2002

90 *Priti Srivastava* v. *State of Madhya Pradesh* AIR 1999 SC 2894

91 *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481

92 *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

93 *Noise Pollution (V), In re* (2005) 5 SCC 733 where *Noise Pollution (II), In re* (2005) 5 SCC 728 was affirmed

94 *Murli S Deora* v. *Union of India* AIR 2002 SC 40

95 *M.C.Mehta* v. *Union of India* AIR 2002 SC 1696

96 *M.C.Mehta* v. *Union of India* AIR 1987 SC 1086

The decision of the Supreme Court of the declaration of assets of a candidate contesting election as MP or MLA and the right of a voter to know the qualifications and involvement of the candidate in any offence received applause from the common people.[98] However, the Parliament was quick to react and tried to invalidate the judgment by making amendments in the Representation of the People Act, 1951.[99] When the said amendment was challenged before the Supreme Court,[100] the Court showed its boldness to declare the said amendment[101] as unconstitutional.

The judiciary was active enough to give due recognition to the theme that man and woman are two pillars of the social structure. Their roles, duties and rights are complementary and supplementary towards each other. The judgment in CEHAT[102] wherein directions were given for the implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is noteworthy. The various laboratories and scan centres all throughout the country have been forced to display notices regarding the Act and resulting in a check of female foeticide.

In *Lakshmi Kant Pandey* cases[103] the Supreme Court gave directions as to what procedures should be followed and what precautions should be taken while allowing Indian children to be adopted by foreign adoptive parents. There was no law to regulate inter-country adoptions and such lack of regulation could cause incalculable harm to Indian children, considering the possibility of child trade for prostitution as well as slave labour. When the Court was approached, it did not throw up its hands in despair and say that since there was no legislation it could do nothing. Justice Bhagwati laid down an entire scheme for regulating inter-country adoptions and intra-country adoptions which has been taken recourse to by the social activists for protecting children and promoting desirable adoptions for the last two decades.

Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial

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97 *Rylands* v. *Fletcher* (1886) LR 3 HL 330

98 *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294

99 Representation of the People (Third Amendment) Act, 2002

100 *People's Union for Civil Liberties* v. *Union of India* (2003) 4 SCC 399

101 Section 33-B of Representation of the People (Third Amendment) Act, 2002. See also *Lily Thomas* v. *Union of India* AIR 2013 SC 2662

102 *Centre for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India* (2001) 5 SCC 577, See *Voluntary Health Association of Punjab* v. *Union of India* AIR 2016 SC 5122

103 *Lakshmi Kant Pandey* v. *Union of India* (1984) 2 SCC 244; *Lakshmi Kant Pandey* v. *Union of India* (1987) 1 SCC 66; *Lakshmi Kant Pandey* v. *Union of India* (1991) 4 SCC 33

sense but in an overt manner and has justified it as an essential component of its role as a constitutional court. In *M.C.Mehta* v. *State of Tamil Nadu*,[104] although the actual petition was in respect of child labour in Sivakasi in Tamil Nadu, where a large number of children were engaged in the hazardous work of matchbox manufacture, the Court thought it fit to 'travel beyond the confines of Sivakasi' and to 'deal with the issue in wider spectrum and broader perspective taking it as a national problem'. The Supreme Court laid down detailed guidelines for the abolition and rehabilitation of child labourers. Justice Hansaria, while referring to the Directive Principles of State Policy, observed-

> It is the duty of all the organs of the State according to Article 37 to apply these principles. Judiciary being also one of the three principles organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.[105]

Jagdish Singh Khehar, J. for himself and on behalf of R. M. Lodha C.J.I., J. Chelameshwar and A. K. Sikri, JJ. in *Madras Bar Association* v. *Union of India*[106] has expressed-

> In every new constitution, which makes separate provisions for the legislature, the executive and the judiciary, it is taken as acknowledged/conceded, that the basic principle of "separation of powers" would apply. And that, the three wings of governance would operate in their assigned domain/province. The power of discharging judicial functions, which was exercised by members of the higher judiciary, at the time when the constitution came into force, should ordinarily remain with the court, which exercised the said jurisdiction, at the time of promulgation of the new constitution. But the judicial power could be allowed to be exercised by an analogous/similar court/tribunal, with a different name.

V. Summing Up

The activist role of the Judiciary is salutary but at the same time, one cannot deny the fact that the Judiciary has many times been reluctant to step into any controversies. The fundamentalists will appreciate the reluctant attitude of the Judiciary on the ground that it is in tune with doctrine of

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[104] (1996) 6 SCC 756
[105] *Ibid* at 766
[106] AIR 2015 SC 1571; (2014) 10 SCC 1

separation of powers whereas the liberalists will consider it to be an escapist attitude of the Judiciary. As stated in *State of Tamil Nadu* v. *State of Kerala*[107] about the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary are:

(i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs-legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs-legislature, executive and judiciary-is also nothing but a consequence of principles of equality enshrined in Articles 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Articles 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Articles 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional

[107] AIR 2014 SC 2407; (2014) 12 SCC 696

limitations or if it infringed the rights enshrined in Part-III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.

(vii) The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are, (i) Does the legislative prescription or legislative direction interfere with the judicial functions? (ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided? (iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality? If the answer to (i) to (ii) is in the affirmative and the consideration of aspects noted in question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional.

Whatever be the argument, one cannot deny the fact that the judiciary is now the last resort for the common man to get justice[108] and the judiciary should keep this in mind while deciding any case, even if the attitude of the Judiciary is considered to be an encroachment of the power of the other organs.[109] As stated by the Supreme Court[110] there can be no implied or express limitations on the inherent powers of the Supreme Court of India, it can be said that such powers are also supposed to be used diligently and cautiously.

[108] In *Subrata Roy Sahara* v. *Union of India* AIR 2014 SC 3241; (2014) 8 SCC 470 it was also stated that The Indian judicial system is grossly afflicted, with frivolous litigation

[109] As stated in *Supreme Court Advocates-on-Record Association* v. *Union of India* 2015 AIR SCW 5457 "being an institution whose hallmark is transparency, it is only proper that the Judge discharging high and noble duties, at least broadly indicate the reasons for recusing from the case so that the litigants or the well-meaning public may not entertain any misunderstanding that the recusal was for altogether irrelevant reasons like the cases being very old, involving detailed consideration, decision on several questions of law, a situation where the Judge is not happy with the roster, a Judge getting unduly sensitive about the public perception of his image, Judge wanting not to cause displeasure to anybody, Judge always wanting not to decide any sensitive or controversial issues, etc. Once reasons for recusal are indicated, there will not be any room for attributing any motive for the recusal. To put it differently, it is part of his duty to be accountable to the Constitution by upholding it without fear or favour, affection or ill-will. Therefore, it is the constitutional duty, as reflected in one's oath, to be transparent and accountable, and hence, a Judge is required to indicate reasons for his recusal from a particular case. This would help to curb the tendency for forum shopping."

[110] *Subramanian Swamy* v. *Arun Shourie* AIR 2014 SC 3020; (2014) 12 SCC 344