

# **JUDICIAL PROCESS AND HUMAN RIGHTS IN INDIA\***

**Dr. T.S.N.Sastry**

**Professor of Law and Co-ordinator**

**Human Rights Education programme**

**Department of Law**

**University of Pune**

**Pune**

## **ABSTRACT**

Judicial Process is an important armor of judiciary. However, when exercised to protect human rights guaranteed under international law and the treaties to which state is a party, and in the absence of proper executive, legislative action to uphold the rights guaranteed by constitution, it attracts a stern amount of criticism. AThis paper subtly attempts to examine the concept of judicial process or judicial activism employed by Indian judiciary, especially, upholding fundamental human rights of citizens. It further delineates, the limitations within which the judges need to exercise due caution to avoid such criticisms, and, to provide the sought remedial mechanism without crossing the limitations as advocated by the constitution.

## **Key Words:**

Indian Judiciary; International Law; Judicial Process; Human rights;

\* This is a revised paper presented in the International Workshop on “Management, Indology, Law and Philosophy” Conducted by Lyon University 2 at Lyon, France during March 27-28.

# **Published in Indian Law Review Vol V 2013 pp56-69**

## **Introduction**

**“... When the light of law fails, Judges are supposed to have some special vision like the third eye of Shiva”**

**-----Justice H.R. Khanna**

The statement of Justice Holmes, “the actual life of the law has not been logic; it has been experience<sup>1</sup>” is more relevant in the contemporary era, compared to that of yester years. The expanding horizons of social needs, and, the impact of other disciplines on law, the courts and judges are more frequently called upon either to evolve remedies against the tenacious procedures of law or administrative orders of the Executive to live up to the expectations of people, to unearth the real meaning of Constitution and Legislative enactments. Whenever Supreme Court, to extract the real meaning of law, or, to fill the gaps in a statute in order to ascertain philosophical ideals of constitution, or binding nature of the principles of international law, delivers a progressive judgment there is “muddling all along.”<sup>2</sup> Commenting on the activist role played by judges, Lord Reid is of the opinion that “We do not believe in fairy-tales anymore,” that judges are not making law and only are in strict adherence to the theory of Legislative supremacy<sup>3</sup>.

If one examines from the pragmatic perspective, whenever the Government, or the Legislature derelicts its responsibility to address social concerns, especially,

---

<sup>1</sup> Oliver Wendell Holmes Jr., *The Common Law*, Little Brown & Co, 1818, p1; also see Julius Stone: Legal System and Lawyers' Reasonings, Universal Law Publishing Co., 1964,pp301-339

<sup>2</sup> See Charles Lindlom “The Science of Muddling Through” *Public Administration Review*, Vol.19, 1959, p.79 quoted in E.W. Thomas, “The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles”2005, Cambridge University Press, at p.24

<sup>3</sup> Lord Reid, “The Judge as Lawmaker”ISPTL,12, 1972,22;cited in E.W. Thomas, n1,p.3

to discharge its treaty obligations by way of incorporation of the principles of international law to which it is a party, well, the judges ought to have to take an active lead role to discharge their constitutional obligations. From a jurisprudential angle of international law, the ample experience, reputation, impartiality and the ability for which judges of municipal courts are known for, in imparting the principles of international law by way of extracting jurisprudential ideology adopted by the province of international law through the prism of legislative and constitutional dictum of theirs not only are able to temper principles of international law to special situations under which it has to be applied, but also tries to accommodate the hard legal principles of it, especially, in the field of human rights to meet exigencies, according to the changing needs of society in the municipal sphere, so long as they are not inconsistent with law of the land.<sup>4</sup>

Furthermore, in cases where they are particularly called for to look at positive side of the remedial mechanism already exist in international law; they are bound to interpret the real meaning and philosophy of constitution in order to provide the much-needed remedy to citizens at large and to address the gaps that exist in legislation. The progressive outlook of approach adopted by judges many a times invites criticism especially, from the juristic sphere that judges are subtly overpowering the legislative or governmental terrain. On the name of public interest, judges upset the apple cart of constitutional scheme of demarcation of powers many a times. It is also viewed that such temperament of principles in a particular case may not constitute as a precedent, and not binding upon other courts subordinate to the highest court of a country, unless and until such decision lays down a rule of law<sup>5</sup>.

---

<sup>4</sup> Agrawala S.K., 26, International Law: Indian Courts and Legislature, Bombay, N.M. Tripathi , 1965; also see Subash C. Kashyap: Constitution of India and International Law; Bimal N. Patel: (Ed) India and International Law ;9 -33, Martin Nijhoff Publishers, The Hague, 2005,

<sup>5</sup> A Lakshminath: Judicial Process: Precedent in Indian Law, (3<sup>rd</sup> edn), Eastern Book Company, 2009,p.188

It is a well-accepted view, there is a possibility to exist certain un-bridged gaps and un-resolved ambiguities in a statute even drafted with all the possible care. To fill such gaps in order to ascertain the real objective of a statute, or where in no legislative dictum exist, judiciary alone is empowered to interpret the principles of municipal or international law to read with constitution or with the philosophy of international law of human rights. The judiciary especially, the highest court of a country has primary responsibility to discharge the obligations entrusted by constitution, to uphold rule of law as a third estate of a state. In cases, where in a state fails to fill the treaty obligations of international law of human rights, judiciary has an obligation to incorporate such principles as long as they are not inconsistent with the law of the land. In such a situation, is it fair in mudslinging on judges that they are making law, whenever a judge interprets a statute to find out a solution or expanding the horizons of constitution to discharge their duty, especially, to uphold the guaranteed human rights of an individual? Is it correct to attribute that they are impinging the powers of Executive and Legislature?

In the last two and half decades, in a number of cases, when the judiciary framed guide lines basing on the established principles of international law, in absence of legislative and executive action, to uphold the human rights of individuals to which state is a party, there is certain amount of criticism in both academic and judicial circles. Many of the critics suggest that the role of a judge is to declare law than to make a law<sup>6</sup>. If judges choose to make law, as lawmakers than to declare the principles of law, they need to apply legal principles with a

---

<sup>6</sup> A. Lakshminath, Practice, Theory of Law, Pragmatic Rationalism and Social Choice, 1 Chankya National Law University Law Journal, 1 (2010); also see Judicial Process, Precedent in Indian Law (Eastern Book Company, Lucknow) 3<sup>rd</sup> edn., 2009.

sense of understanding, and their opinions need to be guided by public opinion that should reach the grassroots level of a society<sup>7</sup>.

In view of different perceptions that are aired on the role of judges in addressing the tranquility of law, this paper makes a modest attempt to delineate, whether judiciary really encroaching the ambit of Legislature and Executive to address social concerns of people to uphold the values of human rights on the name of ‘Judicial Activism or Judicial Review.’ It further address, whether the independence conferred on judiciary by constitution infinite, or there are any limits in which judges have to act with due diligence in interpreting the principles of law on the name of exercising its supreme armor power of judicial review.

### **Judicial Process and Human Rights**

Judicial process basically means, the role played by a judge in a court of law while espousing the concept of law over specific aspects of legal guarantee either by constitution, a legislative enactment or an order of the Executive. In other words, it is referred to as the procedure adopted by a Judge in civil or criminal proceedings according to the law of the land or espousing the real meaning of constitution or a statue or executive or administrative order of a country. The common law countries, especially the English courts have evolved the normative principle of judge made law. However, the modern concept is much concerned with the American system. The Anglo-American system mainly based on Kelson’s pure theory of Law<sup>8</sup>, which was later expanded by other eminent jurists such as H.L.A. Hurt, and Roscoe Pound, John Rawls et.al.

---

<sup>7</sup> Lord Reid: Judge As Law Maker, 12, Journal of Public Society Teachers of Law, 22 (1972); also see Greeta Bird & Nicole Gores, Art of Artifice, The Art of Judgeing in Troubled Times, 12, Southern Cross University Law Review, vii 2008, also see for the views of former judge of the Indian Supreme Court Justice Katju Government of Andhra Pradesh V P.Laxmi Devi 4 SCC 720 (2008)

<sup>8</sup> Edwin W. Patterson,, Hans Kelsen and His Pure Theory of Law ,40 California Law Review, 1952, 6-10

In countries where constitution is supreme, it is the duty of a judge, especially, that of the higher courts to expand the meaning according to the contemporary pace of social conditions. This is otherwise referred to as *boni judicis est ampliare jurisdictionem* (which means, it is the duty of a good judge to extend the jurisdiction-based as it is on the principle that law must keep pace with the society to retain its relevance for if the society moves but the law remains static; it shall be bad for both). The Supreme Court of India since its inception acted basing on this maximum, especially in the last few decades to uphold the fundamental rights (civil, political or socio-economic and cultural rights) are concerned<sup>9</sup>.

Human Rights enables the mankind to lead a decent, civilized and modest life in which the inherent dignity of each human being need to be protected always at any cost by ensuring life and liberty of individuals. Though human rights are of recent origin in international law, well protected and received legal acumen all over the world for a long period. In a strict sense, it is law that embraced human rights in order to expand the tenets of jurisprudence in extending protection to the individual who is the sole object and subject of legal percepts.

In the words of Ronald Dworkin<sup>10</sup>, “rights as trumps” which limit state action whenever it encroached upon individual freedoms. In view of their indivisibility with that of human beings, no human right is inferior to that of another right stated either in the Universal Declaration or in the Covenants or any Conventions and treaties. As a part of universal law, they impose three major

---

<sup>9</sup> A.S. Anand: Indian Judiciary and challenges of 21<sup>st</sup> century, S.P Verma(Ed) Indian Judicial system :Need and directions of Reform, IIPA,2004,p 2,

<sup>10</sup> Rownald Dworkin: Taking Right Seriously; Harvard University Press, 1978 p.325; also see Pildes, Richard H., Dworkin's Two Conceptions of Rights. Journal of Legal Studies, Vol. 29, No. 1, Pt. 1, January 2000. Available at SSRN: <http://ssrn.com/abstract=196673>

obligations on every state<sup>11</sup>, Viz., to respect, to protect, and to fulfill human rights<sup>12</sup>. Judiciary being the third estate, particularly, the higher Judiciary in all most all written constitutions has the mandate to protect and enforce human rights as the command of the constitution. This being the position, rule of law or judicial review being part of constitutional mandate, the judiciary has to discharge its constitutional obligation.

In the Indian context, human rights are not a new concept. From the Vedic times, they are in existence as a part of the concept of ‘Dharma<sup>13</sup>.’ The constitution of India inspired by its ancient perspectives and by the goals of the UDHR has clearly annunciated in its tone and tenor, it is the duty of state to secure justice, liberty, equality and dignity of individuals in its preamble itself. Apart from the Preamble, the Civil and Political rights have been added to part III of the Constitution as Fundamental Rights, and Economic, Social and Cultural Rights, as Directive Principles of State Policy in Part IV. The Directive being non-justiciable rights and enlists the duty upon the state to implement them in the promotion of the rights of citizens, cannot be challenged directly in the courts of law, if the state fails to act upon. However, as rightly observed by Patanjali Shastri J., the constitution has not adopted the doctrine of Parliamentary supremacy alone. A close reading of Articles 13 and 32 clearly specifies, the judiciary too is empowered to review the provisions of Constitution. This is more so, especially, while dealing with Fundamental Rights of the citizens guaranteed under Part III on the lines of the American constitution<sup>14</sup> in directing the state to adhere by the provisions of Part IV, if it fails to act in a reasonable manner or time.

---

<sup>11</sup> According to Art12 of the constitution State includes the Judiciary too which has the obligations in fulfilling the constitutional mandate.

<sup>12</sup> Frequently Asked Questions on Human Rights , UN, 2006

<sup>13</sup> M.P. Singh:’Human Rights in the Indian Tradition-Search for An Alternative Model” in Human Rights and Basic Need, Theory and Practice M.P SinghHelmut Goerlich and Michael Von Hauff (eds) Universal Law Publishing Co, 2008, pp3.45

<sup>14</sup> A.K. Gopan V.s. State of Tamil Nadu AIR 1950 SC 27

## Judicial Process and Human Rights: The Role of the Supreme Court

After the coming into existence in 1950, until E.P.Royappa<sup>15</sup> and Maneka Gandhi's cases<sup>16</sup>, the Apex Court largely confined itself with in the coffins of statutory limitations. In a majority of decisions, the court did not exercise the inherent power of judicial review in protecting the life and liberty of the individual against a statutory enactment or an Executive order curtailing the freedom's of the citizenry that are guaranteed explicitly by the constitution .

Further, in spite of recognition of incorporation of customary principles of international law that are not contrary to municipal law of India, through Article 51(C) of the constitution, it is doubtful to what extent will it fully accept the binding nature of customary principles of international law in every area. Firstly, in a number of cases that came up before it, immediately after the adoption of Constitution on the vexed issue of human rights of aliens who were subjects of a predecessor state in recognizing the principle of 'Vested Rights' after succession<sup>17</sup>. Secondly, in all most all the cases, it held that the Vested Rights of persons of former Princely States valid to continue in the new state, only if the new State recognizes the rights of the citizens of the Predecessor without resorting to the doctrine of "Act of State" developed by the Privy Council. Thirdly, in the Indian context, by the time the constitution came into existence after independence, all most all the princely states have merged with the Union of India. Hence, the liabilities and obligations solely devolved on the Union of India. Even then, the court refused to inject the principles of human rights, confined itself to Statutes and to the Executive orders, and disposed of the cases toeing the line of Privy Council. Fourthly, it did not give any scope even to read Articles 294 and 295 of the

---

<sup>15</sup> E.P.Royappa V.State of Tamil Nadu AIR 1974SC 355

<sup>16</sup> Maneka Gandhi V. Union of India, AIR 1978,SC 597

<sup>17</sup> D.P.O'Connell :Recent Problems of State Succession in Relation to New States, Hague Recueil, 1970, vol.130,pp.101-203 ; also see O'Connell State Succession in International Law and Municipal Law,Vol.I, 1967, Cambridge University Press, p.245

Constitution, which clearly specifies that all the obligations of whatever may be their nature entered by previous government of India and the Princely States shall be the obligations of the Union of India. Fifthly, it did not examine the status of the Princely states in international law, which is of controversial nature and never regarded as states in international law<sup>18</sup>. Finally, when the former sovereigns themselves became part of the Union of India and assumed its citizenship, then where in the question arises that people of those States will continue to be aliens and to produce evidence that the theoretical sovereigns had recognized their rights<sup>19</sup>.

The court more bluntly refused to examine the binding nature of International Covenants of human rights on the State being a party in the absence of legislative sanction in the infamous case of ADM Jabalpur V S. Shulka. The court did not attempt to come out of the influence of the legislative dominance over fundamental rights that are guaranteed to citizens of India on par with that of human rights philosophy advocated by many progressive judicial organs in the rest of the World<sup>20</sup>. Even at this point of time, few judges like, Justice K. Subbarao, Fazail Ali, Vivan Bose, H. R. Khanna et.al., many a times advocated for free exercise of judicial review in extending protection to fundamental rights of the citizens of India in interpreting the true meaning of the provisions of constitution of India. In addition, they cautioned that the judiciary should not buckle within the corridors of Legislative supremacy Vis-à-vis the Administrative Law of the country.

---

<sup>18</sup> Oppenheim.L., International Law, 1, 9<sup>th</sup> edn., R. Jennings, and A. Watts (Eds) Longman, London 1992, 267: n3; also see, T.S.N. Sastry, State Succession in Indian Context, 2004, Dominant Publishers, New Delhi, 81-87

<sup>19</sup> T.S.N. Sastry: State Succession in Indian Context, Dominant Publishers and Distributors, New Delhi, 2004, pp.166-219.

<sup>20</sup> AIR 1976 SC 1207; also see for a detailed and further discussion, M.P. Jain Indian Constitutional Law, Fifth Edition (reprint in 2006); Wadhwa publishers, pp.1348-50

When the judiciary refused to exercise the power of judicial review conferred on it by constitution, rallied behind the Parliamentary supremacy, the Executive transgression had gained an upper hand, and the basic needs of the citizenry of the polity relegated to a secondary position. The government refused to remove the executive veil in extending protection to the constitutionally guaranteed basic aspects of fundamental rights. If this was the situation of fundamental rights itself, it better less said about the Directive Principles of State Policy. There was not much criticism for the inaction of the exercise of Judicial review.

Twenty-eight years after the judgment of Goplan, in 1978, the Supreme Court came out of the purview of the Legislative supremacy and resorted to the interpretative approach of the law that “Life of Law is not Logic but experience.” Finally, it has given due consideration and significance to the Latin maxim **bon - judicis est ampliare jurisdictionem**. Since the adoption of the maxim, the judiciary never looked back in resorting to the principles of social justice and extended its long arm to embrace Art. 51 C of the Constitution in recognizing that Human Rights jurisprudence is part and parcel of constitutional paragon as long as it is in no way confronts with that of the law of the land<sup>21</sup>.

When the judges opened their third eye of judicial review to read the real philosophical nature of constitutional rights of citizens in tune with that of international law of human rights, all the furore started that they are exceeding their constitutional limits. However, in reality what the judges did is, only issued guidelines to state and citizens to follow the principles of law available in international law of human rights in the absence of legislative enactments or administrative guidelines. They started reading the directives in conjunction with

---

<sup>21</sup> For a detailed discussion on the extensive province of the Judicial review see: C.G. Raghavan's introduction to the Festschrift: Constitutional Jurisprudence and Environmental Justice, , D.S. Prakasa Rao, (ed)2002, pp.ix-xxii and the articles there in ; also see S.P. Verma's monograph on Indian Judicial System, Kanishka publishers, 2004.

fundamental rights to make the state to meet its obligations both under constitution and under international law. In the process to meet, the tents of social justice they drafted certain directives to meet the philosophical penchants of the preamble, the bedrock of the constitution of India, especially, in which the people of India solemnly resolved to achieve through the cherished objectives of fraternity, equality, life liberty, and justice. What the court did in the last three decades is considered pragmatic views of its former judges, especially the views of Vivan Bose J., that the Indian courts need to look beyond the Anglo-saxian practice and consider to toe the path of progressive judicial process adopted by its other counter parts beyond the realm of common law.<sup>22</sup> Even if one examines, critically, what has been advocated by Justice Subbara Rao , Vivan bose et.al., is confined only to the province of the Property relations. The activist judges like Justices Bhagwati, Krishna Iyer, Chinnappa Reddy, Venkatachaliah<sup>23</sup>, et.al, have expanded the tenets of constitutional provisions of Part III especially the corner stone Article 21 of the Constitution viz., Life and Liberty of the individual by resorting to Due Process of Law as laid down in Article13.

In way, the judiciary has only expanded the realm of law to suit the contemporary social needs in upholding principles of human rights that are enshrined in the constitution under Part III and IV. From a positivist angle, the path adopted by judiciary in its activist role in decision making process is only extended its helping hand to justify the legitimate constitutional claims of the citizenry when their real concerns are fallen in the deaf ears of other organs of the State. Further, as rightly pointed out by Alexanderwicz , they have only opened the doors for the wide absorption of international customary law, especially Human rights law into Indian municipal law with their long experience in

---

<sup>22</sup> **Virendra Singh V. State of U.P.**, AIR 1954, SC447; also see **Dalmia DariCement CompanyV. Income Tax Officer**,AIR 1958 SC820

<sup>23</sup> M.N.Vekatachalia,Constitutional Underpinnings of A concordial Society, AIR 2008 Journal,113

interpreting the principles of international law<sup>24</sup>. The philosophy of Human rights as an ensemble of principles of Democracy, Good Governance, transparency, the apex court only discharged its constitutional duty to remain the Legislature, it's onerous responsibility under Art.253 of the constitution to give effect to the treaty provisions of International Law of Human Rights to which, the State it is a party<sup>25</sup>.

The path of fortitude that has been towed by the Court after Maneka Gandhi's case, is nothing but only the enunciation of absorbing the jurisprudence of human rights in order to uphold the rights of millions individuals who are left in darkness for generations. When it followed, the progressive path adopted by its counterpart, namely, the Supreme Court of America from **Marbury V. Madison**<sup>26</sup> to till date in a number of Cases,<sup>27</sup> how far it would be fair to attribute that the judiciary is exceeding its limit.

If one looks at a positive perspective, it is the new Dawn of activist role of judiciary led for a number of rights as part of Article 21 of the Constitution<sup>28</sup>. The second general rights, namely, the Directive Principles of state policy, neglected by the state for long, have received their wide acclamation through the judicial reasoning of reading them through the prism of Fundamental rights by Judiciary. In other words, the state is reminded of its duty as stated under Article 38 of the Constitution and under the Principles of International Law of State responsibility to promote Directives as a concomitant right to Right to Development.

---

<sup>24</sup> Alexdrewich, C.H., International Law in India, 1 International Law and Comparative Law Quarterly, 1952, 289 at 292

<sup>25</sup> C.G. Raghavan: Treaty Making Power under the Constitution of India, Essay on the Law of Treaties, (S.K. Agrawala (Ed), 1972, Orient Long Man, Madras 251-58

<sup>26</sup> 1Cranch 137 (1803);

<sup>27</sup> Henry J. Abraham: The Judicial Process, (Seventh edn.,) OUP 1998, pp299-345

<sup>28</sup> The number of sublime rights, such as Quality of Life; Right to Livelihood; Rights of Slum Dwellers; Rights of Hawkers; Right to Health; Right to Shelter; Right to Education, Prevention of Sexual Harassment; Safe guards to Women's Rights; Right to Privacy; Ecological and Environmental Rights; Economic Rights; Right to Information; Right to Good Governance; Rights of Children, Same Sex marriages, and, many other Economic, Social and cultural Rights not stated in the constitution are now part of Art 21.

The activism of judges in sculling out the real meaning of law in the light of human rights prudence is only a method adopted to remind other organs of State to discharge its duty in the promotion and advancement of all the legal rights that are guaranteed to a people. What the judges did on the name of Social Action Litigation is nothing but met the paragon of natural and procedural justice, and as well, to fulfill the mandate both under constitution and that of international law, especially human rights.

## **Conclusion:**

Through the activist role of the judiciary in the eyes of citizens, the courts might have gained popularity as rightly said by Arthur T. Vanderbilt J., that the courts need to play a primary role in cutting the edge of law than that of the Legislature or the Executive<sup>29</sup>. However, it is often a divisive issue whether judges at the higher courts have the same powers as that of a Legislature or Executive, on the name of addressing the social concerns of the society in delivering justice by way of interpreting the tenets of constitution or procedural law. There are two extremes in judicial thinking. One is, some shy away from making any significant change, but often feel that an extreme change is desirable. And the Parliament may take necessary steps to address the concerns of masses whose rights are at stake. The other view is that, it is an abundant duty of judges, as a constitutional authority to discharge their constitutional responsibility to keep alive the hopes of people in developing the principles of common law. This sharp distinction between the judges themselves, lead to an astray in the minds of researchers and scholars outside the judicial realm to arrive at an opinion that judges are of two types namely, conservatives and liberals<sup>30</sup>.

---

<sup>29</sup> The Challenge of Law Reform; Princeton University Press, 1955,pp 4-5

<sup>30</sup> E.W. Thomas, n1 2, 46-70

Apart from the above, many a times a judge himself bewilders when, where and how to draw a line in addressing the question before him either to expand the law or to leave it to parliament. Whatever it may be the view, progressive tendencies of judiciary should not destabilize the division of powers that are equally distributed between Executive, Legislature and Judiciary. In the words of Lord Hoffmann<sup>31</sup>, it is inevitable that the courts themselves often have to decide the limits of their own decision-making power. Further on the independence of judiciary, he is of the view, when a judiciary decides an issue in a liberal fashion by interpreting the principles of law, the courts should exercise its free will to address a question before them than that of the Executive and Legislature. However, at the same time, since the Legislatures are being the elected bodies, larger issues beyond the realm of legal province needs to be left to it to legislate. In resolving this issue, he identifies two issues. One is the principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights. The other is that majority approval is necessary for a proper decision on policy or the allocation of resources. By adhering to these principles, if a court renders its opinion, it is needless to debate whether a decision is within the jurisdictional competence of the judiciary or overstepped into the paragons of the Legislature or Executive. Largely, a court will not show its deference to the other branches of the State.

Though the suggestion of Hoffman is in a way advances the discussion that the issue of allocation of decision-making responsibilities needs to left to the judicial reasoning in drawing the line, it offers no concrete solution to the problem. It still not addresses the controversy in any manner. Further, in a country like India, where in a judge is often influenced by the circumstances in which he lives in may tend to overt in exercising his judicial autonomy on the name of the doing justice. At the same time, while exercising his powers under the garb of

---

<sup>31</sup> R V British Broadcasting Corporation, 2003,2 All ER 977

extending the tenets of human rights jurisprudence to address the concerns of the needy, it is doubtful that the judges may extend every aspect of it while deciding a question of law from every angle of international law. For example, from Maneka to Visakha, in a number of cases no doubt the judiciary expanded the nuances of human rights to meet the expectations of constitution and as well that of International law. But the question still remains, will they extend the same kind of sympathy to protect the human rights of the citizenry in other areas of international law, as discussed above, such as State Succession, State Responsibility and State Jurisdiction, and Diplomatic immunities and privileges et. al.

Whatever the balancing aspect is suggested, restraint need to adopted by the judges themselves while drawing the Lakshman Rekha in interpreting the principles of law in tune with that of either human rights or fundamental rights. No judge, lawyer, academician or researcher or an observer of judicial process will easily arrive at a conclusion that may address a solution to the debate. It is only momentary but not long lasting. At the same time, on the pretext of doing justice in addressing the concerns of the society, the courts need not unnecessarily resort to the powers of other governmental organs which also have the same responsibility like that of the judiciary in discharging their legal and constitutional obligations that are equally addressed to them .

As rightly propounded by Justice Thomas<sup>32</sup>, the judicial process requires judges to have regard to a number of different and often conflicting considerations in arriving at a decision. Then the task of a judge is to balance the competing interests and values in order to exercise the choices, which are endemic to the process. While considering an issue before them, the judges need to have restraint, patience, and requires training like that of a researcher to wait and watch policy in

---

<sup>32</sup> n1 at pp301-302

analyzing the legal intricacies and social issues vis-à-vis the legal principles and the extent of power that they have to exercise without stepping into the shoes of other organs of the Government. It is a delicate issue. However, they need to have cautious approach while addressing a solution rather than thinking that except the judiciary everyone else in the society especially in the Governmental organs are averse to address the concerns of people in accordance with the procedural justice or the law of the land.

As rightly said by Alladi Krishnaswamy Ayyer<sup>33</sup> in the Constituent Assembly:

**“The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive.”**

Accordingly, to address a question of law, judges should thoroughly examine the issue of law involved in a case than that of their egoistic tendencies to overreach the power of other organs. If such presumptive ideology takes a front seat, then certainly it will avoid confrontation between the Legislature, Executive and Judiciary to usher, the thin fragile fabric relations that intertwined between them through the cloth of Constitution. As rightly pointed out by the Prime Minister Manmohan Singh, “Compelling action by authorities of the states through the power of mandamus is an inherent power vested in the judiciary,” “..... but substituting mandamus with a takeover of the functions of another organ may, at times, become a case of over-reach . . . these are all delicate issues which need to be addressed cautiously.<sup>34</sup>,,

---

<sup>33</sup> Constituent Assembly Debates, Official Reports. Vol. XI, p.837

<sup>34</sup> Line dividing activism and over-reach is a thin one: PM’s caution to bench , Indian Express, April 7, 2007

An healthy exercise of judicial power, with restraint and good faith certainly promote a steady relationship with other organs. It will further lead the judiciary to arrive at unanimous opinions like that of I R Coelho (Dead) by LRs Vs. State of Tamil Nadu and Others in 2007,<sup>35</sup> in a majority of cases, than a fractured judgments while evaluating the constitutional validity of a legislation, or laying down norms in the absence of executive or legislative norms, by injecting the principles of international law of human rights treaties to which the state is a party.

The judges always need to take into consideration of the legal reasoning developed by well-equipped lawyers through their language; techniques and received ideals,<sup>36</sup> while exercising the power of judicial review conferred on them. At this juncture, apart from the contribution of the Bench, the judges need to consider the critical comments and research reviews of eminent jurists and scholars in the field of law and in general other sciences where in a particular case need to be decided basing on theoretical and empirical research acumen.

This will ensure to achieve the quality of judicial process as rightly pointed out by Mehren, firstly, the position in sociological terms of law and the legal profession in a given society. Secondly, the approaches and habits of through that are encouraged by the courts in their social defence of private and public rights. Thirdly, the quality of legal education, the kind of man and mind it produces; and, lastly, the opportunities in terms of service and economic reward open to men of legal profession<sup>37</sup>.

---

<sup>35</sup> 2007 SCC (2) ,1

<sup>36</sup> Julis stone n1, pp24-25

<sup>37</sup> Arthur Von Mehren: Judicial Process with particular reference to the US and India, 1963 5,JILI 279quoted by A. Laxminath, n 5,pp122-23

While discussing these issues, it is also necessary to discuss the constraints often faced by judiciary both internally<sup>38</sup> and externally<sup>39</sup>. It needs to be remedied to expedite the judicial process in a more coherent and transparent manner in an era of informative society that expects good governance as the measure to address the concerns of citizenry of the polity to meet the growing needs of justice. This means Justice delayed is justice denied and whatever the activism that a judge shows to address the social concerns, they will not serve the purpose, in the absence of remedial mechanism to remove the obstacles faced by judiciary.

**Published in Indian Law Review Vol V 2013 pp56-69**

---

<sup>38</sup> In the recent past a number of scandals of judges came to lime light which are obviously a blatant shadow on the confidence that people repose on the judiciary. The errant judges and the internal judicial squabbles' between the High Courts and Supreme court especially in the Declaration of assets need to be addressed in a more disciplined fashion than publicly debating and passing judgements and comments on each other.

<sup>39</sup> T.S.N.Sastry Excellence in Public Service: The Need for Financial Autonomy to the Judiciary, the Indian Journal of Public Administration, Vol. LII, 2006, pp 478-83.; also see Report of NCRWC, Vol.II, Book-1,p703-750