

“Role of the Supreme Court in protecting fundamental rights in challenging times”

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A very good morning to Mr. Joseph Raia, Chair ABA International, Ms. Nancy Stafford, Incoming Chair, ABA International and to all the other panellists that have joined us for this conference from the other side of the globe. Good evening to Mr. Jaipat Singh Jain and Mr. Bhasin and to all my Indian friends. I am deeply honoured to be speaking at this conference hosted by the American Bar Association with the Society of Indian Law Firms and Chartered Institute of Arbitrators.

The conference today focusses on the new challenges and shared interests between the United States and India. Our two nations though on opposite sides of the world, have shared a deep social, cultural and economic relationship since the Independence of India given our common ethos and values. Today, the United States and India have formed a strategic bilateral partnership in areas of defence cooperation, trade and economic ties, energy and climate change, science and technology and the like¹. However, I am here to discuss a deeper relationship which binds together our two countries, a “constitutional relationship”, if I may say so, of respect for democracy, rule of law and a rule based international order, and espousal of the values of freedom, liberty, justice and equality for all.

¹ https://www.mea.gov.in/Portal/ForeignRelation/India_US_brief.pdf

As the “leader of the free world”, the United States has been the torchbearer in promoting liberty, speech and expression and religious peace amongst the communities that call it home. At the time of its Independence in 1947, India too was faced with a moment in history where it sought to establish itself as a free country, a country based on equality and freedom for all, focussed on building a secular, pluralistic society which could be a melting pot of cultures, languages, and religions, and promoting values of fraternity not just within the country, but with the entire world. Today, the world’s oldest democracy and the world’s largest democracy represent these ideals of multicultural, pluralist societies where their Constitutions have focussed on a deep commitment to and respect for human rights. I am privileged to say that I have had the benefit of experiencing the freedoms that both India and America have to offer, having witnessed them first hand during my LL.M and SJD at Harvard Law School as a student of law.

Since the birth of Independent India, the cooperation between India and the US has spilled over to the legal domain as well. During the drafting of the Indian Constitution, the Constituent Assembly borrowed various features from Constitutions around the world, moulding them to address the needs of Indian society. The American influence on the Indian Constitution cannot be understated, as it contributed to the heart and soul of the Indian Constitution - the fundamental rights under Articles 14 to 32. The idea of guaranteeing fundamental rights to its population was inspired by the Bill of Rights that was incorporated in the form of amendments to the US Constitution. One of the oft-cited anecdotes of American influence has been on the right to the protection of life and personal liberty under Article 21 of the Constitution. As against its conception in the Bill of Rights, which provides that State shall not deprive “any

person of life, liberty, or property, *without due process of law*", the Constituent Assembly of India omitted references to "due process of law", replacing it instead with "procedure established by law". This contribution was largely due to the meeting between the Constitutional Adviser, Sir Benegal Narsing Rau and Justice Felix Frankfurter of the US Supreme Court in 1947, where the latter advised him that he considered the power of judicial review implied in the due process clause "undemocratic" given that a few judges could veto a legislation enacted by the elected representatives of the people. Justice Frankfurter also considered it to be an undue burden on the judiciary. Inspired by Justice Frankfurter, Sir B.N Rau advocated to eliminate the "due process" clause by replacing it with the phrase "procedure established by law".² As the country evolved, the Supreme Court of India incorporated the doctrine of procedural due process in its jurisprudence, by holding that the procedure established by law must be just, fair and reasonable in *Maneka Gandhi v. Union of India*³. The doctrine of substantive Due Process has also made an entry through creative judicial interpretation.

The courts in the two countries have been staunch advocates of liberal constitutional values. The Indian Supreme Court and the Supreme Court of the United States have been termed as the "most powerful courts" in their own might. The Indian Supreme Court, which is the last court of appeal in India, has a wide reach over its population, executive and lower courts, and provides greater access to individuals by exercising not just its appellate jurisdiction, but also its writ jurisdiction in protecting fundamental rights enshrined in the Constitution. On the other hand, the American Supreme Court

² G. Austin, *The Indian Constitution- Cornerstone of a Nation* 129-130 (OUP, 2014).

³ AIR 1978 SC 597, A. Chandrachud, *A tale of two judgments*, available at <https://www.thehindu.com/opinion/lead/a-tale-of-two-judgments/article8586369.ece>.

has been called “powerful” given its place in American history and society and its contribution to global jurisprudence, specifically in development of concept of judicial review, racial equality and constitutionality of abortion, sodomy and similar social issues.⁴

The Indian Supreme Court has often relied on the comparative jurisprudence of the United States Supreme Court encouraging a transnational judicial dialogue. For instance, in my opinion in *Navtej Johar v. Union of India*⁵, where the Indian Supreme Court decriminalised same sex sexual intercourse, I relied on comparative law developments from the UK, European Court of Human Rights and the celebrated case of *Lawrence v. Texas* of the US, to hold that there is a growing liberal consensus towards equal treatment of LGBTQ rights and India could not be left behind in this transformational vision. Similarly, in *Puttuswamy v. Union India*⁶, where the Indian Supreme Court upheld the right to privacy as a guarantee under the Constitution, specific comparison was made with the United States. Although the American Constitution does not explicitly mention privacy (much like its Indian counterpart), jurisprudence on the right to privacy has been developed to shield various aspects of a person’s life from state interference. Personally, as a judge, I have been inspired by Late Justice Ruth Bader Ginsburg of the Supreme Court of the

⁴ Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AMERICAN J. OF COMPARATIVE L. 176, 192 (2013).

⁵ https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

⁶ https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf

United States, whose ideas of gender equality are a common thread running through many of my opinions against gender-based discrimination.⁷

COVID-19 PANDEMIC AND CHALLENGES FOR THE COURTS:

I shall now turn to discuss the new challenges faced by our judicial systems and the protection of fundamental rights during these times. In the past one year, the world has faced an insurmountable challenge in the form of the COVID-19 pandemic, affecting much of our daily lives. It might not be an exaggeration to say that this is perhaps the most enduring challenge faced by us globally, changing our conceptions of the world we live in and the future that lies ahead. The courts and judicial systems have not been immune to this change, which has not only impacted the structure of the court and its processes, but has also brought to fore litigation concerning the very basic needs and fundamental guarantees affecting our fellow citizens- those of food, basic pay, shelter, and most importantly, health and life.

During March 2020, most nations, including India and US had started witnessing a rise in the COVID cases. While in India, a nationwide lockdown was imposed by the Prime Minister, in the US, various States issued stay-at-home orders, ordered quarantines and restricted the movement of people who were considered contagious.⁸

⁷ Lt. Col. Nitisha & Ors. v. Union of India, https://main.sci.gov.in/supremecourt/2020/20645/20645_2020_35_1501_27144_Judgement_25-Mar-2021.pdf

⁸ <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/>

Due to these restrictions, the form of litigation underwent a massive change in both countries. In the US, the Supreme Court postponed all oral arguments until further notice and in May 2020, oral arguments were heard by telephone conference⁹. In various federal courts as well, court hearings were postponed, jury trials were limited to exceptional circumstances and staff in the courtrooms was limited. Many courts relied on teleconference or video conferencing facilities to continue trials or procedural hearings.¹⁰

In India, COVID-19 and the ensuing lockdown gave an impetus to the judiciary of the country to increase our reliance on technology and to use it for efficient court management. The e-Committee of the Supreme Court, of which I am the Chairperson, rolled out two important initiatives that charted the course for hearings during the lockdown. The *first* was the video conferencing facilities in all district courts, High Courts and the Supreme Court. The *second*, was initiation of e-Filing in courts. At the time of the initiation of the lockdown, the Indian judicial system had to be connected across 3,236 court complexes in 633 districts across the country, comprising of 17,107 judicial officers. Since March 2020 till November 2020, the High Courts and District Courts have dealt with close to 8,205,436 cases¹¹. For the past one year now, Indian courts have been holding virtual hearings to ensure that access to justice is not impeded even during times of a crisis.

⁹ https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20;
https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20

¹⁰ <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>

¹¹ eCommittee Newsletter, February 2021, <https://cdnbbsr.s3waas.gov.in/s388ef51f0bf911e452e8dbb1d807a81ab/uploads/2021/06/2021061744.pdf>.

LITIGATION BEFORE THE UNITED STATES SUPREME COURT:

In addition to the virtual mode of court hearings, the kind of litigation and cases that have been brought before the courts in both countries has also related to the protection of fundamental rights during the pandemic. The litigation witnessed by the courts in the United States, specifically the Supreme Court was however substantially different than that in India. The resilience of the American people and their faith in the protection of personal liberty against government interventions led many to question the blanket restrictions on movement placed by States. Apart from challenges heard by State Supreme Courts on grounds of freedom of speech, peaceful assembly and economic harm, the United States Supreme Court primarily dealt with executive orders restricting freedom of religion during the pandemic. In two instances, the Supreme Court allowed social distancing orders to remain in place and refused to issue a stay while the appeals were pending. For instance, in *South Bay United Pentecostal Church et. al. v. Gavin Newsom, Governor of California*¹², an executive order limited attendance at places of worship to 25% of building capacity. The Supreme Court found that the restrictions placed were consistent with the First Amendment given the public health and safety of people. The Court followed this line of thought consistently in requests brought by churches in California and Illinois. However, a contrary view was taken in November 2020, in the case of *Roman Catholic Diocese of Brooklyn v. Andrew Cuomo, Governor of New York*¹³, where an executive order identifying COVID-19 clusters and restricting its surrounding areas was questioned before the Supreme Court, as some of these areas limited

¹² https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf

¹³ https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf;
<https://www.jurist.org/commentary/2020/12/curtis-doebbler-covid-cuomo-scotus/>

attendance at religious gatherings. The Supreme Court, in a 5:4 majority, held that places of worship were essential and that the executive order violated the minimum requirement of neutrality to religion as it allegedly only targeted the Orthodox Jewish community. It noted that the order singled out houses of worship for harsher treatment, than other businesses in the area that could admit more than 10 persons.

LITIGATION BEFORE THE INDIAN SUPREME COURT:

In contrast to the United States, the Indian Government had announced its first national lockdown to tackle the spread of COVID-19 on 24 March 2020. The actions of the government had far reaching effects on the constitutional rights of the people, which involved, right to affordable healthcare including vaccination, rights of labourers, including migrant labourers and factory workers, right to livelihood and rights of prisoners. Many such cases of constitutional violations found their way to the Supreme Court invoking the exercise of its writ jurisdiction under Article 32 of the Constitution.

The lockdowns in India involved an almost complete restriction on the movement of people and closure of all establishments, except for those providing “essential services”. Although the Indian Constitution allows the President to declare national emergencies, which must be ratified by the Parliament within a month, there is no provision under the Constitution for declaration of environmental or public health related emergencies. The invocation of the emergency power allows the State to suspend fundamental rights, except the right to life and personal liberty. The Indian Government did not use its emergency powers to deal with the COVID-19 pandemic.

Instead, the Union Government invoked the National Disaster Management Act to declare the COVID-19 pandemic as a “disaster” within the meaning of the Act. Under the provisions of the Act, binding directions and guidelines were issued to State Governments for dealing with the pandemic through a nationwide lockdown. Thus, the lockdown was a result of executive decrees, and the legislature did not play any role in its creation. The State Governments on the other hand relied on the Epidemic Diseases Act, which is a colonial era law, to pass any decrees “necessary to prevent the outbreak or spread” of an epidemic disease. The State Governments had declared lockdowns within their States under this Act, even before a nationwide lockdown was imposed by the Union Government. India’s Criminal Procedure Code further allows senior government officers to pass orders restricting movement of people within the jurisdictional limits of their districts if there is an anticipated danger to human “life, health and safety”. Thus, this formed the pyramid of executive power functioning at different levels to tackle the pandemic.

Such restrictions imposed by the pandemic had serious constraints on the liberty of the people. At the same time, the State imposed lockdowns had a disproportionate impact on people belonging to the marginalised sections of the society on account of their socio-economic status. The forced closure of establishments impacted the right to livelihood of low-income labourers, who lived on daily wages. The expenses to be borne for laboratory tests for detecting COVID-19 and vaccination at private centres were beyond the economic capacity of people belonging to the lower strata of the society. Thus, the pandemic and the resulting lockdowns not only raised questions of personal liberty but also of equality and non-discrimination. While there was a negative obligation on the State to ensure that its interference with personal liberty

was proportional to the level of public health crisis, it also had the affirmative obligation to ensure that it alleviates the discriminatory effect of the pandemic and the lockdowns on certain sections of society.

Socio-economic rights in India like the right to health, shelter, education, food and livelihood are not explicitly recognized as fundamental rights under the Indian Constitution. Rather they are listed under the Directive Principles of State Policy under the Constitution. These are not binding on the State but guide the policy of the State. However, the socio-economic rights in India have been developed through judicial precedent by expanding the interpretation of the phrase “right to life” under Article 21 using the Directive Principles of State Policy. The right to life comes alive only when conditions are provided by the State for the full enjoyment of this right. The right to life is not merely about surviving, but it is to live with dignity. However, since socio-economic rights do not flow from the constitutional text but are driven by precedent, it may result in an inconsistency in the adjudication of these rights.

In India, under the rule of law and separation of powers, policy is the domain of the executive. The State is empowered to take policy decisions on how to tackle the pandemic. But if State power infringes the constitutional rights of the people, the validity of the policy is amenable to judicial review. However, since the Indian Supreme Court sits in smaller and co-equal benches, it gives way to contestations about the interpretation of same socio-economic rights and the level of deference that is shown to the executive on issues of policy. Our is a poly-vocal multi-bench court.

Let me give you an example. A public interest litigation was filed in the Supreme Court once the lockdown was declared in India seeking, *inter alia*, the payment of minimum wages for migrant workers who had effectively been deprived of the right to livelihood. The Supreme Court decided not to interfere in the matter, citing that it was in the realm of government policy.¹⁴ On the other hand, in a matter that came up for hearing before a bench presided by me, we were dealing with the executive policy to reduce labour protections during the pandemic¹⁵. The State of Gujarat, a State in the western part of India, had issued a notification increasing the upper limit of working hours in factories, shortening rest periods and reducing overtime pay. The State argued that it was empowered to exempt a class of factories from adhering to labour protections provided under the Factories Act on account of the existence of a “public emergency” under the Act. The Supreme Court found against the State, noting that the standard of public emergencies in Indian jurisprudence is extremely high, and it can only be invoked in times of war, internal disturbances or situations of a similar gravity where there is a breakdown of the state machinery. Mere financial exigencies, even if occurring during a pandemic, do not meet this threshold and could not qualify as an internal disturbance leading to a public emergency. We located the guarantee of workers’ rights including a working hours’ cap and overtime pay within the ambit of Articles 21 (right to life) and 23 (right against forced labour). Even otherwise, the existence of a pandemic did not necessitate an exemption to all factories, irrespective of the manufactured product, from obeying labour welfare laws. Such a notification was unnecessary and more so, not proportional as it denied wages to the workers,

¹⁴ SC leaves the issue of payment of minimum basic wages to migrant workers to Centre, SCC Online (22 April 2020), <https://www.scconline.com/blog/post/2020/04/22/covid-19-sc-leaves-issue-of-payment-of-minimum-basic-wages-to-migrant-workers-to-centre/>

¹⁵ Gujarat Majdoor Sabha v. State of Gujarat, IVLLJ 257 SC (2020).

who are an already worn-down class of society, and pushed the labourers into the chains of servitude.

While the above examples show how the Supreme Court differed in its approach to intervene in the actions of the government resulting from the pandemic, it also indicates how smaller and co-equal benches of the Court provide a possibility of reading law differently. While stability of law, finding its formulation in rules of *stare decisis*, is important, it is necessary that law keeps evolving. It can shed its skin when its precedents have become outmoded and old, otherwise it will not be able to grow and thrive. Further, I also believe that multiple benches of the Supreme Court allow the Court to hear a wide variety of claims and increase the accessibility of the apex court of the country to ordinary citizens.

One of the initial issues that the Supreme Court had to confront was of migrant labourers. Deprived of their right to livelihood on account of the national lockdown in March 2020, the migrant workers started walking on foot from urban areas to reach their homes during the COVID-19 pandemic. Transportation services were closed at the time with an embargo on the movement of buses and trains. The migrant workers survive on daily wages. Deprived of their wages, they decided to head home to their local communities, from cities to their villages. A public interest litigation was filed before the Supreme Court in April 2020 seeking to provide them basic amenities. Initially, the Supreme Court refused to interfere. However, subsequently, in May 2020, the Supreme Court took *suo motu*¹⁶ cognizance of the matter and issued

¹⁶ In Re: Problems and Miseries of Migrant Labourers, *Suo Motu* WP (C) No. 6/2020, https://main.sci.gov.in/supremecourt/2020/11706/11706_2020_36_1501_28166_Judgement_29-Jun-2021.pdf.

interim directions to the Government to provide free train and bus travel to the migrants to their destinations, free food and water for their journeys and free health screening process on arrival at their destinations. While delivering its judgement in the matter, the Supreme Court noted that the pandemic had put the migrant workers in the same situation as they were in March 2020. Although, transportation arrangements were no longer an issue, concerns relating to food security, livelihood and workers' rights remained. The Supreme Court held that Article 21 includes the right to dignity and thus, the right to basic food and nutrition. Pursuant to this, it directed the State Governments to bring appropriate schemes to deliver rations to all migrant workers even if they did not have ration cards and to run community kitchens for their benefit.

The Supreme Court also took up the issue of congestion in prisons, intertwining the right to personal liberty and the right to health of undertrials and convicts. During the first wave of the pandemic in March 2020, the Supreme Court ordered all States to set up 'high level committees' to consider releasing convicts who had been jailed for up to 7 years on parole. The Supreme Court made a similar suggestion for undertrials who were awaiting trial for offences carrying a maximum penalty of 7 years.¹⁷ When the first wave subsided, those released were re-imprisoned. In view of the second wave of the pandemic in May 2021, the Supreme Court on 7 May 2021 ordered that those who were released in the first wave of the pandemic, were eligible

¹⁷ In Re: Contagion of COVID-19 Virus in Prisons, Suo Motu WP (C) No. 1/2020, https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_1_8_21570_Order_23-Mar-2020.pdf.

for immediate release and passed orders regarding improvement in sanitary conditions of the prisons, and regular testing for the inmates and prison staff.¹⁸

While it is important that prisons are de-congested because they are highly susceptible to becoming hot spots for virus, it is equally important to examine why prisons are congested in the first place. The criminal law, including anti-terror legislation should not be misused for quelling dissent or for the harassment of citizens. As I noted in *Arnab Goswami v. The State of Maharashtra & Ors*, “our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one too many. We must always be mindful of the deeper systemic implications of our decisions”¹⁹.

Another important issue that came up before a bench of the Supreme Court, which I was a part of, during the second wave of the pandemic was the shortage in the supply of essential drugs, including vaccines, and services. While we addressed multiple issues like the supply of essential drugs, the state of medical infrastructure, hospital admission policy and supply of oxygen, I would take this opportunity to specifically discuss how the Supreme Court engaged with the government on its policy of vaccination. The Indian Government had introduced a liberalized vaccination policy, in which the Union Government was only vaccinating people above the age of 45 years, health care workers and other frontline workers for free. People in the age

¹⁸ In Re: Contagion of COVID-19 Virus in Prisons, Suo Motu WP (C) No. 1/2020, https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_31_301_27999_Order_07-May-2021.pdf.

¹⁹ Arnab Manoranjan Goswami v. The State of Maharashtra & Ors., Criminal Appeal No. 743/2020, dated November 27, 2020, https://main.sci.gov.in/supremecourt/2020/24646/24646_2020_33_1501_24858_Judgement_27-Nov-2020.pdf.

group of 18-44 had to approach the State Government vaccination centres or private hospitals to get vaccinated and had to bear the cost of such vaccination. The people in this age group were also required to book appointments for vaccination digitally.

The Supreme Court was cautious that it could not transgress into the domain of policymaking and usurp the role of the executive. However, in a humanitarian crisis, it could not stand as a silent spectator. It adopted a “bounded deliberative approach” seeking justifications from the government for its policy, which it reiterated must be bound by a human rights framework which in this case implicated the right to life under Article 21 and the rights’ to equality under Article 14 of the Constitution. The Supreme Court observed that *prima facie* the Union Government’s policy of differential pricing where a certain class of citizens is given free vaccines and another class has to pay for vaccines or depend on the financial wherewithal of each State to avail free vaccines was arbitrary and inconsistent with the right to life (which includes the right to health) under Article 21 of the Constitution. We noted that the social strata of the 18-44 age group also comprises persons who belong to under privileged and marginalized groups.²⁰ Such persons may not have the ability to pay for essential vaccines which is a public good in a pandemic. Hence, we noted that *prima facie* a rational policy would require the Union Government to take up the responsibility of procuring vaccines and negotiating with the vaccine manufacturers as a monopolistic buyer, and subsequently allocate the vaccines to the States for distribution to people free of cost.

²⁰ In Re: Distribution Of Essential Supplies And Services During Pandemic, Suo Moto WP No. 3 of 2020, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_Judgement_30-Apr-2021.pdf.

On the issue of mandatory booking of appointments for vaccination online for persons in the age group of 18-44, we noted that there exists a digital divide in the country. Digital literacy and digital access have not penetrated a majority of the population in India. There is especially a disparity between urban and rural areas. Hence, the Supreme Court observed that, “[a] vaccination policy exclusively relying on a digital portal for vaccinating a significant population of this country between the ages of 18-44 years would be unable to meet its target of universal immunization owing to such a digital divide.” Thus, *prima facie*, it was held that this could have serious implications on the fundamental right to equality and the right to health of persons within this age group.²¹

While these were *prima facie* observations of the Supreme Court, the Court's approach of questioning the rationale of the policy decisions of the government helped in grounding the dialogue between the government and the Court regarding the existence of the policy within the constitutional framework. The Union Government thereafter revised its policy, bearing the responsibility of procuring 75% of the vaccines and administering them free of cost to persons above the age of 18 years, while also capping the price that could be charged for the remainder 25% of vaccines being procured by private hospitals from manufacturers. Further, the Union Government also allowed on-site registration and vaccination of persons in the age group of 18-44 years along with digital registration.

²¹ In Re: Distribution Of Essential Supplies And Services During Pandemic, Suo Moto WP No. 3 of 2020, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf.

CONCLUSION

The role of the Indian Supreme Court and its involvement in aspects affecting the daily lives of the population of India cannot be understated. While being acutely aware of this responsibility, the judges of the Supreme Court of India are careful to maintaining the separation of powers. Many of its interventions have changed the course of Indian history - be it in protecting civil and political liberties which cast a negative obligation on the State or in directing the State to implement socio-economic rights as affirmative obligations under the Constitution. While some have termed these interventions of the Indian Supreme Court as “judicial activism” or “judicial overreach”, the Court plays the role of a counter-majoritarian institution and it is its duty to protect the rights of socio-economic minorities. As the guardian of the Constitution, it has to put a break where executive or legislative actions infringe fundamental human rights. Even in the context of the separation of powers, the scheme of checks and balances through supervision results in a certain degree of interference by one branch into the functioning of the other. As Aileen Kavanagh has said “the dogma of a strict separation of functions contrasts sharply with the actual constitutional distribution of powers as well as constitutional practice and reality.”²² Instead of imagining separate branches of government isolated and compartmentalized by walls between them, we should view their working taking effect in a complex interactive, interdependent and interconnected setting where the branches take account of and coordinate with the actions of the other.²³ The Supreme Court has used various methods in holding the executive and legislature accountable, whether it is by striking down a law and ruling on its unconstitutionality,

²² Aileen Kavanagh, *THE CONSTITUTIONAL SEPARATION OF POWERS IN PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* (Davide Dyzenhaus & Malcolm Thorburn ed., OUP 2016).

²³ Ibid

or by restraining to intervene in certain matters of policy or through its deliberative approach of making the executive and legislature aware of the constitutional implications of the decisions at hand. The Supreme Court has to act in furtherance of its role as *sentinel on the qui vive* and respond to the call of constitutional conscience and it is this role that prompts it to address the challenges of the 21st century, ranging from the pandemic to the rise of intolerance, features which we find across the world.

I would once again like to thank the American Bar Association for inviting me to this conference and hope that these challenging times are faced through the combined strength of the legal relationships and shared values of India and the US.