

## **‘JUDICIAL ACTIVISM UNDER THE INDIAN CONSTITUTION’**

Address by Hon’ble Mr. K.G. Balakrishnan, Chief Justice of India

(Trinity College Dublin, Ireland – October 14, 2009)

Ladies and Gentlemen:

I am indeed very grateful for the opportunity to speak about the evolution of judicial activism in the Indian legal system. Before I touch on the subject, I must of course emphasise the fact that during the framing of the Indian Constitution in the 1940’s, the engrafting of Directive Principles of State Policy was inspired from the Irish example. The common experience of colonial rule in both countries also makes it viable for us to draw comparative insights in the matter of analysing legislations, the judicial process and of course precedents themselves.

The phrase ‘judicial activism’ carries more than one connotation. The common law tradition conceives of courtroom litigation as an adversarial process where the onus is on the pleaders to shape the overall course of the proceedings through their submissions. In this conception, the role of the judge is cast in a passive mould and the objective is to dispassionately evaluate the arguments made by both sides. However the actual experience of a courtroom clearly bears witness to the tendency on part of some judges to pose incisive questions before the practitioners. This may have the consequence of proceedings being judicially-directed to a certain degree. While this literal understanding of activism from the bench may have its supporters as well as detractors, the focus of my talk will be on another understanding of ‘judicial activism’. In the Indian context, there has

been a raging debate on the proper scope and limits of the judicial role – especially of that played by the higher judiciary which consists of the Supreme Court of India at the Centre and the High Courts in the various States that form the Union of India. The terms of that debate have been broadly framed with respect to the considerations of ensuring an effective ‘separation of powers’ between the executive, legislature and the judiciary as well as concerns about the efficacy and legitimacy of judicial interventions in the long-run. In the course of this talk, I will attempt to present some background information as well as the main themes of these debates.

### **The place of ‘judicial review’**

In post-independence India, the inclusion of explicit provisions for ‘judicial review’ were necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who chaired the drafting committee of our Constituent Assembly, had described the provision related to the same as the ‘heart of the Constitution’. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.

While judicial review over administrative action has evolved on the lines of common law doctrines such as ‘proportionality’, ‘legitimate expectation’, ‘reasonableness’ and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the

fundamental rights guaranteed in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7<sup>th</sup> schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures.

Hence the scope of judicial review before Indian courts has evolved in three dimensions – firstly, to ensure fairness in administrative action, secondly to protect the constitutionally guaranteed fundamental rights of citizens and thirdly to rule on questions of legislative competence between the centre and the states. The power of the Supreme Court of India to enforce these fundamental rights is derived from Article 32 of the Constitution. It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights. This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of *writs* evolved in common law – such as *habeas corpus* (to direct the release of a person detained unlawfully), *mandamus* (to direct a public authority to do its duty), *quo warranto* (to direct a person to vacate an office assumed wrongfully), *prohibition* (to prohibit a lower court from proceeding on a case) and *certiorari* (power of the higher court to remove a proceeding from a lower court and bring it before itself). Besides the Supreme Court, the High Courts located in the various States are also designated as constitutional courts and Article 226 permits citizens to file similar writs before the High Courts.

With the advent of Public Interest Litigation (PIL) in recent decades,

Article 32 has been creatively interpreted to shape innovative remedies such as a ‘continuing mandamus’ for ensuring that executive agencies comply with judicial directions. In this category of litigation, judges have also imported private law remedies such as ‘injunctions’ and ‘stay orders’ into what are essentially public law-related matters.<sup>1</sup> Successful challenges against statutory provisions result in reliefs such as the striking down of statutes or even reading down of statutes, the latter implying that courts reject a particular approach to the interpretation of a statutory provision rather than rejecting the provision in its entirety.<sup>2</sup>

Beginning with the first few instances in the late-1970’s, the category of Public Interest Litigation (PIL) has come to be associated with its own ‘people-friendly’ procedures. The foremost change came in the form of the dilution of the requirement of ‘locus standi’ for initiating proceedings. Since the intent was to improve access to justice for those who were otherwise too poor to move the courts or were unaware of their legal entitlements, the Court allowed actions to be brought on their behalf by social activists and lawyers.<sup>3</sup> In numerous instances, the Court took *suo moto* cognizance of matters involving the abuse of prisoners, bonded labourers and inmates of mental institutions, through letters addressed to sitting judges. This practice

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<sup>1</sup> See: Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems’ in B.N. Kirpal et. al. (eds.), *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (OUP, 2000) at p. 159-192; Also see K.G. Balakrishnan, ‘Growth of Public Interest Litigation in India’, *Fifteenth Annual Lecture, Singapore Academy of Law* (October 8, 2008), Text available from <www.sal.org>

<sup>2</sup> In the United Kingdom, Courts have developed another tool for ruling on legislative action – i.e. issuing a ‘declaration of incompatibility’ for statutory provisions that contravene the ECHR.

<sup>3</sup> Refer: Susan D. Susman, ‘Distant voices in the Courts of India: Transformation of standing in Public Interest Litigation’, 13 *Wisconsin International Law Journal* 57 (Fall 1994)

of initiating proceedings on the basis of letters has now been streamlined and has come to be described as ‘epistolary jurisdiction’.

In Public Interest Litigation (PIL), the nature of proceedings itself does not exactly fit into the accepted common-law framework of adversarial litigation. The courtroom dynamics are substantially different from ordinary civil or criminal appeals. While an adversarial environment may prevail in cases where actions are brought to highlight administrative apathy or the government’s condonation of abusive practices, in most public interest-related litigation, the judges take on a far more active role in the literal sense as well by posing questions to the parties as well as exploring solutions. Especially in actions seeking directions for ensuring governmental accountability or environmental protection, the orientation of the proceedings is usually more akin to collective problem-solving rather than an acrimonious contest between the counsels. Since these matters are filed straightaway at the level of the Supreme Court or the High Court, the parties do not have a meaningful opportunity to present evidence on record before the start of the court proceeding. To overcome this problem, our Courts have developed the practice of appointing ‘fact-finding commissions’ on a case-by-case basis which are deputed to inquire into the subject-matter of the case and report back to the Court. These commissions usually consist of experts in the concerned fields or practicing lawyers. In matters involving complex legal considerations, the Courts also seek the services of senior counsels by appointing them as *amicus curiae* on a case-by-case basis.<sup>4</sup>

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<sup>4</sup> See Ashok H. Desai & S. Muralidhar, ‘Public Interest Litigation: Potential and Problems’ in B.N. Kirpal et. al. (eds.), *Supreme but not Infallible* (OUP, 2000) 159-192, at p. 164-167

## **Considering the objections to the doctrine of ‘judicial review’**

However, in many jurisdictions - questions have been asked about the proper understanding of ‘judicial review’ as well as its expansion. There are two principled objections offered against the very idea of ‘judicial review’ in a democratic order.

The first idea is that the judiciary being an unelected body is not accountable to the people through any institutional mechanism. In most countries judges are appointed through methods involving selection or nomination, in which ordinary citizens do not have a say. It is argued that allowing the judiciary to rule on the validity of the enactments passed by a popularly elected legislature amounts to a violation of the idea of ‘separation of powers’. Skepticism is also voiced against judges using their personal discretion to grant remedies in areas in which they have no expertise. This critique locates the role of the judiciary as purely one of resolving disputes between parties and deferring to the prescriptions of the elected legislature while doing so. In the Common Law realm, this critique is based on the age-old notion of ‘parliamentary sovereignty’. With respect to the inherent value of a written constitution that also incorporates ‘judicial review’, it would be appropriate to refer to an observation made by Justice Aharon Barak:

*“To maintain real democracy and to ensure a delicate balance between its elements -a formal constitution is preferable. To operate effectively, a constitution should enjoy normative supremacy, should not be as easily amendable as a normal statute, and should give judges the power to review the constitutionality of legislation. Without a formal constitution, there is no legal limitation on legislative supremacy, and the supremacy of human rights can exist only by the grace of the majority’s self-restraint. A*

*constitution, however, imposes legal limitations on the legislature and guarantees that human rights are protected not only by the self-restraint of the majority, but also by constitutional control over the majority. Hence, the need for a formal constitution.”*<sup>5</sup>

However, we must also consider another nuanced objection to the doctrine of ‘judicial review’. It is reasoned that the substantive contents of a constitution adopted by a country at a particular point of time reflect the will of its framers. However, it is not necessary that the intent of the framers corresponds to the will of the majority of the population at any given time. In the Indian setting, it is often argued that the members of the Constituent Assembly were overwhelmingly drawn from elite backgrounds and hence did not represent popular opinions on several vital issues. Furthermore, the adoption of a constitution entails a country’s precommitment to its contents and the same become binding on future generations.<sup>6</sup> Clearly the understanding and application of constitutional principles cannot remain static and hence a constitutional text also lays down a procedure for its amendment.

This power of amendment by the legislature is not unlimited and the idea of ‘judicial review’ designates the higher judiciary as the protector of the constitution. This scheme works smoothly as long as the demands and aspirations of the majority of the population correspond with the

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<sup>5</sup> Cited from: Aharon Barak, ‘A judge on judging: The role of a Supreme Court in Democracy,’ 116 *Harvard Law Review* 16 (2002)

<sup>6</sup> See: Stephen Holmes, ‘Precommitment and the Paradox of Democracy’ in Douglas Greenberg et. al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) at p. 195-240

constitutional prescriptions. However, scope for dissonance arises when majoritarian policy-choices embodied in legislative or executive acts come into conflict with constitutional provisions. The higher judiciary is then required to scrutinize the actions of its co-equal branches of government. Some scholars have argued that fact-situations of this type involve tensions between the understanding of the words ‘constitutionalism’ and ‘democracy’ respectively. Hence, it is postulated that the provision for ‘judicial review’ gives a self-contradictory twist to the expression ‘constitutional democracy’.<sup>7</sup>

In this regard the role of the judiciary can be described as one of protecting the countermajoritarian safeguards enumerated in the Constitution. It is apt to refer to an opinion given by Justice Robert Jackson where it was held that citizens could not be compelled to salute the U.S. national flag if the same offended their religious beliefs.<sup>8</sup> He observed as follows:

*‘The very purpose of the bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.’*

For example, in India there is considerable disenchantment with the

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<sup>7</sup> Refer: Jurgen Habermas and William Rehg, ‘Constitutional democracy: A paradoxical union of contradictory principles?’, *Political Theory*, Vol. 29, No. 6 (December 2001) at p. 766-781

<sup>8</sup> *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943)



constitutional provision which places the personal laws of religious groups beyond the scope of constitutional scrutiny. The framers preferred this position in order to protect the usages and customs of religious minorities with regard to the guarantee of 'freedom of religion'. However, there have been persistent majoritarian demands for a constitutional amendment of this position in order to enact a 'Uniform Civil Code' for regulating the private relations of citizens belonging to all religions. Even though there may be a good case for some specific changes to personal laws with the objective of ensuring gender-justice, the demands for the whole-scale rejection of personal laws threaten a majoritarian imposition. Noted scholar Samuel Isacharoff has argued that in fractured or pluralist societies it is beneficial to implement a constitutional scheme in order to restrain destructive majoritarian tendencies.<sup>9</sup>

### **How have Indian courts expanded the meaning of rights?**

It can be stated with some certainty that the doctrine of 'judicial review' helps in binding a polity to its core constitutional principles. In the post World War II era, the memory of devastating conflicts and oppressive colonialism ensured that these principles were initially centered on the protection of basic civil-political rights such as free speech, assembly, association and movement as well as guarantees against abusive practices by state agencies such as arbitrary arrest, detention, torture and extra-judicial killings. The growth of Constitutionalism has also been synonymous with that of liberal values which seek to safeguard an individual's dignity as well

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<sup>9</sup> See: Samuel Isacharoff, 'Constitutionalising Democracy in fractured societies', 82 *Texas Law Review* 1861-1891 (2004); In this article he has stressed on the importance of constitutionalism for ensuring stability in post-apartheid South Africa as well as Bosnia after the conflict which accompanied the break-up of Yugoslavia.

as collective welfare at the same time. In highly disparate and iniquitous societies, such a commitment also requires some countermajoritarian safeguards. Depending on the social profile of a country's population, these safeguards may be in the nature of exceptional treatment for ethnic, religious and cultural minorities as well as proactive measures designed for the advancement of historically disadvantaged communities and poorer sections of society. Such safeguards which are meant to tackle social differences based on factors such as religion, caste, gender, class and region among others, also have clear socio-economic dimensions. Hence, the role of the Courts in protecting constitutional values goes beyond the enforcement of clearly defined civil-political rights that can be litigated by individual citizens and incorporates a continuously evolving understanding of 'group rights' which necessarily have socio-economic dimensions as well.

To appreciate the transformation in the substantive nature of justiciable rights, it is necessary to reiterate the theoretical distinction between their 'negative' and 'positive' dimensions.<sup>10</sup> The classification of enumerated rights can be based on who they are directed against and whether they involve a 'duty of restraint' or a 'duty to facilitate entitlements'. The language of a substantive right usually indicates whether it is directed against state agencies, private actors or both. For instance in the Indian Constitution, civil-political rights such as 'freedom of speech, assembly and association' are directed against the State, since the text expressly refers to the State's power to impose reasonable restrictions on the exercise of the same. This implies that under ordinary conditions the State has an obligation

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<sup>10</sup> The distinction between the notions of 'negative' and 'positive' rights in legal theory was first prominently discussed by Wesley Newcomb Hohfeld.

not to infringe on these liberties. This ‘duty of restraint’ forms the basis of rights with a ‘negative’ dimension. Hence in the early years of the Indian constitutional experience, civil liberties and the protection against deprivation of life and liberty were understood mainly as imposing duties of restraint on governmental agencies as well as private citizens. However, in contrast to these justiciable ‘negative’ rights the directive principles of state policy allude to several socio-economic objectives which had a ‘positive’ dimension. Even though the directive principles are non-justiciable, their language is couched in the terms of positive obligations on governmental agencies to enable their fulfillment.<sup>11</sup>

The Indian Courts have responded to this hierarchy between ‘negative’ and ‘positive’ rights by trying to collapse the distinction between the same. While the fundamental rights of citizens enumerated in Part III of the Constitution are justiciable before the higher judiciary, Part IV deals with the ‘Directive Principles of State Policy’ that largely enumerate objectives pertaining to socio-economic entitlements.<sup>12</sup> The Directive Principles aim at creating an egalitarian society whose citizens are free from the abject physical conditions that had hitherto prevented them from fulfilling their best selves. They are the creative part of the Constitution, and fundamental to the governance of the country. However, the key feature is that the Directive Principles are ‘non-justiciable’ but are yet supposed to be the basis of executive and legislative actions. It is interesting to note that at the time of

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<sup>11</sup> See generally: Sandra Fredman, *Human rights transformed – positive rights and positive duties* (New Delhi: Oxford University Press, 2008), especially ‘Chapter 4: Justiciability and the role of the courts’ at p. 93-123

<sup>12</sup> The framers included ‘Directive Principles of State Policy’ following the example of the Irish Constitution.

drafting of the Constitution, some of the provisions which are presently part of the Directive Principles were part of the declaration of fundamental rights adopted by the Congress party. K.M. Munshi (a noted lawyer and a member of the Constituent Assembly) had even included in his draft list of rights, the ‘rights of workers’ and ‘social rights’, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living.<sup>13</sup> Subsequently, the objective of ensuring these entitlements was included in the Directive Principles.

The primordial importance of these principles can be understood by the following words of Dr. B.R Ambedkar, when he insisted on the use of the word ‘strive’ in the language of Article 38 which mentions the governmental objective of an equitable distribution of material resources:

*“We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives. ... Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.”* [Constituent Assembly Debates, 19-11-1948]

Thus, the enforceability of measures relating to social equality though incorporated in aspirational terms was never envisaged as being dependent only on the availability of state resources. In some instances, the Courts have

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<sup>13</sup> At the same time, even some controversial as well as communally sensitive issues such as the desirability of enacting a Uniform Civil Code (Article 44) and the prohibition of cow-slaughter (Article 48) came to be included in the non-justiciable Directive Principles.

privileged fundamental rights over directive principles while in others they have creatively drawn a harmonious relationship between the two. An example of this is the expansion of the conception of ‘personal liberty’ under Article 21 of the Constitution which was traditionally invoked in the civil-political context to check governmental abuses. The judicially expanded understanding of the same now includes several socio-economic entitlements for citizens which place positive obligations on the state. What is interesting is that the reading in of these socio-economic entitlements by judges has often directly referred to the language of provisions contained in the part dealing with directive principles. In this sense, judicial creativity has transformed the substantive character of the protection of life and liberty.

Article 21 of the Constitution of India reads as follows: “*No person shall be deprived of his life or personal liberty except according to procedure established by law.*” The interpretation of this article in the early years of the Supreme Court was that ‘personal liberty’ could be curtailed as long as there was a legal prescription for the same. In *A.K. Gopalan’s* case,<sup>14</sup> the Supreme Court had ruled that ‘preventive detention’ by state agencies was permissible as long as it was provided for under a governmental measure (e.g. legislation or an ordinance) and the Court could not inquire into the fairness of such a measure. It was held that the words ‘procedure established by law’ were different from the ‘substantive due process’ guarantee provided under the 14<sup>th</sup> amendment to the US Constitution. It was also reasoned that the framers of the Indian Constitution consciously preferred the former expression over the latter. This narrow construction of Article 21 prevailed for several years

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<sup>14</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

until it was changed in *Maneka Gandhi's* case.<sup>15</sup> In that decision, it was held that governmental restraints on 'personal liberty' should be collectively tested against the guarantees of fairness, non-arbitrariness and reasonableness that were prescribed under Articles 14, 19 and 21 of the Constitution. The Court developed a theory of 'inter-relationship of rights' to hold that governmental action which curtailed either of these rights should meet the designated threshold for restraints on all of them. In this manner, the Courts incorporated the guarantee of 'substantive due process' into the language of Article 21.<sup>16</sup> This was followed by a series of decisions, where the conceptions of 'life' and 'personal liberty' were interpreted liberally to include rights which had not been expressly enumerated in Part III. In the words of Justice Bhagwati:<sup>17</sup>

*"we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms."*

Notably, over the decades, the Supreme Court has affirmed that both the Fundamental Rights and Directive Principles must be interpreted harmoniously. It was observed in the *Kesavananda Bharati* case,<sup>18</sup> that the directive principles and the fundamental rights supplement each other and aim at the same goal of bringing about a social revolution and the establishment of a welfare State, the objectives which are also enumerated in

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<sup>15</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

<sup>16</sup> See: T.R. Andhyarujina, 'The Evolution of Due Process of Law by the Supreme Court' in B.N. Kirpal et. al. (eds.), *Supreme But Not Infallible – Essays in Honour of the Supreme Court of India* (OUP, 2000) at p. 193-213

<sup>17</sup> Observations in *Francis Coralie v. Union Territory of Delhi*, (1981) 1 SCC 688

<sup>18</sup> (1973) 4 SCC 225

the Preamble to the Constitution. Furthermore, in *Unni Krishnan, J.P. v. State of Andhra Pradesh*,<sup>19</sup>, Justice Jeevan Reddy declared:

*“The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in Part IV”.*

This approach of harmonizing the fundamental rights and directive principles has been successful to a considerable extent. As indicated earlier, the Supreme Court has interpreted the ‘protection of life and personal liberty’ as one which contemplates socio-economic entitlements. For instance, in *Olga Tellis v. Bombay Municipal Corporation*,<sup>20</sup> a journalist had filed a petition on behalf of hundreds of pavement-dwellers who were being displaced due to construction activity by the respondent corporation. The Court recognised the ‘right to livelihood and housing’ of the pavement-dwellers and issued an injunction to halt their eviction.

In *Parmanand Katara v. Union of India*,<sup>21</sup> the Court held that no medical authority could refuse to provide immediate medical attention to a patient in need in an emergency case; The public interest litigation had arisen because many hospitals were refusing to admit patients in medico-legal cases. Hence, the Supreme Court ruled that access to healthcare, is a justiciable right. In another prominent Public Interest Litigation, the Supreme Court ordered the relocation of hazardous industries located near residential areas in New Delhi. In the process, it spelt out the citizens’ ‘right to clean environment’

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<sup>19</sup> (1993) 1 SCC 645

<sup>20</sup> AIR 1985 SC 2039

<sup>21</sup> AIR 1989 SC 2039

which was in turn derived from the protection of life and liberty enumerated in Article 21.<sup>22</sup>

The court has also recognized access to free education as a justiciable right.<sup>23</sup> This decision prompted a Constitutional amendment which inserted Article 21-A into the Constitutional text, thereby guaranteeing the right to elementary education for children aged between 6-14 years. The Courts have also pointed to Directive principles in interpreting the prohibitions against forced labour and child labour. The enforcement of these rights leaves a lot to be desired, but the symbolic value of their constitutional status should not be underestimated.

### **Milestones of Public Interest Litigation in India**

One of the earliest cases of public interest litigation was reported as *Hussainara Khatoon (I) v. State of Bihar*.<sup>24</sup> This case was concerned with a series of articles published in a prominent newspaper - the *Indian Express* which exposed the plight of undertrial prisoners in the state of Bihar. A writ petition was filed by an advocate drawing the Court's attention to the deplorable plight of these prisoners. Many of them had been in jail for longer periods than the maximum permissible sentences for the offences they had been charged with. The Supreme Court accepted the *locus standi* of the advocate to maintain the writ petition. Thereafter, a series of cases followed in which the Court gave directions through which the 'right to

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<sup>22</sup> *M.C. Mehta v. Union of India* (1996) 4 SCC 750

<sup>23</sup> *J.P. Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645

<sup>24</sup> (1980) 1 SCC 81; See Upendra Baxi, 'The Supreme Court under trial: Undertrials and the Supreme Court', (1980) *Supreme Court Cases* (Journal section), at p. 35



speedy trial’ was deemed to be an integral and an essential part of the protection of life and personal liberty.

Soon thereafter, two noted professors of law filed writ petitions in the Supreme Court highlighting various abuses of the law, which, they asserted, were a violation of Article 21 of the Constitution.<sup>25</sup> These included inhuman conditions prevailing in protective homes, long pendency of trials in court, trafficking of women, importation of children for homosexual purposes, and the non-payment of wages to bonded labourers among others. The Supreme Court accepted their *locus standi* to represent the suffering masses and passed guidelines and orders that greatly ameliorated the conditions of these people.

In another matter, a journalist, Ms. Sheela Barse<sup>26</sup>, took up the plight of women prisoners who were confined in the police jails in the city of Bombay. She asserted that they were victims of custodial violence. The Court took cognizance of the matter and directions were issued to the Director of College of Social Work, Bombay. He was ordered to visit the Bombay Central Jail and conduct interviews of various women prisoners in order to ascertain whether they had been subjected to torture or ill-treatment. He was asked to submit a report to the Court in this regard. Based on his findings, the Court issued directions such as the detention of female prisoners only in designated female lock-ups guarded by female constables and that accused females could be interrogated only in the presence of a female police official.

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<sup>25</sup> *Upendra Baxi (Dr) v. State of U.P.*, (1983) 2 SCC 308

<sup>26</sup> *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96

Public interest litigation acquired a new dimension – namely that of ‘epistolary jurisdiction’ with the decision in the case of *Sunil Batra v. Delhi Administration*,<sup>27</sup> It was initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court. The prisoner complained of a brutal assault committed by a Head Warder on another prisoner. The Court treated that letter as a writ petition, and, while issuing various directions, opined that:

*“...technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found”.*

In *Municipal Council, Ratlam v. Vardichand*,<sup>28</sup> the Court recognized the *locus standi* of a group of citizens who sought directions against the local Municipal Council for removal of open drains that caused stench as well as diseases. The Court, recognizing the right of the group of citizens, asserted that if the:

*"...centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men."*

In *Parmanand Katara v. Union of India*,<sup>29</sup> the Supreme Court accepted an application by an advocate that highlighted a news item titled

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<sup>27</sup> (1978) 4 SCC 494

<sup>28</sup> (1980) 4 SCC 162

<sup>29</sup> (1989) 4 SCC 286

"*Law Helps the Injured to Die*" published in a national daily, *The Hindustan Times*. The petitioner brought to light the difficulties faced by persons injured in road and other accidents in availing urgent and life-saving medical treatment, since many hospitals and doctors refused to treat them unless certain procedural formalities were completed in these medico-legal cases. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law.

In many other instances, the Supreme Court has risen to the changing needs of society and taken proactive steps to address these needs. It was therefore the extensive liberalization of the rule of *locus standi* which gave birth to a flexible public interest litigation system. A powerful thrust to public interest litigation was given by a 7-judge bench in the case of *S.P. Gupta v. Union of India*.<sup>30</sup> The judgment recognized the *locus standi* of bar associations to file writs by way of public interest litigation. In this particular case, it was accepted that they had a legitimate interest in questioning the executive's policy of arbitrarily transferring High Court judges, which threatened the independence of the judiciary. Explaining the liberalization of the concept of *locus standi*, the court opined:

*"It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or*

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<sup>30</sup> (1981) Supp. SCC 87

*economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him.”*

The unique model of public interest litigation that has evolved in India not only looks at issues like consumer protection, gender justice, prevention of environmental pollution and ecological destruction, it is also directed towards finding social and political space for the disadvantaged and other vulnerable groups in society. The Courts have given decisions in cases pertaining to different kinds of entitlements and protections such as the availability of food, access to clean air, safe working conditions, political representation, affirmative action, anti-discrimination measures and the regulation of prison conditions among others.

For instance, in *People’s Union for Democratic Rights v. Union of India*,<sup>31</sup> a petition was brought against governmental agencies which questioned the employment of underage labourers and the payment of wages below the prescribed statutory minimum wage-levels to those involved in the construction of facilities for the then upcoming Asian Games in New Delhi. The Court took serious exception to these practices and ruled that they violated constitutional guarantees. The employment of children in construction-related jobs clearly fell foul of the constitutional prohibition on child labour and the non-payment of minimum wages was equated with the extraction of forced labour. Similarly, in *Bandhua Mukti Morcha v. Union of*

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<sup>31</sup> AIR 1982 SC 1473

*India*,<sup>32</sup> the Supreme Court's attention was drawn to the widespread incidence of the age-old practice of bonded labour which persists despite the constitutional prohibition. Among other interventions, one can refer to the *Shriram Food & Fertilizer* case<sup>33</sup> where the Court issued directions to employers to check the production of hazardous chemicals and gases that endangered the life and health of workmen. It is also through the vehicle of PIL, that the Indian Courts have come to adopt the strategy of awarding monetary compensation for constitutional wrongs such as unlawful detention, custodial torture and extra-judicial killings by state agencies.<sup>34</sup>

In the realm of environmental protection, many of the leading decisions have been given in actions brought by renowned environmentalist M.C. Mehta. He has been a tireless campaigner in this area and his petitions have resulted in orders placing strict liability for the leak of Oleum gas from a factory in New Delhi,<sup>35</sup> directions to check pollution in and around the Ganges river,<sup>36</sup> the relocation of hazardous industries from the municipal limits of Delhi,<sup>37</sup> directions to state agencies to check pollution in the vicinity of the Taj Mahal<sup>38</sup> and several afforestation measures. A prominent decision was made in a petition that raised the problem of extensive

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<sup>32</sup> (1984) 3 SCC 161

<sup>33</sup> (1986) 2 SCC 176

<sup>34</sup> See observations justifying the payment of compensation for human rights violations by state agencies in the following decisions: *Bhim Singh v. State of Jammu and Kashmir*, (1985) 4 SCC 677; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746; *D.K. Basu v. Union of India*, (1997) 1 SCC 416; Also see: Lutz Oette, 'India's International obligations towards victims of human rights violations: Implementation in domestic law and practice' in C. Raj Kumar & K. Chockalingam (eds.), *Human rights, Justice and Constitutional empowerment* (OUP, 2007) at p. 462-485

<sup>35</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

<sup>36</sup> *M.C. Mehta v. Union of India* (1988) 1 SCC 471

<sup>37</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 750

<sup>38</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 351; Also see Emily R. Atwood, 'Preserving the Taj Mahal: India's struggle to salvage cultural icons in the wake of industrialisation', 11 *Penn State Environmental Law Review* 101 (Winter 2002)

vehicular air pollution in Delhi. The Court was faced with considerable statistical evidence of increasing levels of hazardous emissions on account of the use of diesel as a fuel by commercial vehicles. The Supreme Court decided to make a decisive intervention in this matter and ordered government-run buses to shift to the use of Compressed Natural Gas (CNG), an environment-friendly fuel.<sup>39</sup> This was followed some time later by another order that required privately-run ‘autorickshaws’ (three-wheeler vehicles which meet local transportation needs) to shift to the use of CNG. At the time, this decision was criticized as an unwarranted intrusion into the functions of the pollution control authorities, but it has now come to be widely acknowledged that it is only because of this judicial intervention that air pollution in Delhi has been checked to a substantial extent. Another crucial intervention was made in *Council for Environment Legal Action v. Union of India*,<sup>40</sup> wherein a registered NGO had sought directions from the Supreme Court in order to tackle ecological degradation in coastal areas. In recent years, the Supreme Court has taken on the mantle of monitoring forest conservation measures all over India, and a special ‘*Green bench*’ has been constituted to give directions to the concerned governmental agencies. At present, I am part of this Green bench and can vouch for the need to maintain judicial supervision in order to protect our ecological resources from rampant encroachments and administrative apathy.

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<sup>39</sup> See decision in *M.C. Mehta v. Union of India*, (1998) 8 SCC 648; Also refer: Armin Rosencranz & Michael Jackson, ‘The Delhi Pollution case: The Supreme Court of India and the limits of judicial power’, 28 *Columbia Journal of Environmental Law* 223 (2003)

<sup>40</sup> (1996) 5 SCC 281

An important step in the area of gender justice was the decision in *Vishaka v. State of Rajasthan*.<sup>41</sup> The petition in that case originated from the gang-rape of a grassroots social worker. In that opinion, the Court invoked the text of the *Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)* and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces. Though the decision has come under considerable criticism for encroaching into the domain of the legislature, the fact remains that till date the legislature has not enacted any law on the point. It must be remembered that meaningful social change, like any sustained transformation, demands a long-term engagement. Even though a particular petition may fail to secure relief in a wholesome manner or be slow in its implementation, litigation is nevertheless an important step towards systemic reforms. A recent example of this approach was the decision in *People's Union for Civil Liberties v. Union of India*,<sup>42</sup> where the Court sought to ensure compliance with the policy of supplying mid-day meals in government-run primary schools. The mid-day meal scheme had been launched with much fanfare a few years ago with the multiple objectives of encouraging the enrolment of children from low-income backgrounds in schools and also ensuring that they received adequate nutrition. However, there had been widespread reports of problems in the implementation of this scheme such as the pilferage of foodgrains. As a response to the same, the Supreme Court issued orders to the concerned governmental authorities in all States and Union Territories, while giving

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<sup>41</sup> (1997) 6 SCC 241; See D.K. Srivastava, 'Sexual harassment and violence against women in India: Constitutional and legal perspectives' in C. Raj Kumar & K. Chockalingam (eds.), *Human rights, Justice and Constitutional empowerment* (OUP, 2007) at p. 486-512

<sup>42</sup> (2007) 1 SCC 728

elaborate directions about the proper publicity and implementation of the said scheme.

### **Conclusion: A defence of ‘judicial activism’**

The expansion of ‘judicial review’ (which is often described as ‘judicial activism’) has of course raised the popular profile of the higher judiciary in India. However, arguments are routinely made against the accommodation of ‘aspirational’ directive principles within the ambit of judicial enforcement. There are two conceptual objections against the justiciability to these positive obligations.

The first is that if judges devise strategies to enforce the directive principles, it amounts to an intrusion into the legislative and executive domain. It is reasoned that the articulation of newer fundamental rights is the legislature’s task and that the judiciary should refrain from the same. Furthermore, it is posed that executive agencies are unfairly burdened by the costs associated with these positive obligations, especially keeping in mind that these obligations were enumerated as directive principles by the framers on account of practical considerations. This criticism mirrors the familiar philosophy of ‘judicial restraint’ when it comes to constitutional adjudication.

However, the second objection to the reading in of positive obligations raises some scope for introspection amongst judges. It can be argued that the expansion of justiciability to include rights that are difficult to enforce takes away from the credibility of the judiciary in the long-run. The judicial inclusion of socio-economic objectives as fundamental rights can be



criticised as an unviable textual exercise, which may have no bearing on ground-level conditions. In turn the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary.<sup>43</sup>

The prescription of normative rights always carries the risk of poor enforcement. However, the question we must ask ourselves is whether poor enforcement is a sufficient reason to abandon the pursuit of rights whose fulfillment enhances social and economic welfare. At this point, one can recount Roscoe Pound's thesis on law as an agent of social change. The express inclusion of legal rights is an effective strategy to counter-act social problems in the long-run. At the level of constitutional protection, such rights have an inherent symbolic value which goes beyond empirical considerations about their actual enforcement.<sup>44</sup> The colonial regime in the Indian subcontinent periodically made legislative interventions to discourage retrograde and exploitative social practices such as Sati (immolation of widows), prohibition of widow-remarriage and child marriage. Even though there have been persistent problems in the enforcement of these legislations, in the long run they have played an important part in reducing the incidence of these unjust customs. It is evident that in the short run even the coercive authority of law may not be enough of a deterrent, but in the long run the

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<sup>43</sup> The following article encapsulates the arguments offered against the constitutional prescription of aspirational rights, such as directive principles: Jeffrey Usman, 'Non-justiciable Directive Principles: A constitutional design defect', 15 *Michigan State Journal of International Law* 643 (2007)

<sup>44</sup> For a theoretical defence of bringing social-welfare oriented rights within the purview of 'judicial review', Refer: Mark Tushnet, 'Social Welfare Rights and the forms of Judicial Review', 82 *Texas Law Review* 1895 (2004)

very fact of the continued existence of such authority helps in creating public opinion against the same practices.<sup>45</sup>

In the same way the framers of our Constitution sought to depart from the inequities of the past by enumerating a whole spectrum of rights and entitlements. While the understanding of ideas such as ‘social equality’ and ‘religious freedom’ is keenly contested in the legislative as well as judicial domains, there is no doubt that constitutional rights have been an important tool of social transformation in India. The enumeration of the various civil liberties and protections against arbitrary actions by the state are now identified as core elements of citizenship and violations provoke a high standard of scrutiny both by the judiciary as well as civil society groups. The inclusion of entitlements such as universal adult franchise have greatly reduced the coercive power of casteist and feudal social structures and empowered political parties that represent historically disadvantaged sections such as the Scheduled Castes (SC) and Scheduled Tribes (ST).

Even though practices such as untouchability, forced labour and child labour have not been totally eradicated, our constitutional provisions prohibiting the same are the bedrock behind legal as well as socio-political strategies to curb the same. The Supreme Court of India has further internalized the importance of laying down clear normative standards which drive social transformation. Its interventions through strategies such as the expansion of Article 21 and the use of innovative remedies in Public Interest Litigation (PIL) cases has actually expanded the scope and efficacy of

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<sup>45</sup> See: S.B. Burman, ‘Symbolic dimensions of the enforcement of law’, *British Journal of Law and Society*, Vol. 3, No. 2 (Winter 1976) at p. 204-217

constitutional rights by applying them in previously unenumerated settings. Furthermore, the Courts allow groups and interests with unequal bargaining power in the political sphere to present their case in an environment of due deliberation.

The dilution of the rules of standing among other features has allowed the Courts to recognize and enforce rights for the most disadvantaged sections in society through an expanded notion of ‘judicial review’. Even though the framers of our Constitution may not have thought of these innovations on the floor of the constituent assembly, most of them would have certainly agreed with the spirit of these judicial interventions. With these words, I would like to thank all of you for being patient listeners.

Thank You!

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