

## JUDICIAL ACTIVISM

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### 1. Introduction

The democratic polity runs smoothly when the different organs of the State - the Legislature, the Executive and the Judiciary - play their role within the Constitutional framework, without transgressing their bounds. In particular the judiciary is required to act as a bulwark against excesses that may be committed by the Legislature and the Executive, encroaching on the fundamental rights of the individual. The term judicial activism implies a degree of willingness on the part of judiciary to make significant changes in public policy particularly in policies laid out by the other public institutions and wings of the State and pronouncement of decisions that overrun Legislative and executive policies.

### 2. Scope and Basis for Court's Activist Role

The Supreme Court of India enjoys supremacy and preeminent position in view of the powers of judicial review and power to interpret the Constitution vested in it under the Constitution of India. It is the Supreme Court which has the ultimate say in adjudicating as to whether or not the provisions of the Constitution have been followed or circumvented. It is the interpretative power of the Constitutional provisions that makes the Supreme Court the most powerful body among different organs of the State. Under Article 32(1), the Supreme Court's power to enforce fundamental rights is the widest. There is no limitation in regard to the kind of proceedings in Article 32(1), except that the proceedings must be "appropriate" and the discretion the Supreme Court enjoys enables it to play an activist role. In

*L.Chandra Kumar v. Union of India*, (1997) 3 SCC 261, a Constitution Bench of Supreme Court (Seven Judges) declared that "the power of judicial review is a basic and essential feature of the Constitution which cannot be taken away or abridged by any amendment of the Constitution." Further, Article 141 stipulates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. There are other provisions too in the Constitution which strengthen the role of the Apex Court in the Constitutional Scheme.

These powers provide considerable leeway to the Apex Court to play an activist role and promote judicial activism.

### 3. Self-regulation

The Apex Court has consciously observed self-restraint and self-regulation in relation to (a) political questions (b) legislative powers and (c) discretionary powers of administration. In *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461 (2008-2009), Justice *Dwivedi* observed; "Structural socio-political value choices involve a complex and complicated political process. This Court is hardly fitted for performing that function ....."

Again, in *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, the Supreme Court examined the nature of Presidential power under Article 356 and the scope and judicial review. Justice *Verma* observed: "only cases which permit application of totally objective standards for deciding whether the Constitutional machinery has failed, are amenable to judicial review and the remaining cases wherein there is any significant area of subjective satisfaction

dependent on some imponderables or influences are not justiciable because there are no judicially manageable standards for resolving the controversy and those cases are only subject to political scrutiny and correction.”

#### 4. Tracing the Origins of Judicial Activism

*Golaknath v. State of Punjab*, AIR 1967 SC 1643, (1966) remains a milestone in the Constitutional Jurisprudence of our country when the Supreme Court came to a headlong collision with the Parliament when it held that Parliament does not have any power to abridge or take away any of the fundamental rights from the date of the decision in that case, rejecting the argument advanced on behalf of the Government that Parliament has the power to amend any part of the Constitution including Part-III of the Constitution which included fundamental rights. In *Keshavananda Bharti v. State of Kerala* (AIR 1973 SC 1461) a 13 Judge Bench of Supreme Court with 7 to 6 majority decision held that though the Parliament is vested with power for amending any part of the Constitution but it cannot take away or abridge the basic structure or the basic features of the Constitution, thereby reasserting its position once again.

#### 5. Article 21 : The Sleeping Volcano

(i) Article 21 reads “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Though Article 21 is couched in a negative language, it confers the fundamental right to life and personal liberty. By any standards, these are the most precious fundamental rights and the only place where they appear in the Constitution is Article 21. Nonetheless, Article 21 remained like an innocuous, superfluous provision, more like a sleeping volcano, for almost three decades. The text of Article 21 remaining intact, the

content and scope of Article 21 underwent a sea-change with the activist judicial intervention of the Supreme Court paving way for a new constitutional revolution.

(ii) The *A.K. Gopalan's* case (AIR 1950 SC 27) placed a narrow interpretation on the words “personal liberty” as the majority Court held that Article 22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and 21. This was overruled in *R.C. Cooper v. Union of India* (AIR 1970 SC 564) (*Bank Nationalisation* case, 1970). Finally, the whole gamut of the case law on the subject came to be considered in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, resulting in a progressive and landmark judgement. It held that a law which encroached upon the fundamental right to life and personal liberty guaranteed by Article 21 had to satisfy the requirements of both Articles 14 and 19 and therefore, any such law could not be arbitrary, unfair and unreasonable. Article 21 was thus rejuvenated.

*Bhagwati, J.*, held :-

“The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R.C. Cooper's* Case and our approach in the interpretation of the fundamental rights must now be in tune with that wavelength. .... It is not a valid argument, to say that the expression ‘personal liberty’ in Article 21 must be so interpreted as to avoid overlapping between that Article and Article 19 (1). The expression “personal liberty” in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.”

(iii) **Post - Maneka Era - Expanding Horizons of "life" in Article 21 :**

In a series of Judgements that followed, Supreme Court expanded the scope of 'life' under Article 21 as under :

Right to "life" in Article 21 cannot be restricted to mere animal existence or physical survival. It includes the right to live with human dignity and all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter. The expression 'life' comprehends livelihood and means of livelihood. Right to live includes right to decent environment and pollution free water and air. It includes the protection of person's tradition, culture, heritage and all that gave meaning to a man's life. Social Justice is a device to ensure 'life' to be meaningful and livable. Right to life connotes hygienic conditions in work place and leisure. That which alone can make it possible to live must be declared to be an integral component of the right to live. (*Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746, *State of Maharashtra v. Chandrabhan*, AIR 1983 SC 803, *Ramasharan v. Union of India*, AIR 1989 SC 549, *Shanthistar v. Narayan* (1990) 1 SCC 520, *CPMSS v. State of U.P.*, AIR 1990 SC 2060, *Subhash v. State of Bihar*, (1991) AIR 1991 SC 420, *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922, and *Olga Tellies v. Bombay Municipal Corporation*, AIR 1986 SC 180).

**7. Directive Principles - Status elevated to justiciable rights :-**

In *Air India Statutory Corporation v. United Labour Union*, AIR 1997 SC 645, the Supreme Court relied on Article 21 of the Constitution to declare that the Directive Principles now stand elevated to inalienable fundamental human rights and they are justiciable by themselves.

**7. Expansion of Scope of "State" under Article 12 and its impact.**

A very important power wielded by the judiciary is the power of judicial review of the decisions of Public Authorities. Most of the fundamental rights are available only against the "State" as defined under Article 12 of the Constitution. The decision of Justice *P.N. Bhagwati* in *R.D. Shetty v. International Airport Authority of India*, AIR 1979 SC 1628, acted as a catalyst to judicial activism in an era of ever expanding governmental activities and proliferation of Public Corporations. He adopted the functional test and observed :

"..... Where a Corporation is an instrumentality or agency of Government, it would, in the exercise of its power of discretion be subject to the same Constitutional or Public law limitations as Government."

**8. Intervention in the Realm of Muslim Personal Law - *Shah Bano's case***

The Supreme Court, in *Mohd. Ahmed Khan v. Shah Bano Begum and others*, AIR 1985 SC 945, has held that although the Muslim Law limits the husband's liability to provide for maintenance of the divorced wife to the period of *iddat*, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of *iddat* but if she is unable to maintain herself after period of *iddat*, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure. The Muslim Women (Protection of Rights on Divorce) Act, 1986

annulled this gain, afforded by Supreme Court.

### 9. Independence of Judiciary vis-a-vis the Executive

1993 marked the watershed year in the history of Indian jurisprudence with the pronouncement of the Judgement of the Supreme Court in Advocates-on-Record Association Case, AIR 1994 SC 268. This judgement snatched away from the executive the power of appointment, posting and transfer of judges and vested the same in the judiciary itself. The special reference made to the Supreme Court by President of India on 23-07-1998 in exercise of his powers conferred under Article 143(1) of the Constitution of India resulted only in reaffirmation of the supremacy of the judiciary subject to the condition that the Chief Justice of India is obliged to comply with the norms and requirement of the consultation process with his senior colleagues. (*Special Reference No.1 of 1998 Re. (9 Judges) (1998) 7 SCC 739*).

The post 1993 period noticed greater assertiveness on the part of the Supreme Court in probing corrupt practices in public life notably the *Jain Hawala* case, the Urea Scam, the Fodder Scam etc.

### 10. Relaxation of Locus Standi Principle- A leap forward

From the traditional approach where the courts concede locus standi only to the aggrieved person, now it is held that any public spirited person can also approach on behalf of a socially or economically disabled person to espouse the cause of such disadvantaged sections of the society. In the words of Supreme Court in *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

“Whenever there is a public injury or Public injury caused by an act of omission of the State, or Public authority

which is contrary to the Constitution or law, any member of public acting *bona fide* and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy body or meddlesome interloper .....”

The same principle is reiterated in *Janata Dal v. H.S. Chowdhary*, AIR 1993 SC 892.

As a direct consequence of this concession, there has been a significant expansion in public interest litigation which further brought to focus the activist role of the Apex Court.

### 11. Judicial Activism as reflected in Public Interest Litigation (PIL)

#### (i) Relevance of PIL

The Apex Court has consciously relaxed the *locus standi* principle for accessing justice by the weaker and disadvantaged sections of the society, and in the language of Supreme Court :

“This is absolutely necessary for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the Constitutional objectives, (*SP Gupta and others v. Union of India and others* (7 Judges), AIR 1982 SC 149). Supreme Court emphatically reiterates its approach as under :

“Article 32 does not merely confer power on the Court to issue a direction, order or writ for the enforcement of the fundamental rights but it also lays a constitutional obligation on the Court to protect the fundamental rights of the

people and for that purpose this Court has all incidental and ancillary powers including (the power) to forge new remedies and fashion new strategies designed to enforce fundamental rights. It is in realisation of this Constitutional obligation that this Court has innovated new methods and strategies particularly for enforcing the fundamental rights of the poor and disadvantaged who are denied their human rights and to whom freedom and liberty have no meaning.”, (*Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802).

(ii) As a result of the activist role assumed by Supreme Court, a host of unenumerated human rights and fundamental rights were read into Article 21. Right to life in Article 21 includes right to live with human dignity, right to livelihood and means of livelihood, right to pollution free environment, health care etc. The details are discussed in para 12.

### (iii) Milestone Judgments in PIL

Some of the important judgements under PIL rendered by Supreme Court are :

In human prison conditions : *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675, Horrors of bonded labour : *Peoples' Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473, Release of bonded Labour: *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, Right to livelihood: *Olga Tellies v. Bombay Municipal Corporation*, (1985) 3 SCC 545, Right to human dignity : *Francis Coraile Mullin v. Union Territory of Delhi*, AIR 1981 SC 746 : (*Upendra Bani v. State of U.P.*, (1986) 4 SCC 106), Right to basic needs: *Kishan Patrik v. State of Orissa*, 1989 (1) SCALE 32, Right to be protected from industrial pollution : *M.C. Mehta v. Union of India*, AIR 1987 SC 965, Medical attention to accident victims : *Paraman Katara v. Union of India*, AIR 1989 SC 2039: Right to health care of

workers : *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922, and Ecological imbalance : *Rural litigation and Entitlement Kendre v. State of U.P.*, (1989) Suppl. SCC 504. The list is not exhaustive.

## 12. Unenumerated Fundamental Rights

As a result of the activist role assumed by Supreme Court, a host of unenumerated human rights and fundamental rights were read into Article 21, as under :

### (a) Right to travel abroad:

Forms part of “personal liberty” under Article 21 as recognised by *Maneka's* case.

### (b) Right to live with human dignity

In *Consumer Education and Research Centre and others v. Union of India and others*, AIR 1995 SC 922 (4 Judges), the Supreme Court observed that the aim of social justice is to attain substantial degree of social, economic and political equality which is the legitimate expectation. Social security, just and humane conditions of work and leisure to workman are part of this meaningful right to life and to achieve self expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilised living while sharing according to the capacity, social and cultural heritage.” (Para 20).

Right to human dignity implies the right of a person not to be subjected to ‘bonded labour’, (*Bandhu Mukthi Morcha v. Union of India*, AIR 1984 SC 802 para 10), or to unfair conditions of labour even without minimum wages, (*Peoples Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473), and includes the right of a bonded labour to rehabilitation after release, (*Neeraja v. State of M.P.*, AIR

1984 SC 1099 paras 1, 5 and 11). The right to life embraces not only physical existence but also the quality of life and for residents of hilly areas, access to road is access to life itself, (*State of Himachal Pradesh v. Umed Ram*, 1986 (1) SCALE 182). The right to live with human dignity is a fundamental right. It is incumbent upon the State to provide at least the minimum conditions ensuring human dignity in the “Care Homes” maintained by it, (*Vikram Dev Singh Tomar v. State of Bihar*, AIR 1988 SC 1782).

**(c) Right to livelihood**

A five Judge Bench of the Supreme Court ruled that the word ‘life’ in Article 21 includes ‘right to livelihood’ also. The Court held that the right to livelihood was an important facet of the right to life as no person can live without the means of livelihood. While agreeing that the right to livelihood is included in Article 21, the Court held that it can be curbed or curtailed by following just and fair procedure (*Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180).

**(d) Right to Health Care of Workers**

The Supreme Court held that “the right to health to a worker is an integral part of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which workers would lead life of misery. Facilities and opportunities as enjoined in Article 38 should be provided to protect the health of the workman. Continued treatment while in service or after retirement is a moral, legal and constitutional concomitant duty of the ‘employer and the State’. Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21; read with Articles 39(c), 41 and 43 of Constitution and make the life of the workman meaningful and purposeful with dignity of person.” (*Consumer Education and Research Centre v.*

*Union of India* (AIR 1995 SC 922 (4 Judges))).

**(e) Right to Education**

In a milestone judgment in *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666, popularly known as Capitation fee case, the Supreme Court held that the right to education is a fundamental right under Article 21 of the Constitution, which cannot be denied to a citizen by charging capitation fee. The right to education flows directly from right to life. Charging capitation fee for admission to educational institutions is illegal and violative of Article 14.

In *Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, the Supreme Court was asked to examine the correctness of the decision given in *Mohini Jain’s* case, (1992) 3 SCC 666. The private Managements pleaded inability to run the colleges as the economics do not work out. The Court partly overruled *Mohini Jain’s* case and held that the right to free education is available only to children upto 14 years of age. Private institutions are allowed subject to regulation, so as to prevent commercialising education. 50% of seats in professional colleges will be filled by candidates prepared to pay higher fees but selection will be on merit basis. Free seats will be filled in by Government or University.

**(f) Right to Medical Aid to Accident Victims**

Held that it is the professional obligation of all doctors whether Government or private, to extend medical aid to the accident victims immediately to preserve life without waiting for legal formalities to be complied with by the Police under Cr.PC (AIR 1989 SC 2039).

**(g) Rights to Prisoners and Under-trials**

**(i) Right to Bail:**

Refusal to grant bail in a murder case

without reasonable ground would amount to deprivation of personal liberty under Article 21, *Babu Singh v. State of U.P.* (AIR 1978 SC 527). An undertrial prisoner is entitled to the trial on presumption of innocence (AIR 1980 SC 1632 P. 26).

(ii) **Right to Free Legal Aid:**

There are two ingredients of a right of appeal : service of a copy of the judgement to prisoner in time to enable him to file appeal and provision of free legal service to a prisoner who is indigent. These are State responsibilities under Article 21 (*M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548). Failure to provide free legal aid vitiates trial (*Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401).

(iii) **Right Against Solitary Confinement:**

Prison authorities do not have the power to put a prisoner under death sentence to solitary confinement. Solitary confinement denies camaraderie with fellow prisoners and hence Article 21 is attracted. Solitary confinement is permissible only under valid law (*Sunil Bhatra (I) v. Delhi Administration*, AIR 1978 SC 1575).

(iv) **Right to Speedy Trial:**

Right to speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21. Court ordered release of undertrials against bond, (*Hussainara Khatoon (I) v. Home Secretary*, AIR 1979 SC 1360). Detention of under-trial prisoners for a period longer than what they would have been sentenced to, if convicted, is illegal. All such prisoners were directed to be released (AIR 1979 SC 1369 ; AIR 1979 SC 1377).

(v) **Right of a Detenu**

It is imperative that immediately after a person is taken into custody in pursuance of a detention order, the members of his

household must be informed, in writing (AIR 1990 SC 1216; AIR 1982 SC 710). Rights of a detenu under preventive detention are drawn not only from Article 22 but also from Article 14, 19 and 21 (*Additional Secretary v. Gadia*, (1991) 1 SCJ 200, Para 7).

(vi) **Right Against Hand-cuffing:**

Hand cuffing is unfair under Article 21, (*Khedat Mazdoor Chatna Sangath v. State of M.P.*, AIR 1995 SC 31). The routine resort to hand-cuffs and irons bespeaks a barbarity hostile to the Indian goal of human dignity and social justice (*Sunil Bhatra (II) v. Delhi Administration*, AIR 1980 SC 1579 at 1595).

(vii) **Right to Camaraderie with Family:**

The right of the detenu to have interview with his lawyer and members of the family is part of his "personal liberty" guaranteed by Article 21 (*Francis Coralie v. Union of Territory of Delhi*, AIR 1981 SC 746).

(h) **Right to Privacy:**

The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 (*R. Rajagopal v. State of Tamilnadu*, AIR 1995 SC 264).

### 13. **Activism, Restraint and Abdication**

It is true to say that judicial activism received considerable media attention and public adulation. Just as there are standard bearers of judicial activism, there are also advocates of judicial restraint. The votaries of restraint argue strongly that the judiciary should limit its role in policy making and particularly to minimise its interference with the policies of the other branches of Government. Activism, they feel, is illegitimate because the Court is a relatively undemocratic institution. Justice *H.R. Khanna*, a former Judge of Supreme Court

says "If other organs or wings of State transgress the limits of their authority, one can always approach the Courts to seek redress. If the judiciary itself by act of judicial despotism tries to take over and transgress that limit where would the aggrieved parties actually approach and seek the judicial redress? ..... of all the different types of despotism, the judicial despotism ..... is more irrational, illogical and inexcusable.", (*"The Role of Judiciary"* by H.R. Khanna at page 26 of the Book *"Judging Judges"*, 1999 Edition). In *ADM Jabalpur v. Shukla*, AIR 1976 SC 1207) during Emergency, Supreme Court held that a petition of *Habeas Corpus* is not maintainable during Emergency proclaimed by President under Article 359(1). It would be apposite to recollect that this was an instance of judicial abdication as Article 32 as well as 226 did not get suspended even during proclamation of Emergency.

#### 14. Conclusion:

The assertive and innovative measures initiated by the Supreme Court towards attaining constitutionally ordained objectives which is otherwise known as judicial activism has furthered the cause of social justice. But one should not be oblivious of the realities of life that the judiciary alone cannot underwrite the burden of social reform and social justice and it will be hypocrisy to expect all solutions for social evils through judiciary. Judiciary is not the panacea for all the basic maladies affecting either the society or the other organs of the State. The judiciary can however be trusted to be circumspect and intervene in the functions assigned to other wings of the Government as and when there is a manifest error or abuse or misuse of power.

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