JUDICIAL ACTIVISM IN INDIA WITH REFERENCE TO ARTICLE 21 OF THE CONSTITUTION

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MASTER OF LAWS

Supervised by

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SUPERVISOR CERTIFICATE

It is to certify that Ms. Farhana Newaz is pursuing Master of Laws (LL.M.) from National Law University, and has completed her dissertation titled *"Judicial Activism in India with reference to Article 21 of the Constitution"* under my supervision. The research work is found to be original and suitable for submission.

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DECLARATION

I, Farhana Newaz, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled "JUDICIAL ACTIVISM IN INDIA WITH REFERENCE TO ARTICLE 21 OF THE CONSTITUTION" is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

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PREFACE

With the independence and adoption of the Constitution of India the Political revolution was complete but it was the beginning of a new socio-economic revolution for creating a new nation based on new values. Our Constitution, unlike other Constitutions does not provide only for the structure of governance but also provides for the realignment of diversified social forces to build-up a new born democratic republic on the constitutional values of liberty, equality, fraternity and justice to all - social, economic and political. The world history is full of several revolutions but planning and executing a new revolution through a constitutional mechanism is a unique achievement of India.

Judiciary in the country devised as an arm of social revolution by the Constitution makers, by its activism has infused a new life in certain article. In the days ahead, because of the doctrine of basic structures, the judiciary is going to assume a very significant role in its interpretation process. In recent past, the apex court in several cases has also displayed new political jurisprudence in the matters of constitutional adjudications. Judicial Law making with complex variables has been acclaimed by modern constitutionalism. Today, a substantial volume of laws flows from the decisions of the higher courts. Under a number of circumstances a judge is compelled to lay down a new rule by interpretation, leaving policy to the elected organs of democracy. Justice Bhagwati observed, 'judicial activism is now a central feature of every political system that rest adjudicatory power in a free and independent judiciary'.

Judicial activism has started growing from a power to right. With the courts exercising its power in remedying the grievances of many; gradually the exercise of the power in this field has expanded. Judicial activism has an inherent activity of self propagation. The Supreme Court's repeat performances have made it an integral part of Indian Legal system. It is called public Interest Litigation. The Supreme Court became free from the bonds of consecrated principles of precedents and procedures. It moved like a knight errant roaming at will in pursuit of its own ideal of beauty and goodness. The methods were not subtle; the limits were not inhibiting and the judicial capacity unbounded in the chosen area of the operation.

If the Judiciary adopts a 'dynamic' rather than an 'activist' role, it will be able to discharge its functions properly in tune with the spirit of the Constitution.

It is only because of judicial activism that multiple rights could be implicitly mentioned in Article 21 of the Indian Constitution which was not expressly mentioned.

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TABLE OF ABBREVIATIONS

1.	**&**	And
2.	**AIR**	All India Reporter
3.	**Anr.**	Another
4.	**Art.**	Article
5.	**Chap.**	Chapter
6.	**Cl.**	Clause
7.	**Co.**	Company
8.	**E.g.**	Example
9.	**Ed.**	Edition
10.	**Govt.**	Government
11.	**HC**	High Court
12.	**Hon'ble**	Honourable
13.	**Ibid**	Ibidem
14.	**LJ**	Law Journal
15.	**Ltd.**	Limited
16.	**NCT**	National Capital Territory
17.	**NGO**	Non-Governmental Organization
18.	**Numb**	Number
19.	**Ors**	Others
20.	**Para**	Paragraph
21.	**PIL**	Public Interest Litigation
22.	**pp.**	Page
23.	**Pvt.**	Private
24.	**Reg.**	Regulation
25.	**SC**	Supreme Court
26.	**SCC**	Supreme Court Cases
27.	**SCJ**	Supreme Court Journal
28.	**SCR**	Supreme Court Reporter
29.	**Sec.**	Section
30.	**SLP**	Special Leave Petition
31.	**Supp.**	Supplementary
32.	**Supra**	Above
33.	**V.**	Versus
34.	**Vip**	See
35.	**Vol.**	Volume
36.	**WP**	Writ Petition

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CHAPTER-I

INTRODUCTION

1.1. Introduction

Under the Indian Constitution, the State is under the prime responsibility to ensure justice, liberty, equality and fraternity in the country. State is under the obligation to protect the individual's fundamental rights and implement the Directive Principles of State Policy. In order to restrain the State from escaping its responsibilities, the Indian Constitution has conferred inherent powers, of reviewing the State's action, on the courts. In this context, the Indian judiciary has been considered as the guardian and protector of the Indian Constitution. Considering its constitutional duty, the Indian judiciary has played an active role, whenever required, in protecting the individual's fundamental rights against the State's unjust, unreasonable and unfair actions/inactions.

Black's Law Dictionary defines judicial activism as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent".

Judicial Activism happens when the courts have power to review the State action. Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void, if it is in contravention with the Indian Constitution. The power of judicial review is the basic structure of the Constitution.

In the recent times, the Judiciary has assumed considerable significance due to its inherent functions of adjudicating matters. The conflict arisen between the Executive and the Legislature are also being sent to the higher judiciary and the decision given by the higher judiciary are deemed to be final and binding by everyone. In the present study the role of judiciary as one of the effective organ of the government to protect the life or personal liberty of the persons is chosen for discussion and study.

"Though the role of judiciary is said not to make law but only to interpret and declare it. But, in an ever-growing and fast-changing societal set-up, the burden falls on the judiciary to mould the law to ensure its relevance in a changed scenario since amendment of the law may be a time-consuming process. So, regardless of the appearance of neutrality, the values and beliefs of the judiciary play a major role in the life of the nation. While deciding the matter, the judges have to pour life into the law when the occasion demands by making new inroads in law. Common law could not have grown if judges had hesitated to enter the arena of judicial activism. In the sense, the judiciary can actively push things in a certain direction."

In the past few years, in India, the Hon'ble Supreme Court and various High Courts have pronounced judgments that are accredited to be a break from the past precedents. These judgments are seen to reflect the changes in the society and tend to give new directions for action by the executive and the legislatures, which is termed as "Judicial Activism".

In India the judiciary has developed the fundamental rights jurisprudence while giving the liberal interpretation to right to life or personal liberty under Article 21 of the Constitution. It is the active role played by the judiciary which led to implicitly includes multiple rights under Article 21 which has not been specifically mentioned in the Indian Constitution such as right to live with human dignity, right to livelihood, etc.

1.2. Research Problem:

In view of the controversy veering around judicial activism the problem is to clarify and study in proper perspective the idea of judicial activism. In this study the case of judicial activism will be appreciated so as to assess the constructive role of judiciary in interpretation of right to "life or personal liberty."

1.3. Objectives:

"The objective of the present study is to analyze the judicial pronouncements in relation with the interpretation of life or personal liberty enshrined in Article 21 of the Constitution and to show how the judiciary has played creative and constructive role in protecting the liberty of the person. It will also establish how the judiciary has widened the scope of the protection of life or personal liberty by dynamic, innovative and most timely interpretation of the expressions so as to make our constitutional protection attuned with the requirement of globalization of the human rights."

1.4. Scope and Limitation:

"The scope of study which limited the study of different dimensions of right to life or personal liberty guaranteed under Article 21 of the Constitution. The main emphasis will be limited to judicial interpretation of right to life or personal liberty."

1.5.Hypotheses:

1) The term "Judicial activism" is further expansion of well known judicial creativity. Though initially objected to by the supporters of other branches of the government, it has come to stay and is being appreciated as saviour of fundamental rights and the constitutional objectives.

2) " Judicial Activism has served the great cause of the protection of life or personal liberty enshrined in Article 21 of the Constitution and through creative interpretation of procedure established by law it has expanded the scope of Article 21 beyond imagination serving the rights of life and liberty of the people in right direction with great acclamation."

1.6. **Research Questions:**

1. Whether judiciary is working within acceptable parameter of judicial creativity or it has crossed its limits?

2. Whether judicial activism assert the cause of democracy by ensuring life and personal liberty to the persons?

1.7. **Research Methodology:**

The Researcher will utilize both qualitative and quantitative data collection tools, focusing mainly on the qualitative part and will adopt a doctrinal mode of research for this study. The data

and laws relevant to this topic shall be collected through different books and journals. The main emphasis will be put on the decisional law in relation to the research topic along with critical appraisal. In addition to the said sources, the other sources of data collection will also form part of study eg. different articles available in law journals, the newspapers and internet regarding this topic.

1.8. **Research Design:**

The researcher has divided the study into six chapters which are as follows-

Chapter I-

> "The very first Chapter titled *"Introduction"* gives the brief introduction to the topic of the study. It also includes the aims and objectives, scope and limitation, significance, research questions and methodology."

Chapter II-

"The second Chapter titled *"Meaning, concept and scope of judicial activism"* elucidates the meaning of the term 'judicial activism' and elaborates the concept and scope of judicial activism. It also explains the origin of judicial activism."

Chapter III-

"The third chapter titled *"Judicial Activism and Judicial Restraint"* enumerates the two concepts judicial activism and judicial restraint distinctly. Judicial restraint is considered to be the flipside of judicial activism."

Chapter IV-

"The fourth chapter titled *"Judicial Activism under Article 21 of the Indian Constitution"* elucidates the active role of judiciary using the weapon of judicial activism to implicitly declare certain rights to be fundamental under the umbrella of Article 21."

Chapter V-

"The fifth chapter titled *"Critical Appraisal of Judicial Activism"* points out the critical appraisal faced by the judiciary due to the active role played by it."

Chapter VI-

" The sixth chapter titled *"Conclusion"* concludes the study of judicial activism in India with reference to Article 21 of the Constitution and suggests certain measures to maintain harmony and judicial pronouncements more acceptable."

CHAPTER-II

MEANING, CONCEPT AND SCOPE OF JUDICIAL ACTIVISM

"The term 'judicial activism' was coined for the first time by Arthur Schlesinger Jr. in his article 'The Supreme Court: 1947' published in Fortune magazine in 1947. The history of judicial activism could be dated back to the celebrated case of Marbury v. Madison in the year 1803 when Chief Justice Marshall evolved the concept of judicial review."[1]

2.1. Meaning of Judicial Activism:

[1]Essays for Competitive Exams, ' Essay-Judicial Activism in India', Friday, March 24,2017, file:///C:/Users/asus/Documents/dissertation/Essay%20-%20Judicial%20Activism%20in%20India%20_%20SBI%20Clerk%202018%20Study%20Materials%20_%20Gr8AmbitionZ.html

"Judicial activism refers to a philosophy of judicial-decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions. The Constitution has prescribed specific functions to the three wings of the government i.e. the executive, the legislature and the judiciary. It is when the judiciary with a view to perform its duties effectively steps into the shoes of the executive and the legislature, the concept of judicial activism comes into being.[2] The real connotation of judicial activism will be discussed in the subsequent chapter. Here different views on judicial activism are discussed."

Meaning of Judicial Activism Given in Dictionaries:

The term "Judicial Activism" is defined by various scholars in different ways. "According to Merriam-Webster's Dictionary of Law, judicial activism" is *"the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent".*[3]

According to Black's Law Dictionary, judicial activism is -

"a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."[4]

"The two definitions given above show different approaches about judicial activism. The Merriam-Webster's dictionary expresses a tinge of judicial performance of onerous duty to protect the liberty of the people whereas the Black's Law Dictionary puts main emphasis on the personal views of judges about public policy."

2.2. Views ABOUT JUDICIAL ACTIVISM BY VARIOUS JUDGES, AUTHORS AND ACADEMICIANS:

[2] ibid.
[3] Webster's 20th century Dictionary.
[4] Ed. By Garner A. Bryan, Black's Law Dictionary (West Group Publication, 7th ed., 2002)

"Judicial activism signifies an activism in judicial process, further implying judicial pronouncements on different intricate issues whereby new legal philosophy can be created."

Different views have been expressed on different times by various judges, authors and academicians about judicial activism which are given below-

1) According to *Justice Mr. Satyabrata Sinha*[5]:

   Justice Sinha views judicial activism as the felt necessity of the time requiring activist role by the judges. Justice Sinha elaborates his point of view by observing that 'Judicial activism has become necessitated because of change in moral values, change in political scenario, and increases in the field of public interest litigation'.

2) According to *Justice M.N. Rao*:[6]

   Justice M.N. Rao views judicial activism from the point of view of critics of judicial activism. He points out "A very common criticism we hear about judicial activism is that in the name of interpreting the provisions of the constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges metamorphose into legal principles and constitutional" values. "One other facet of this line of criticism is that in the name of judicial activism the theory of separation of powers is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them. Critics openly assert that the constitution provides for checks and balances in order to pre-empt concentration of power by any branch not confided in the Constitution."

Mr. M.N. Rao further points out:

". . . Subsequently, it is now unanimously accepted, must be eschewed in the judicial process. But this is easier said than done. Often times, private notions of judges take the shape of legal principles."

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[5] Justice SatyabrataSinha, Judge, High Court, Calcutta, "Judicial Activism: Its Evolution and Growth," The Administrator, Vol. XLII April – June 1997 pp. 51-56

[6] www.legal.com

"Without resorting to a preference in favour of any particular value choice and thereby inviting criticism of entering into the constitutionally forbidden area of judicial activism, the court can always draw lines at new angles by dexterously resorting to innovative interpretative processes. . ."

Justice Rao while narrating the critique of judicial activism as overstepping or transgressing the constitutionally provided limit also tries to defend judicial activism through innovative interpretative processes.

3) According to *Professor A. Lakshminath*,[7] has opined thus:

"The terms judicial activism and judicial restraint take on vastly different meanings depending upon who is using them. First, they can refer to the way in which the court makes its decisions. If its opinions move slowly from one case to the next, deciding disputes on narrow grounds of technicalities rather than on constitutional principles, and if it appeals to the authority of state decisions and precedent, then the Court is believed to be exercising judicial restraint. On the other hand, if the Court leaps into new territory by enunciating the widest decision possible in a particular case, even though the cases could be decided on the narrow grounds, then it is said to be indulging in judicial activism . . ."

"Another set of meanings of "judicial activism" and "judicial restraint" concern the relationship of the court with the other branches of the national government. If the Supreme Court refuses to accept anything that smacks of political question or if it defers regularly to the other branches of government claiming that a particular petitioner either has not exhausted his remedies or must go to the legislature for relief, then some people will call that judicial restraint. On the other hand, if the Court becomes a principal legislator in the government process, and if its decisions pronounce it fit to assume this role, then others will call that judicial activism . . .

"A heavy responsibility is cast upon Judges to evolve law in consonance with the changing needs and aspirations of the society and to serve the cause of social justice. Judicial activism is the founding stone of this approach."

[7] Professor A. Lakshminath, Dr. B.R. AmbedkarCollehe of Law, Andhra University, Vishakhapattanan, "Judicial activism and judicial restraint,"

Dr. Lakshminath views judicial activism vis-à-vis the judicial self restraint and tries to reconcile judicial activism in view of changing social needs and requirement of social justice.

4) According to Professor P.M. Bakshi:[8]

"Judicial activism does not carry any statutory definition. In a rough manner, it is understood as connoting that function of the judiciary which represents its active role in promoting justice". "What is "active" could itself be a matter of difference of opinion or at least the expression of different shades of view, with varying emphasis."

"In one sense one can say that the court displays activism, when it affords a positive relief. In this sense, activism is not a new concept. Instead of granting substituted remedy such as damages, the court would be assisting the parties in realizing their legitimate expectations as per contract. . ."

"But the modern understanding of activism is on different lines. The jurist, speaking of judicial activism in the modern context, thinks more of public law than of private law. Justice between individuals is not his main concern. His business is to explore how justice to the individual or group of individuals or to society in general is ensured through the active participation of the court, particularly as against public agencies. . ."

"Should court interfere in every case of (alleged) injustice or unjust action or inaction perpetrated by any other agency or should they go strictly according to legal principles. . ."

"The traditional answer would be that a court is expected to administer the law as laid down by the competent authority and is not to act according to what to regards as the ideal solution, if such a solution is not consistent in law. . ." Secondly, there is the aspect of interpretation of statues. Notwithstanding the existence of the massive treaties on the subject, the interpretation of statues still retains a good deal of latitude for the individual judge.

"Finally, there are areas of jurisprudence where there is neither statue law governing the matter, nor a define case law. Here the judge is as free as a bird in the sky to begin with. But this is only

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8 P.M. Baxi, "JusicialActicism" Some Reflections, The Administrator, Vol. XLII, April – June 1997 pp. 5.

to begin with, because every a bird in the sky comes home to roost, and the judge notwithstanding the freedom will have to examine carefully which course he will select. . .”

“A judge who happens to select a bold course of action is generally understood as representing judicial activism. There is nothing wrong in the judge taking or preferring one course of action to another. Of course, if the number of cases in which such activism shown by the judiciary in a particular branch of the law is large enough, then naturally activism in that sphere becomes routine. . . ’’

Mr. PM Baxi has elaborately discussed judicial activism from different point of view and has tried his best to defend judicial activism in marginal unprovided cases and in cases where the requirement of justice necessitates to act them actively.

5) Defence of judicial activism by *Prof. Upendra Baxi*-

Prof. Upendra Baxi is the staunch defender of judicial activism in his famous Introduction to KK Mathew’s book on Democracy, Equality and Freedom accepting the law creating role of judiciary has asserted that the Indian Supreme Court has demonstrated its creativity through justifying that it not only creates law, it also creates constitution. In his book The Indian Supreme Court and Politics, Dr. Baxi has pointed out the political significance of the role of the Supreme Court and spoken of hard reality that “we may or may not want a government by judiciary; but, in certain respects, we have already. We may, or may not, want justices the power to make law or even the constitution; but they have it and, what is more they exercise it readily and regularly.”[9]

DEFINITION OF JUDICIAL ACTIVISM BY HON’BLE JUDGES:

6) Views of *Justice P.N. Bhagwati* [10]on Judicial Activism-

“One of the most creative judges on the Indian Supreme Court Bench, to be long remembered for his decision in Maneka Gandhi v. Union of India, Justice PN Bhagwati views judicial activism as follow”:

[9] The Indian Supreme Court and Politics, (1980) XI.

"Judicial activism is now a central feature of every political system that vests adjudicatory power in a free and independent judiciary." Judicial activism can take many forms. But "technical" and "juristic" are two important forms of activism and no legal system can survive in modern age without providing some scope to the judge to exercise these two of judicial activism. Beyond these two forms is the third form of activism which is termed by Justice Bhagwati as social activism.

Justice Bhagwati clearly delineates the area of judicial activism in its different forms, that is to say technical judicial activism, juristic judicial activism and social activism. To him, "the term judicial activism is not a term of fashion or populism but a term signifying an important source of judicial power, which judges should use for realization of willed result."

"Social activism as analyzed by Justice Bhagwati is a most complex and challenging task facing the modern judiciary today, particularly in developing countries like India. The modern judiciary cannot afford to hide behind notions of legal justices and plead incapacity when social justice issues are addressed to it. The challenge is an important one, not just because judges owe a duty to do justice with a view to creating and moulding a just society, but because modern judiciary can no longer obtain social and political legitimacy to go beyond legal justice and meet the challenge of making a meaningful contribution to the issue of social justice. Moreover, social activism is the key to meet this challenge. In a country like India where issues of poverty, "exploitation, and differentiation are regularly coming before the courts, the judges cannot turn away pleading legal formalism or lack of capacity from deciding such issues and still claim that courts stand for a lot of citizens" . . .

This is precisely what happened when Apex court of USA during the New Deal Era "struck down legislation pertaining to the working hours of men, women and children" and other similar legislations which were enacted to protect the welfare of the working class. Interestingly, those who were supporting such social legislation intended to bring about social justice and criticized the justices who nullified such liberal legislation for their judicial activism, pleading for judicial restraint.

"In the course of time, however, it became impossible for the Supreme Court of USA to maintain that it provided for justice to the large bulk of the American population if it could not sustain the

validity of such liberal legislations. In America, there was great hue and cry. Even the talk of court fighting started in Presidential Circle. The Judges themselves moulded themselves and heard the requirement of the time and a very well-known dictum came into existence-switch in time saved the nine. During 1940's, the Supreme Court upheld the progressive measures of the government and heralded a new era during 1950s. In a nutshell, the negative activism of the Supreme Court of 1930's was converted into judicial activism with innovative interpretation during 1950's. The most innovative, creative and transformative decision came by the unanimous Supreme Court in Brown v. Board of Education, segregation in schools was declared unconstitutional. American cases like the Dred Scott and Plessy because in the changed circumstances it would have been impossible for the court to maintain its credibility with the people if it adhered to the doctrines enunciated in the earlier decisions. The Supreme Court in Brown case had to legitimatize its rhetoric that it provided equal justice to all citizens, including blacks. Thus, the judges' function requires them to go beyond legal formalism and attend to the greater demand that requirements of constitutionalism make of them."

Further, Justice Bhagawati believes:

"The task of the judges takes them deeper into future to make decisions which will affect sometimes even political development and therefore in all humility they have to be aware of social needs and requirements and economic and political compulsions and to recognize changes taking place in a fast developing society and to develop and adopt law to the changing needs and requirements of the people. In addition, on each occasion when they do so they are expected to provide justifying reasons which must satisfy not only themselves but also critics and jurists, nay the society itself, for what they decide".

"Sensitivity and understanding of social needs, social requirements and political compulsions as the first and accountability in the form of providing reasons, satisfying critics, jurists and the society itself as the second were the two major characteristics of activism. This kind of activism neither rests on the theory of judicial function assigning unrestricted and uninhibited power to judges nor approves the slot machine method of judicial decision making. It rests on a truth that lies midway between these two extremes . . . and constitutional interpretation to the demands of social justice. This is not the kind of activism that is unbridled where the judicial outcome

depends on the sole subjectivity and the values of the judge rather this is the kind that is directed towards advancing constitutional values. . .”

6) According to *Justice V.K. Krishna Iyer*[11]

“The term ‘judicial activism’ is thus very slippery and difficult to define. Various groups differ in their concept of activism. In one sense every judge is, or at least should be, an activism so long as one decides, in whatever way one may choose to decide. Once remarked that every judge was an activist either on forward gear or the reverse gear.”

Writing on “Reform of Judicial System”, Justice Krishna Iyer has opined:[12]

“None can progress unless he dreams. None can seek reform unless he imagines. But hardly there can be a progress in dreams and reform in imagination. None else can an access to such dreams and imaginations. To reform, one needs a scientific theory with an applied science. One without other is infirm. We have philosophy and ideals on the reform of judicial system in abundant measure, but rarely any scientifically analyzed proposals with a practical outlay.”

He also finds:

“. . . This dissatisfaction and discontentment against the prevailing judicial system is writ large. With entire vehemence, defects and deficiencies are being focused. Only here lies the honor of the galaxy. There has unfortunately been very insignificant Endeavour to plan to remedy or reform. A plight of the ideal system is in captivity of rhetoric words, which has never a landing on the ground. Every idealist senses a substantial gap between a system of his design and one which is prevalent, but has no definite device to fill in.”

On “Restructuring of the Judicial System,” Justice Krishna Iyer writes:[13]

“Recommendations put forth through law reforms, have invariably been for minor repair or dilapidated system. As yet there has been no plan under recommendation for complete

[11] Justice V.R. K. Krishna Iyer, “Judicial Activism”, Chapter 6, Justices versus Justice, Taxman & Allied Services, p. 35.
[12] “On reform of Judicial System,” Justices versus Justice, Chapter 8, Taxmen & Allied Publishers, Bombay, p. 63.
[13] “On reform of Judicial System,” Justices versus Justice, Chapter 8, Taxmen&Allied Publishers, Bombay, p. 64.

renovation of restructuring. Anxiety for a change is tremendous, but practical and workable outlay is in nobody's design."

Also, Justice V.R. Krishna Iyer has found:

"The fundamental fallacy in our justice policy is the indifference to the poor, many thereby denying Gandhi, and the exclusion of garibihatao from our legal process, thereby making a gimmick of people's justice. Our court system has a tourist department design of social justice – as if people mattered least in the plan of judicial justice and him who can pay get the best service. Or is there no plan at all?"

Justice Krishna Iyer has very rightly emphasized the need for change in the ethos of the judiciary and pointed out further:

"The same apparatus which administered colonial justice, the same precedent of imperial legal culture and the same bar and bench ethos bequeathed when British quit these die hard intellectual factors, have created barriceds against implementation of social justice, imperative which are creedal to our Constitution."[14]

This appears to be the main problem of not only the Indian judiciary but also various other institutions of the Indian bureaucracy. According to justice Krishna Iyer,

"In the prevelant system, a bar and bench have imperial ethos and no other substantial relationship."[15] These factors have no place in the apparatus of his contemplation.

Justice Krishna Iyer is not a common judge, but held to be a judge of the common man. His first love and perhaps last has been with those five words "WE THE PEOPLE OF INDIA." Ideal justice system according to him is as follows:

"We the people of India" – five words…our justice system must be people oriented. Our justice administration must have people participation. Equally clearly our legal order must be geared to community goods."[16]

[14] "On reform of Judicial System," Justices versus Justice, Chap. 8, Taxmen &Allied Pub.Bombay, p. 64.
[15] Ibid., p. 65

It is therefore true that the system of justice ought to be geared to "we the people of India", especially because it is a constitutional mandate and not only what is recommended by respected and renowned jurists or political leaders. But unfortunately, this has not been the case so far. The colonial system of justice has been perpetuated even after disaster has not received due attention of the ruling elite or political parties in power.

7) According to *Mr. J. S. Verma*, the Former Chief Justice of India,[17]Defines Judicial Activism as "the process by which new juristic principles are evolved to update the existing law, to bring it in conformity with the current needs of the society, and thereby, to sub serve the constitutional purpose of advancing public interest under the Rule of Law".[18] Undoubtedly this definition gives a clear picture of the judicial activism from a jurist point of view, but the present trend of judicial activism also defies this definition. Many a time in recent past judges in the name of enforcing rule of law has ried to enforce rule of judges. Judicial Activism can be best described as creative interpretation of law to meet the requirements of justice.

8) According to *Shri. Tarkunde,*[19] Former Chief Justice of India holds that

"judicial activism is an effort to fill gaps left by the legislature. What we see today is not judicial activism but equity judges making their presence felt. He further states that the recent importance of judiciary is due to the shortcoming of the executive and not so far of legislature."

9) According to *Shri Shanti Bhushan*[20] Former Law Minister is reported to have called what is termed judicial activism, "a responsible exercise of powers and performance of duties by the judiciary." However, he feels that "even the powers of judiciary should not be absolute and its functioning should be monitored by an independent body which has the confidence of the people."

10) Justice *Ranganath Mishra,*[21], feels that

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[16] Ibid., p. 68.
[17] Sathe S.P., Judicial Activism In India,(Oxford University Press, 2002)
[18] Verma J.S., New Dimensions of Justice (Universal Law Publishing Co. Pvt. Ltd., 2000 Ed.)
[19] "Executive Has Not Been Implementing the Laws",Rashtriya Sahara, November 1996, p. 30 – 31.
[20]Dr NeelanVerma and GianeshwarDayal, "Regime of Law?",Rashtriya Sahara, Nov. 1996, p. 22
[21] "You cannot stretch the system beyond the limits," Rashtriya Sahara, November 1996, p. 30 – 31.

"the talk of judicial activism is due to the failure of the executive to come to its expectations." Further, he believes that there is system failure which needs to be pulled up, made to work and the judiciary has to act as a balancer.

2.3.ORIGIN OF JUDICIAL ACTIVISM:

"The origin of judicial activism through judicial review can be traced back during the Stuart period of 1603-1688 under the unwritten Constitution of Britain. Judicial review was asserted for the first time through the activism of Justice Coke in the year 1610. While evolving the judicial review principles, Chief Justice Coke asserted that if a law made by the Parliament violated the principles of 'reason' and 'common law' then the courts might adjudge and review it as void. This theory of Coke's was repeated by Sir Henry Hobart in 1615 and by Sir John Holt in 1702. The power of judiciary to review the acts of the British Parliament under 'reason' and 'common law' were asserted by the British Chief Justices[22]".

2.3.1. JUDICIAL ACTIVISM IN INDIA:

"Judicial Activism in India means the power of the Supreme Court and the High Court but not the sub-ordinate courts to declare the laws as unconstitutional and void if it infringes or if the law is inconsistent with one or more provisions of the constitution. The courts do not suggests any alternative measures while declaring such law as unconstitutional and void to the extent of such inconsistency". "According to SP Sathe, a court giving a new meaning to the provision so a to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court"[23].

2.3.2. EVOLUTION OF JUDICIAL ACTIVISM IN INDIA:

"The Supreme Court of India started off as a technocratic court in the 1950's but slowly started acquiring more power through constitutional interpretation and its transformation into an activist court has been gradual and imperceptible. The roots of judicial activism in fact are to be seen in court's early assertion regarding the nature of judicial review."

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[22] Drishti, *"Separation of Powers and Judicial Activism in India",* November 13,2015.
[23] Judicial Activism in India, Satyaranjan Purushottam Sathe, Oxford University Press, 2002.

"In India, the judicial activism can be positive as well as negative. It is said to be positively activist when a court engaged in altering the power relations to make them more equitable and it is said to be negatively activist when a court is using its ingenuity to maintain the status quo in power relations. This is an elaboration of Cordozo's oft quoted dictum regarding 'felt necessities of the times'."

"Judicial Activism connotes the assertive role played by the judiciary to force the other organs of the government to discharge their assigned constitutional functions towards the people. It has held reinforcing the strength of democracy and reaffirms the faith of people in rule of law. Judicial activism may have been force upon the judiciary by an insensitive and unresponsive administration that disregards the interest of the people and that the nation does not suffer because of the negligence on the part of the executive and legislature. So in India, there has been an evolution of judicial activism through various judicial pronouncements". Various landmark judgments where judicial activism has been evolved are as follows-

a) *AK Gopalan* v. *State of Madras*[24]

A significant decision was observed in this case as it represented the first case where the court meaningfully interpreted and examined the key fundamental rights enlisted in the constitution including Articles 19 and 21. In this case, a writ of habeas corpus was filed and the contention was whether under this writ and the provisions of The Preventive Detention Act, 1950, there was a violation of his fundamental rights i.e. Articles 13,19,21 and 22 of the Indian Constitution. There was a contention on behalf of the counsel of the petitioner that the right to movement was a fundamental right under Art 19 and therefore the defense counsel must prove that the preventive detention law was a reasonable restriction as per the five clauses of Art 19(2).

The judge restricted the scope of fundamental rights and by reading them in isolation of Articles 21 and 22 that provided guidelines for preventive detention and foreign precedents like cases of UK and US were used in limiting the scope of Article 21. Justice Kania said that "the term due process prevented the courts from engaging in substantive due process

[24] AIR 1950 SC 27

analysis in determining the reasonableness of the level of process provided by the legislature."

"Fazl Ali's dissent broadly construed the provision 'procedure established by law' in Article 21 to encompass higher principles of natural law and justice, and not just statutory law. He said that the Indian Constitution intended to incorporate the same language as the Japanese Constitution and encompass 'procedural due process' conception, he still cited to American , British and foreign precedent to support a much more expanded view of due process. They were based on the principles of Natural Justice. Fazal Ali highlighted a series of US decisions; the US Supreme Court recognized that the word law does not exclude certain fundamental provisions. Drawing on British and US legal sources he argued for incorporating procedural due process into article 21, guided by principles of Natural Justice in accordance with universal, transactional and legal norms."

"In this case two major points were held that Articles 19, 21 and 22 are mutually exclusive. Art 19 was to not apply to a law affecting personal liberty to which Art 21 applies. The restrictions under Article 19 applied only on free people. Unless the state arrested a person for making a speech, holding an assembly, forming an association or for entering a territory, the arrest had to be EXAMINED under article 21. A 'LAW' affecting life and liberty could not be declared unconstitutional merely because it lacked natural justice or due procedure. Hence article 21 provided no immunity against competent legislative action."

b) *Kharak Singh* v. *State of Uttar Pradesh*[25]

The petition under Art 32 of the Indian Constitution was filed where it challenged the constitutional validity of Chapter 20 of the UP Police Regulations and the powers conferred upon police officials by its provisions on the ground they violate the rights of the citizens guaranteed by Articles 19(1)(d) of the Indian Constitution. On the basis of the accusations made against him, he had police constables entering his house and shout at his door, walking him up in the process and on a number of occasions they had compelled him to accompany them to the station and had also put restrictions on him leaving the town.

[25] AIR 1963 SC 1295

The judges made a breakthrough while interpreting and finding the connection between Articles 19 and 21 remarking that if a person's fundamental right under Art 21 is infringed the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art 19(2) so far as the attributes covered by Art (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does not amount to a reasonable restriction within the meaning of Art 19(2) of the Constitution but in this petition no such defence is available, as admittedly there is no such law. So, the petitioner Kharak Singh could legitimately plead that his fundamental rights, both under Articles 19(1)(d) and 21, were infringed by the State and hence, on these grounds the petitioner Kharak Singh was "entitled to issue a writ of mandamus directing the respondent-State of UP not to continue to visit his house".

In this case, "the majority adopted a restrictive conception of liberty that only extended to direct infringement of the freedom of movement, and refused to recognize the existence of a right to privacy. However this theory which was the minority judgement of J Subba Rao went on to become the majority judgement in Satwant Singh Sawhney v. Union of India"

c) *Maneka Gandhi* v. *Union of India*[26]

In this case, the SC restored the citizen's faith in the judiciary. The three landmark judgements were depicting a great change in the thought process of the judiciary and had set the stage for Judicial Activism to be introduced and the SC not only broadened the meaning of "personal liberty" but also adopted the theory of "due process" in "procedure established by law". The court acknowledged that when a law restricts personal liberty, a court should examine whether the restriction on personal liberty also imposed restrictions on any of the rights given by Art 19. The court held that personal liberty includes "a variety of rights which go to constitute the personal liberty of man", in addition to those mentioned in Art 19, and that one such right included in "personal liberty" is the right to go abroad. The court also held the according to the "audi alteram partem theory", impounding Mrs. Gandhi's passport without giving her a hearing

[26] (1978) 2 S.C.R. 621

violated procedure established by law. These were the principles of natural justice and fair procedure. The court had to decide whether Mrs. Gandhi was entitled to a hearing before her passport was impounded. It was determined that as there was no post decisional hearing, the impounding was considered to be unconstitutional and void.

"Amongst the fundamental rights, Articles 14, 19 and 21 of the Indian Constitution comprising the "golden triangle" have been invoked most often to declare legislation or arbitrary state action invalid. In this case, there was a conflict whether the right to travel abroad formed a right to personal liberty under Art 21. The SC departed from the stereotyped notion and held that fundamental rights form an integrated scheme under the constitution. Emphasizing the need to read Part 3 of the constitution in a holistic manner, the SC said that the mere fact that a law satisfied the requirements of one fundamental right did not exempt it from the operation of other fundamental rights. In a majority judgement, the seven-bench stated that any procedure established by law under Art 21 would have to be "fair, just and reasonable" and it differed from the Satwant Singh case by establishing that even in presence of a law, an arbitrary law will not be considered. The SC after this judgement became the watchdog of the constitution instead of supervisors.[27]

2.4. SCOPE OF JUDICIAL ACTIVISM UNDER INDIAN CONSTITUTION:

Judiciary is performing laudable job "by expanding the scope of right, life and liberty" but sometime it appear to interfere with the domain of other branches of government. The minute study of the most of the cases revealed that judiciary activizes "the other branches of the government to perform their duties" i.e. to say it inspires legislation or performance of administrative actions where necessary. It performs activist role where the other branches are inactive and thereby set spice the expectations of the people for whom the constitution is made and through channelized satisfactory answer serves the cause of avoiding reactions and regulations.

[27] Drishti Das, "Separation of Powers and Judicial Activism in India", November 13, 2015.

CHAPTER- 3
JUDICIAL RESTRAINT AND JUDICIAL ACTIVISM

Judicial restraint and judicial activism are product of different approaches to role of judiciary in asserting the role of judiciary as its power to judicial review. Judicial review is the power associated with judiciary to declare the acts done by the other two branches of the government to be ultravires/unconstitutional. The idea of judicial restraint and judicial activism shows the difference of degree in "exercise of the judicial power". It is related with the two classic approaches towards the role of judiciary in society. The former is declaratory theory which is also known as Blackstonian theory. It allows the judicial role only to find the law and declare it.

The other theory is creative theory which allows long range of judicial creativity through interpretation of statutes and other sources of law. In order to give legitimacy to the role of judges they themselves search the declaratory theory. They enjoy credibility and confidence of the people because they apply law and not create law that ensures objectivity in role of judiciary. With the change of time, the judicial creativity became imperative and judges themselves created certain principles to regulate their power of judicial review. It is known as judicial self-restraint. "Judicial self-restraint envisages that while exercising the power of judicial review", judiciary exercises self restraint- it gives due credence to the decisions taken by the legislative and executive branch and declare their actions unconstitutional only when it becomes very necessary in performance of the judicial duty to vindicate the constitutional imperative and rights of the people. The self imposed restraint of judiciary adds credibility and inspires public confidence in the judiciary. To this end Henry J. Abraham has very succinctly set out 16 maxims of judicial self-restraint which are as follows:

1. The court has to decide only in definite "case" or "controversy".
2. Parties bringing suit must have standing.
3. The court does not render advisory opinion.
4. Specific constitutional issue has to be raised.
5. The court shall not decide constitutionality at the instance of one who has availed himself a benefit.
6. Local remedies must have been exhausted.
7. Question raised must be substantial and not trivial.
8. Superior court views question of law and not question of fact.
9. In the UK before 1966, the House of Lords felt "bound by its own decisions", but the US Supreme Court had never held itself absolutely bound by precedent.
10. Court appears inclined to defer political questions.
11. "There is always a presumption in favour of constitutionality."
12. Judicial parsimony is case of alternate ground.
13. The court does not impute ill motives to lawmakers.
14. In case of unconstitutionality, courts should try to confine it to particular section or sections.

15. Much deference is to be paid to the legislature as an unfair, unjust and injudicious law may be constitutional.
16. Protection against abuses of legislature lies at the polls and not in the courts.

But while interpreting the law, the judiciary cannot work satisfactorily by exercising judicial self-restraint. The need of hour, the felt necessities of times, the new challenges emerging in new situations require that judiciary should play some activist role and be assertive in exercise of judicial power beyond the exercise of judicial self-restraint. This assertiveness involves "judicial creativity with a view to act judiciary as vehicle of national life" to act as voice of the constitution. It involves judicial creativity. Judicial creativity is a step further from the judicial self-restraint. Judicial creativity is now well accepted norms of judicial role in society. As Professor Gray pointed out – since judiciary is the highest and authoritative interprator of law, the judicial decisions are themselves law and other are the sources of law. As Dr.Upendra Baxi pointed out in his grand introduction to KK Mathew's Lecture in the last quarter of twentieth century there are few who will dispute that judges create law and Indian judiciary has demonstrated that it has not created only ordinary law but also the constitutional law.[28]

Further the judicial creativity has been given added dimension of judicial activism to fulfill the aspirations of the people, objectives of the constitution and to meet the end of justice when the other two branches of government have miserably failed. "The inaction on the part of legislative and executive branches of the government provide instant confidence and legitimacy to the exercise of judiciary's review power more actively". Thus, judicial activism comes in light as further extension of judicial creativity. The Black's Law Dictionary very well explains judicial activism as follow-

"*Judicial activism is judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of the appellate judges. It is commonly marked by decisions calling for social engineering and occasionally the decisions represent intrusions in the legislative and executive matters."*

[28] Upendra BAxi, Introduction to KK Mthew, On Democracy, equality and freedom, Eastern Book Co, Lucknow, 1971,1

The legitimacy of judicial activism is inspired by the confidence and support of the people at large. Justice Jackson very aptly pointed out-

> The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands.[29]
>
> In a nutshell, judicial self-restraint and judicial activism are the two sides of the same coin to be viewed differently. Sometimes, it appears that the same judge may be a well known restraintvist judge in some cases while activist in some other cases. Judicial activism is viewed in context of the performance of the other two branches of the government. As RA Posner points out – "Judicial activism properly so called is a view of the capacity and responsibility of courts related to other agencies of the government".[30]

3.1. ROLE OF JUDICIARY – A MARCH FROM POSITIVISM TO JUDICIAL ACTIVISM:

"The role of Indian judiciary during the first two decades was most positivist as pointed out by Edward Mc Whinney in his famous book "Judicial Review" published in 1969[31]. But the study herewith reveal how the Indian judiciary has transformed itself from positivist to the activist court."

"The Indian Constitution, declared in 1950, typically obtained its standards from Western models – parliamentary vote based mostly system and a free legal from England, the elemental Rights from the Bill of Rights, and political orientation from the govt. structure within the U.S. Constitution, and also the Directive Principles from country Constitution. These advanced standards and foundations were non inheritable from the West and then forced from higher than on a semi-medieval, semi-in reverse society in Asian country. The Indian legal, being a wing of the State, has consequently assumed a a lot of extremist half than its U.S. partner in making an attempt to vary Indian culture into a gift day one, by implementing the innovative standards and thoughts within the Constitution through Court selections. Within the early time of its creation the Indian Supreme Court was to a good extent reformist and not

[29] Robert H. Jackson, The Supreme Court in the American System of Government (Harvard University Press, Cambridge 1955) 23.
[30] Richard A Posner, Overcoming Law ,Universal Law Publishing Co Pvt Ltd, 2007, 5
[31] Edward Mc Whinney, Judicial Review 4th edn ,University of Toronto Press,1969

extremist. Therein amount, which may extensively be same to be up to the time Justice Gajendragadkar aroused perceptibly judge of Asian country in 1964, the Indian Supreme Court took once the traditional British approach of Judges being inactive and not extremist. There wasn't terribly several law creating judgments therein amount."

"Equity Gajendragadkar, World Health Organization aroused perceptibly judge in 1964, was famed to be star work. A significant part of the Labor Law which he created was judge made law e.g. that if a laborer in an industry was looked to be rejected for offense there must be an enquiry held in which he should be given a chance to protect himself.[32]"

"In 1967 the Supreme Court in *Golakh Nath v. State of Punjab*[33], held that the essential rights in Part III of the Indian Constitution couldn't be revised, despite the fact that there was no such confinement in Article 368 which just required a determination of two third greater parts in both Houses of Parliament. Consequently, in *Keshavananda Bharti v. State of Kerala*[34], a 13 Judge Bench of the Supreme Court overruled the Golakh Nath choice yet held that the essential structure of the Constitution couldn't be changed. 4With reference to what decisively is implied by `basic structure' is as yet not clear, however some later decisions have attempted to clarify it. The point to note, notwithstanding, is that Article 368 no place says that the fundamental structure couldn't be changed. The choice has in this way for all intents and purposes altered Article 368. An extensive number of choices of the Indian Supreme Court where it has assumed a lobbyist part identifies with Article 21 of the Indian Constitution, and subsequently we are managing it independently."

"The activist Court in its new role bimanual down several opinions to form basic human rights important to the underprivileged and vulnerable sections; of the community and assure them social, economic and political justice; By such expansive interpretation it recognized the rights of beneath trial prisoners, jail inmates, and kids beneath misbehaviour acts and re-examined the validity of the provisions of the penal law enabling death sentence, and recognized the correct to a driver trial, the correct to; associate degree freelance judiciary, and therefore the right to economical and honest governance etc. Thus, the rights given by the Constitution; were thus, given most expanse therefore on create them real expressions of liberty,

[32] http://www.grkarelawlibrary.yolasite.com/resources/FM-Jul14-LT-2-Jyoti.pdf
[33] AIR 1967 SC 1643: (1967) 2 SCR 762
[34] (1973) 4 SCC 225

equality, and justice. The preamble of the Constitution now not remained a mere decoration, but, became the supply of the essential structure of the Constitution and therefore the State actions may well be scrutinized not just in terms of their compatibility with specific provisions however in terms of; their compatibility with the broad principles of constitutionalism like school of thought."

"The Indian Supreme Court and therefore the High Court's distended judicial access in furtherance of its activist role by entertaining letters from persons inquisitive about opposing banned acts, permitting social activist organizations or people to require up; cudgels on behalf of the poor and underprivileged sections World Health Organization possessed neither information nor resources for activating the legal process;; and allowing voters to talk on behalf of an outsized unorganized by; silent majority against unhealthy governance, wrong development, or environmental degradation. The wide definition of 'life' and 'liberty' as taken by the Courts helped numerous varieties of problems to return before the Courts. The doors opened by the Constitutional Courts in pursuance of its determination to stay open the legal method a lot of democratic and democratic junction rectifier to the PILs being employed generously for numerous varieties of relief, like for safeguarding the fundamental; rights of beneath trial prisoners in jails, melioration of the conditions of detention in protecting homes for ladies, for medical check-up of remand home inmates, prohibition of traffic in ladies and relief for his or her victims, for the discharge of guaranteed labour, social control of different labour laws, e.g. full and direct payment of wages to staff or prohibiting the use of youngsters in construction work, acquisition of cycle-rickshaws by authorized rickshaws pullers, relief against protective violence to ladies prisoners whereas in police lock up, for environmental protection, for social control of gender equality and protection from molestation and therefore the likes. One might notice the activist role of the judiciary leading to law-making conjointly. There was no law to manage the adoption of youngsters by foreigners."

"In *Lakshmi Kant Pandey v. Union of India*[35] , the Supreme Court laid down directions for regulating such adoptions and these directions have been in force for more than nineteen years. Similarly when women's organization approached the Supreme Court with a request to lay down guidelines as to how sexual harassment of working women could be combated, the Supreme

[35] AIR 1987 SC 232

Court in *Vishaka v. State of Rajasthan*[36], responded by laying down guidelines and also declaring them to be the law made by it under Article 141 of the Constitution."

"The Indian Supreme Court while liberally interpreting the rights could not stop at merely those rights that had been recognized as judicially enforceable rights known as civil liberties. The Constitution of India includes socio-economic rights such as the right to primary education (Article 45), the right to adequate means of livelihood [Article 39(1) or the right to work (Article 41) in the directive principles of state policy contained in Part IV of the Constitution. These social and economic rights have been recognized in the Universal Declaration of Human Rights [Article 23(1)], right to work [Article 23(3)] right to just and favorable remuneration; (Article 26) right to education and in the International Covenant of Economic, Social and Cultural Rights [Article 7(a) right to fair wage and Article 6 right to work]. It was generally felt and it is true also that these rights cannot be effectively made enforceable through judicial process. They require legislative and executive action."

"But, the Supreme Court declared the right to education *Unni Krishnan v. State of A.P.*[37], the right to shelter *Olga Tellis v. Bombay Municipal Corporation*[38] and the right to childhood *M.C. Mehta v. State of Tamil Nadu*[39] , as being part of the fundamental right to life and personal liberty guaranteed by Article 21 of the Constitution. The Court by incorporating the above rights within the fundamental right to life and personal liberty made them enforceable thanks to the activist role of the judiciary."

CHAPTER-4

JUDICIAL ACTIVISM AND EXPANDING HORIZON OF ARTCLE 21

"The study in this chapter will demonstrate how the protection of life and personal liberty given a narrow meaning in early times has been given a wide, comprehensive and most expansive

[36] (1997) 6 SCC 241: AIR 1997 SC 3011
[37] (1993) 1 SCC 645
[38] AIR 1986 SC 180: (1985)35CC 545
[39] (1996) 6 SCC 756: AIR 1997 SC 699

meaning to cover all facets of right to live with human dignity which is very essential of all the rights."

"Article 21 of the Indian Constitution provides for protection of life and personal liberty." It reads:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

"Though Article 21 starts with a negative word but the word 'No' has been used in relation to the word deprived. The object of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law. It clearly means that this fundamental right has been provided against state only." The limited scope of life or personal liberty was very well explained by AV Dicey in relation to England.**According to him**, "*The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification*."

"It gives the limited scope of personal liberty to be safeguarded by the State. To start with the Indian Supreme Court interpreted Art. 21 in such a way in *AK Gopalan v. State of Madras* so as to provide the safeguards of Art.21 only against the executive wing of the State leaving aside the legislative wing to prescribe any procedure to restrict the life or personal liberty. That is to say "procedure established by law" was interpreted to be any procedure laid down by the Parliament or State legislature irrespective of its arbitrariness. The judicial attitude got changed sufficiently in backdrop of the experiences upto the decision of *Maneka Gandhi v. Union of India* which brought great revolution in the areas of protection of life or personal liberty extending the protection against the unjust, unreasonable and arbitrary procedure. Though the judiciary has been conscious of the protection of right to life or personal liberty from the very beginning but the post 1975 emergency has brought great change in judicial outlook asserting its power of review most actively.The post-emergency period (1977-98) is known as the **period of Judicial Activism** because it was during this period that the Court's jurisprudence blossomed with doctrinal creativity as well as processual innovations."

"A great transformation in the judicial attitude towards the safeguard of personal liberty has been noticed after the horrible experiences of the infamous 1975 national emergency. It marks how A.K. Gopalan v. State of Madras taking restrictive protection to life or personal liberty got transformed in Maneka Gandhi v. Union of India which is the most landmark decision in the history of Indian Supreme Court. It expanded the horizon of rights under Art. 21. The judicial pronouncement before the case of Maneka Gandhi Vs Union of India (1978) were not satisfactory in providing adequate protection to the 'right to life and personal liberty' guaranteed under Article 21 of the constitution of India . Prior to Maneka Gandhi's decision, as has been shown earlier, Article 21 guaranteed the right to life and personal liberty only against the arbitrary action of the executive and not from the legislative action."

4.1. INNOVATIVE INTERPRETATION OF LIFE OR PERSONAL LIBERTY-

The discussion hereafter will reveal how the restrictive meaning of the expressions 'life' or 'personal liberty' have been abandoned and expansive and alive meaning has been given to it.

4.1.1. PRIOR TO MANEKA GANDHI'S CASE[40]-

"The meaning of the word's personal liberty came up for consideration of the Supreme Court for the first time in *AK Gopalan* v. *Union of India*[41]. In that case the petitioner, A.K. Gopalan, a communist leader was detained under the Preventive Detention Act, 1950. The petitioner challenged the validity of his detention under the Act on the ground that it was violative of his right to freedom of movement under Art. 19(1)(d) which is the essence of personal liberty guaranteed by Art.21 of the Constitution. The arguments for him were that the words 'personal liberty' includes the freedom of movement also and therefore the Preventive Detention Act, 1950 must also satisfy the requirement of Art 19(5). In other words, the restrictions imposed by the detention law on the freedom of movement must be reasonable under Art 19(5) of the constitution. Art. 19(1) and Art.21 should be read together because Art. 19(1) deals with substantive rights and Art.21 deals with procedural rights. In Art 21 'procedure established by law' means 'due process of law' of the American constitution which includes the principles of natural justice and since the impugned law does not satisfy the requirement of due process it is

[40] Maneka Gandhi v. Union of India, AIR 1978 SC 597
[41] AIR 1950 SC 27

invalid. Rejecting both the contentions, the Supreme Court by the majority held that the **'personal liberty' in Art.21 means nothing more than the liberty of the physical body, that is, freedom from arrest and detention without the authority of law.** The Supreme Court interpreted the 'law' as 'state made law' and rejected the plea that that by the term 'law' in Art.21 meant not the state made law but jus natural or the principle of natural justice. Fazal Ali, J however in his dissenting judgment held that the Act was liable to be challenged as violating the provisions of Art.19. He gave a wide and comprehensive meaning to the words 'personal liberty' as consisting of freedom of movement and locomotion. Therefore, any law which deprives a person of his personal liberty must satisfy the requirements of Arts.19 and 21 both."

"But this restrictive interpretation of the expression 'personal liberty' in Gopalan's case was not followed by the Supreme Court during the second decade of the functioning of the constitution." A shift in judicial outlook is discernible in *Kharak Singh v. State of U.P.*[42] The Supreme Court held – "The 'personal liberty' is not only limited to bodily restraint or confinement to prisons only, but is used as a compendious term including within itself all the varieties of rights which go to make up the personal liberty of a man other than those dealt within Article 19(1). In other words, while Art.19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Art.21 takes in and comprises the residue."

4.1.2. NEW DIMENSION GIVEN TO THE INTERPRETATION OF ARTICLE 21 IN MANEKA GANDHI V. UNION OF INDIA:

Having had the experience of a quarter of century of the functioning of the constitution and observing the curtailment of personal liberty, especially during the 1975 emergency, the Supreme Court adopted an activist and innovative interpretation of Article 21.

"In *Maneka Gandhi v. Union of India*,[43] the Supreme Court departed from its earlier stand taken in AK Gopalan's case and widened the scope of the words 'personal liberty' considerably." Speaking for the apex court Bhagwati J. observed:

[42] AIR 1963 SC 1295
[43] AIR 1978 SC 597

"The expression 'personal liberty' in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19."

"The Court expressed the view that the provision relating to fundamental rights should be interpreted widely." To quote Justice Bhagwati again:

"The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

"The Supreme Court abandoned the restricted meaning of the expression 'procedure established by law' adopted in **Gopalan** to mean any procedure, whatsoever laid down by competent legislature. It also changed the outlook taken in Gopalan that Art.21 is to be interpreted in light of the language used in that article itself. The Supreme Court brought a revolutionary change in the interpretation of the 'procedure established by law'. It interpreted this expression in such a way as to widen the protection of Article 21 even against the legislature. The Supreme Court evolved the approach of a golden triangle i.e. to interpret Article 21 in light of Article 14 and 19. It established that a law prescribing procedure for depriving a person of personal liberty under Article 21 have to meet the requirement of Article 21 and also of Art.19 as well as of Art.14. By doing so the Supreme Court imported the principle of reasonableness which is an essential element of equality or non arbitrariness pervading Article 14. The procedure was held to fulfill the requirement of 'right, just and fair' and not 'arbitrary, fanciful or oppressive'. The requirement of procedure being 'right, just and fair' brought the principle of 'natural justice', i.e. 'fair play in actions'. In Maneka Gandhi, the Supreme Court of India established an appropriate relationship between Article 14, 19 and 21. It heralded a new era of expansive interpretation of procedure established by law by indirectly incorporating the requirement of American due process which was advertently avoided by the framers of the constitution. In post Maneka Gandhi v. Union of India, the Supreme Court has read the requirement of Article 21 itself and particularly in the word 'law' the conversion of procedure established by law into 'due process of law'. The opinion of Chandrachud J. in Maneka Gandhi to mean procedure in Article 21 to be 'fair, just and reasonable, not fanciful, oppressive or arbitrary' and the opinion of Krishna Iyer J. to attribute meaning to 'law' in Article 21 'as reasonable law and not any enacted piece' gave

new dimensional expansion to the scope of Article 21 in coming cases. Thus in Sunil Batra v. Delhi Administration, Krishna Iyer J. clarified that True, our Constitution has no 'due process' clause…but…after Cooper and Maneka Gandhi, the consequence is the same. He asserted that the ultimate outcome is that Article 21 is counter-part of procedural due process of the American constitution." The views taken by Chandrachud J. in Maneka Gandhi were reiterated by D. A. Desai J. in Sunil Batra case. Said, the learned judge:

"The word 'Law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive."

"The new era heralded by the Supreme Court in Maneka Gandhi blossomed in many many cases coming afterwards. In *Jolly George Varghese* v. *Bank of Cochin*[44], Krishna Iyer J. further explained and attached a new dimension to the interpretation of Article 21 in light of Article 14 and 19 in context of most valuable right of human dignity." To quote Krishna Iyer J:

"The high value of human dignity and the worth of human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under the law which is fair, just and reasonable in its procedural essence."

"The new trend went further and the protection of life or personal liberty was given to ensure also the substantive safeguards. Thus in *Mithu* v. *State of Punjab*[45], the Constitution Bench unanimously invalidated Section 303 of Indian Penal Code read with Section 354(3) of Cr.P.C. treating it unconstitutional and void being violative of Articles 14 and 21. It is to be noted that Section 303 of IPC providing for mandatory death sentence for murder committed by a life convict is a substantive law."

The journey of judicial activism in relation to Article 21 starting from Maneka Gandhi has covered a very wide range of protection given to a person under Article 21, that is to say, protection against executive as well as legislature, protection against not only procedural law but also substantive law and so on so forth.

[44] AIR 1980 SC 470
[45] AIR 1983 SC 473

"The study hereafter will reveal how the Judiciary has expanded the scope of protection of life and personal liberty covering a variety of and innumerable rights interpreted in light of Directive Principles of State Policy, International expanding horizon of the protection of liberty and protection of the life and liberty not only of Indian citizens but also the foreigners coming to India."

4.2. JUDICIAL ACTIVISM RECOGNISING MULTIPLE RIGHTS UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION:

The study hereafter will make clear that the judiciary has interpreted Article 21 to cover multiple rights directly emerging from Article 21 and also being accepted as penumbral rights. The different rights covered under Article 21 are discussed below.

4.2.1. Right to livelihood

4.2.2. "Right to live with human dignity"

4.2.3. "Right to travel abroad".

4.2.4. Right to health and medical assistance.

4.2.5. Right to electricity.

4.2.6. Right to shelter.

4.2.7. Right to member of protective homes.

4.2.8. Right to sleep.

4.2.9. Right to education.

4.2.10. Right to get pollution free air and water.

4.2.11. “Right to speedy trial”.

4.2.12. “Right to free legal aid.”

4.2.13. “Right against solitary confinement.”

4.2.14. Right against inhuman treatment.

4.2.15. Right against handcuffing.

4.2.16. Right to food.

4.2.17. Right against delayed execution.

4.2.18. Right to privacy.

4.2.19. Protection of the right of foreigners.

4.2.20. Right to minimum wages.

4.2.21. Right against sexual harassment.

4.2.1. RIGHT TO LIVELIHOOD:

1) In *Olga Tellis* v. *Bombay Municipal Corporation,*[46]

“This case which is popularly known as ‘pavement dwellers case’ a five Judges Bench of the Court finally ruled that the word ‘life’ in Art 21 includes ‘right to livelihood’ also.”

The court held: “*It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means*

[46] AIR 1986 SC 180; (1985) 3 SCC 545

of livelihood. In view of the fact that Articles 39(a) and 41 require the State to secure to the citizen an adequate means of livelihood and the right to work, it would be sheer pendentary to exclude the right to livelihood from the content of the right to life."

"In this case the petitioners had challenged the validity of Sections 313, 313-A, 314 and 497 of the Bombay Municipal Corporation Act, 1888 which empowered the Municipal Authorities to remove their huts from pavement and public places on the ground that their removal amounted to depriving them of their right to livelihood and hence it was violative of Art 21. While agreeing that the right to livelihood is included in Art 21 the Court held that it can be curbed or curtailed by following just and fair procedure. It was held that the above sections of the Bombay Municipal Corporation Act were constitutional since they imposed restrictions on the right of livelihood of pavement and slum dwellers in the interest of the general public."

2) In *Sodan Singh* v. *New Delhi Municipal Committee,*[47]

"The five Judges Bench of the Supreme Court has held that the right to carry on any trade or business is not included in the concept of life and personal liberty. Art 21 is not attracted in a case of trade and business. The petitioners, hawkers doing business of the pavement of roads in Delhi, had claimed that the refusal by the Municipal authorities to them to carry on business of their livelihood amounted to violation of their right under Art 21 of the Constitution. The Court distinguished the ruling of the Court in Olga Tellis case and held that it is not applicable in this case."

3) In *D.K. Yadav* v. *J.M.A. Industries,*[48]

"The Supreme Court has held that the right to life enshrined under Art 21 includes the right to livelihood and therefore termination of the service of a worker without giving him reasonable opportunity of hearing is unjust, arbitrary and illegal. The procedure prescribed for depriving a person of livelihood must meet the challenge of Art 14 and so it must be right, just and fair and not arbitrary, fanciful or oppressive."

4) In *LIC of India* v. *Consumer Education & Research Centre,*[49]

[47] AIR 1989 SC 1988
[48] (1993) 3 SCC 258

"It has been held that the "right to life and livelihood" as interpreted in Olga Tellis v. Bombay Municipal Corporation[50] and several other cases by Supreme Court includes the 'right to life insurance policies of LIC of India' and it must be within the paying capacity and means of the insured."

4.2.2. RIGHT TO LIVE WITH HUMAN DIGNITY:

1) In *Maneka Gandhi* v. *Union of India*,[51]

"In this case the Court gave a new dimension to Art 21. It has been held that the right to 'live' is not merely confined to physical existence but it includes within it ambit the right to live with human dignity."

2) In *Francis Coralie* v. *Union Territory of Delhi*,[52]

"Elaborating the view of Maneka Gandhi's case, the court held that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The right to 'live' is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also 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 and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human beings."

3) In *People's Union for Democratic Rights* v. *Union of India*,[53]

"The Supreme Court held that non-payment of minimum wages to the workers employed in various Asiad Projects in Delhi was a denial to them of their right to live with basic human dignity and violative of Art 21 of Constitution. J.Bhagwati speaking for the majority held that the rights and benefits conferred on the workmen employed by a contractor under various laws are

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[49] (1995) 5 SCC 482
[50] AIR 1986 SC 180: (1985) 3 SCC 545
[51] AIR 1978 SC 597
[52] AIR 1981 SC 746
[53] AIR 1982 SC 1473

clearly intended to ensure basic human dignity to workmen and if the workmen are deprived of any of these rights and benefits, that would clearly be a violation of Art 21."

4) In *Chandra Raja Kumari* v. *Police Commissioner Hyderabad,*[54]

The court held that *"the right to live includes right to live with human dignity or decency and, therefore, holding of beauty contest is repugnant to dignity or decency of women and offends Art. 21 of the Constitution."*

4.2.3. RIGHT TO TRAVEL ABROAD:

1) In *Satwant Singh* v. *Assistant Passport Officer, New Delhi*[55],

"The Supreme Court further extended the scope of this Article and held that the '*right to travel abroad'* was part of a person's 'personal liberty' within the meaning of Article 21 of the Constitution."

3) In *Mrs. Maneka Gandhi* vs . *Union of India (UOI) and Anr*[56]

"The Supreme Court decided the following issues (i) Constitution - validity of provision Articles 14, 19 and 21 of Constitution of India and Section 10 (3) (c) of Passports Act, 1967 - validity of Section 10 (3) (c) challenged - procedure in Article 21 means procedure which conforms to principles of natural justice - power conferred under Section 10 (3) (c) not unguided and it is implied in it that rules of natural justice would be applicable - held, Section10 (3) (c) not violative of Article 21. (ii) Right of dignity - right to live is not merely confined to physical existence and held that, it includes within its ambit right to live with human dignity. (iii) Inter-relationship - principle of reasonableness provided under Article 14 must apply to procedure as contemplated under Article 21. Article 21 controlled by Article 19 also in case a law does not infringe Article 21 even then it has to meet challenges of Articles 14 and 19. (iv) Post-decisional hearing - petitioner's passport impounded and not given pre-decisional notice and hearing. The Government contended that rule *audi alteram partem* must be excluded because it may have frustrated very purpose of impounding passport and also stated that the concept of post-

[54] AIR 1998 AP 302
[55] AIR 1967 SC 1836
[56]AIR1978SC597

decisional hearing developed to maintain balance between administrative efficiency and fairness to individual. The Supreme Court stressed that fair opportunity of being heard following immediately Order impounding passport would satisfy mandate of natural justice."

4.2.4. RIGHT TO HEALTH AND MEDICAL ASSISTANCE:

1) In *Parmananda Katara* v. *Union of India*,[57]

The Court held that- "It is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under CrP.C. Art 21 of the Constitution casts the obligation on the State to preserve life."

2) In *Vincent Parikurlangara* v. *Union of India*,[58]

The Supreme Court held that- "the right to maintenance and improvement of public health is included in the right to live with human dignity enshrined in Art 21. A healthy body is the very foundation of all human activities. In a welfare State this is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health".

3) In *Paschim Bang Khet Mazdoor Samiti* v. *State of W.B.*,[59]

The Supreme Court following Parmananda Katara's rule held that-"the denial of medical aid by government's hospitals to an injured person on the ground of non-availability of beds amounted to violation of right to life under Art. 21 of the Constitution."

4) In *Consumer Education and Research Centre* v. *Union of India*,[60]

"The Supreme Court has held that the right to health and medical care is a fundamental right under Art.21 of the Constitution as it is essential for making the life of the workman meaningful and purposeful with dignity of person. 'Right to life' in Art.21 includes protection of the health and strength of the worker. The expression 'life' in Art.21 does not connote mere animal

[57] AIR 1989 SC 2039
[58] (1987) 2 SCC 165.
[59] (1996) 4SCC 37
[60] (1995) 3 SCC 42.

existence. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in workplace and leisure."

4.2.5. RIGHT TO ELECTRICITY:

1) In *Smt. S.Padma* v. *Central Electricity Supply*[61]

"The Court held that right to shelter is a fundamental right implicit under Article 21 of the Constitution of India and shelter without electricity makes the life miserable. Electricity is the basic necessity for survival of a person in modern days. Abrupt disconnection of power supply or non-supply of power seriously affects a person's right to have his food, water and decent environment, medical care and education. Disconnection of power supply from the premises of a consumer or non-supply of power to an applicant has a drastic impact on the day-to-day life of the citizens. It affects study of children, enhances the misery of old and sick persons, endangers the safety of the houses more particularly it is unbearable in the present days of global warming."

4.2.6. RIGHT TO SHELTER:

1) In *Chameli Singh* v. *State of UP*,[62]

The Court held that –"the right to shelter is a fundamental right under Art.21 of the Constitution. In any organized society, the right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to benefit himself. It was held that right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. Right to shelter includes adequate living place, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to provide an easy access to daily avocations. To bring the Dalits and Tribes in to the mainstream of national life, providing of these facilites and opportunities to them was held to be the duty of the State as fundamental to their basic human and constitutional rights."

4.2.7. RIGHT TO MEMBER OF PROTECTIVE HOMES:

1) In *Vikram Deo Singh Tomar* v. *State of Bihar*,[63]

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[61]

[62] (1996)2 SCC549

"Through a public interest litigation it was brought to the notice of the Court that the female inmates of the 'Care Home Patna' were compelled to live in inhuman conditions in an old ruined building. They are illiterate and provided insufficient and poor quality of food, and no medical attention is afforded to them. The Supreme Court held that *'the right to live with human dignity'* is the fundamental right of every citizen and the State is under duty to provide at least the minimum conditions ensuring human dignity. Accordingly, the Court directed the State to take immediate steps for the welfare of inmates of 'Care Home Patna'."

2) In *SR Kapoor* v. *Union of India*,[64]

"Through a PIL mismanagement of hospital for mental disease located as Shahadara in Delhi was brought to the notice of the Court, the Court directed that the Government of India to take over its management from Delhi Administration and to take steps to improve its working on the lines of institution run by NIMHANS at Bangalore."

4.2.8. RIGHT TO SLEEP:

1) In *Ramlila Maidan* v. *Home Secretary, Union of India*,[65]

Justice Swatanter Kumar held that "the decision to forcibly evict the innocent public sleeping in mid-night was amiss and suffered from the element of arbitrariness and abuse of power to some extent. The Police force failed to act in accordance with the rules and standing orders".

Justice Dr. B. S. Chauhan held-"Sleep is necessity and not a luxury. It is necessary for optimal health and happiness as it directly affects the quality of the life of an individual when awake including the mental sharpness, emotional balance, creativity and vital health. Sleep is a biological and essential ingredient of the basic necessities of life. If sleep is disturbed, the mind gets disoriented and it disrupts health cycle. If deprivation is brought about in odd hours, it also causes energy disbalance, indigestion and also affects cardiovascular health. The deprivation of sleep would result in mental and physical torture both. Sleep is a self rejuvenating element of our social cycle and therefore is a part and parcel of human life. Right of privacy and right to sleep have always been treated to be fundamental right like a right to breathe, to eat, to drink, to blink

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[63] AIR 1988 SC 1782
[64] AIR 1990 SC 752
[65] 2012 Cr LJ 3516 (SC)

etc. Any suspicious or conspiracy thing on the part of the assembly could have been investigated by the appropriate forum but the implementation appears to have been done in an unlawful and derogatory manner that did violate the basic human rights of the crowd to have a sound sleep which is also a constitutional freedom acknowledged under Article 21 of the Constitution."

4.2.9. <u>RIGHT TO EDUCATION:</u>

1) In *Mohini Jain* v. *State of Karnataka,*[66]

The case which is popularly known as "Capitation Fee case", the Supreme court has held that "the right to education is a fundamental right under Art.21 of the Constitution which cannot be denied to a citizen by charging higher fee known as capitation fee. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education."

"In this case, Miss Mohini Jain, a resident of Meerut (in the State of UP), applied for admission to the MBBS course in the session commencing February/March, 1991, to a private medical college located in the State of Karnataka. The college management asked her to deposit a sum of Rs. 60,000/- as the tuition fee for the first year and also to show a bank guarantee of the amount equal to the fee for the remaining years. When Miss Jain's father intimated the management that the asked amount was beyond his reach, the management denied Ms. Jain's admission to the medical college. Miss Jain informed the court that the management demanded an additional amount of Rs. four and a half lakhs, however, the management denied the allegation."

"A two-member bench consisting Justice Kuldip Singh and Justice R. M. Sahai gave the judgment of the case on 30 July 1992 (1992 AIR 1858). For the first time in the post independent India, right to education of the Indian citizens and the State obligation to secure the right came under scrutiny at the premises of the apex court. It is important to note that this was the time when neo-liberal economic policy were knocking at the door of India".

2) In *Unni Krishnan* v. *State of A.P.*,[67]

"In this case, The college management was seeking enforcement of their right to business through the charging of 'capitation' fees from students seeking admission." The court expressly

[66] (1992) 3 SCC 666
[67] (1993) 1 SCC 645

denied this claim and proceeded to examine the nature of the right to education - specifically the following articles of the constitution:

"Article 45: The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

"Article 41: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education ..."

"Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law."

"Article 46: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

The Court held that "the right to basic education is implied by the fundamental right to life (Article 21), when read in conjunction with the directive principle on education (Article 41). The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45 which provides that the state is to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14.Article 41 indicates that after the age of 14, the right to education is subject to the limits of economic capacity and development of the state. Indeed it was found that there is no fundamental right to education for a professional degree that flows from Article 21.Quoting Article 13 of the International Covenant on Economic, Social and Cultural Rights, the Court stated that the state's obligation to provide higher education requires it to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the right of education by all appropriate means."

3) In *TMA Pai Foundation* v. *State of Karnataka*,[68]

"An 11 Judge Constitution Bench of the Supreme court has overruled the Unni Krishnan decision partly. The court held that the scheme relating to admission and fixing of fee were not correct and, to that extent, they are overruled."

4) In *Salal Hydro Project v. State of J&K*[69],

[68] AIR 2003 SC 355

[69] (1983) 2 SCC 181: AIR 1984 SC 177

The court suggested: *"The Central Government would do well to persuade the workmen to send their children to a nearby school and arrange not only for the school fees to be paid but also provide, free of charge, books and other facilities such as transportation."*

4.2.10. <u>RIGHT TO POTABLE WATER, POLLUTION FREE AIR AND HEALTHY ENVIRONMENT:</u>

1) In *Subhas Kumar* v. *State of Bihar*,[70]

"The Court has held that public interest litigation is maintainable for ensuring enjoyment of pollution free water and air which is included in the 'right to live' under Art.21 of Constitution."

2) In *Re: Noise Pollution,*[71]

"In this case, Anil Mittal filed the case. The reason for this was that a 13 year old girl was a victim of rape. She cries for help but went unheard due to blaring sound of loudspeakers noise music over loudspeakers in the neighborhood. The petitioner complained of the noise created by the use of loudspeakers being used in religious performances or singing bhajans and the like in busy commercial hi fi audio systems are used. There are rules framed by the government regarding noise pollution and known as Noise Pollution Control and Regulation Rules, 199. On 11-10-2002 govt brought in an amendment in the rules and the amendment empowered the state government to permit use of loudspeakers or public address system during night hours between 10pm to 12pm in the midnight on or during the cultural or religious occasions for a limited period not exceeding 15 days."

"The Supreme Court observed that Right to life enshrined in Art.21 is not of mere survival or existence. It guarantees a right of person to life with human dignity and there in are included all the aspects of life which go to make a person life meaningful complete and worth living. Everybody who wished to live in peace, comfort and quiet within his house has a right to prevent the noise as pollutant reaching him. No one claim a right to noise to create noise even in his own premises which would travel beyond his precincts and cause nuisance to neighbors or others."

[70] AIR 1991 SC420
[71] AIR2005SC3136

2) In *M. C. Mehta* vs . *Union of India (UOI).*[72]

"The Supreme Court ordered the closure of tanneries at Jajmau near Kanpur, polluting the river Ganga."

4) In *Narmada Bachao Andolan* vs . *Union of India and Others*[73]

"A writ petition was filed inter alia praying that respondents be restrained from proceeding with construction of dam. After thoroughly going through rival contentions Court inter alia passed following directions that construction of dam will continue as per Award of Tribunal ,construction up to 90 meters height can be undertaken immediately, construction above 90 meters height to be taken up after necessary clearance, relief and rehabilitation to oustees to be immediately given in terms of packages offered, Environment sub-group will continue to monitor and ensure that all step are taken not only to protect but restore and improve environment, each State shall be bound to comply directions of Narmada Control Authority with regard to acquisition of land for purpose of relief and rehabilitation and every Endeavour shall be made to see that project is completed as expeditiously as possible."

6) In *Rural Litigation and Entitlement Kendra v. State of U.P*.[74]

"The Court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. The Court had appointed a Committee for the purpose of inspecting certain lime stone-quarries. The Committee had suggested the closure of certain categories of stone quarries having regard to adverse impact of mining operation therein."

7) In *Indian Council for Enviro - Legal Action* vs . *Union of India (UOI) and Ors*.[75]

"The court issued appropriate orders and directions for implementing and enforcing the laws to protect ecology. The petition was filed by a registered voluntary organization working for the

[72] (1987) 4 SCC 463

[73] AIR2000SC3751
[74] (1985) 2 SCC 431
[75](1996)5SCC281

cause of environmental protection in India as a public interest litigation complaining ecological degradation in coastal areas."

8) In *S. Jagannath v. Union of India*,[76]

"The Court held that setting up of shrimp (small fish) culture farms within the prohibited areas and in ecology fragile coastal areas have adverse effect on environment and coastal ecology and economies and, therefore, they cannot be permitted to operate."

9). In *Church of God (Full Gospel) in India v. K.K.R.M.C. Welfare Association*[77],

"The Supreme Court held-"In the exercise of the right to religious freedom under Arts. 25 and 26, no person can be allowed to create noise pollution or disturb the peace of others. The custom of religious prayer through the use of loudspeakers is not an essential element of any religion."

4.2.11. <u>RIGHT TO SPEEDY TRIAL:</u>

1) In *Hussainara Khatoon (No. 1)* v. *Home Secretary State of Bihar,*[78]

"A petition for a writ of habeas corpus was filed by number of undertrial prisoners who were in jails in the State of Bihar for years awaiting their trial. The Supreme Court held that 'right to a speedy trial' a fundamental right is implicit in the guarantee of life and personal liberty enshrined in Art.21 of the Constitution. Speedy trial is the essence of criminal justice."

2) In *Abdul Rehman Antuley* v. *R.S. Nayak,*[79]

"The Supreme Court has laid down detailed guidelines for speedy trial of an accused in a criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. The court held that the right to speedy trial flowing from Art.21 is available to accused at all stages namely the stage of investigation, inquiry, trial, appeal, revision and retrial. The Court said that the accused cannot be denied the right of speedy trial merely on the ground that he had failed to demand a speedy trial."

[76] AIR 1997 SC 811
[77] AIR 2000 SC 2773
[78] AIR 1979 SC 1360
[79] AIR 1992 SC 1630

3) In *Raghubir Singh* v. *State of Bihar*,[80]

"The accused persons who were being tried for waging war against the State filed writ petitions under Article 136 before the Supreme Court for quashing the proceedings before the Special Judge on the ground of violation of their right to speedy trial under Art 21 of the constitution. The court held that there was no delay in investigation and trial of their cases warranting the quashing of proceeding against them. The Court held that the right of a speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21."

4.2.12. RIGHT TO FREE LEGAL AID:

1) In *Hussainara Khatoon.* vs. *State of Bihar*,[81]

"In this case in the State of Bihar, a very large number of men and women, children including, were behind prison bars foe years awaiting trial in courts of law. The offences with which some of them were charged were trivial, which even if proved, would not warrant punishment for more that a few months, perhaps a year or two, and yet they remanded in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their having commenced. Hence, the Court ordered immediate release of these under trials many of whom were kept in jail without trial or without a charge."

"It was held that equality under Article 21 is impaired where procedural law does not provide speedy trial of accused, does not provide for his pre-trial release on bail on his personal bond, when he is impoverished and there is no substantial risk of his absconding, if an under-trial prisoner is kept in jail for a period longer than the maximum term of imprisonment which could have been awarded on his conviction and if he is not offered free legal aid, where he is too poor to engage a lawyer, provided the lawyer engaged by the State is not objected by the accused."

"The Supreme Court held that the state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to improving speedy trial."

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[80] (1986) 4 SCC 481
[81] (1980) 1 SCC 98

2) In *M.H. Haskot v. State of Maharashtra,*[82]

"The Supreme Court has ruled that free assistance must be provided to all poor accused, irrespective of the severity of the crime attributed to them, at every stage of the three-tier justice delivery system and could not be restricted to the trial stage only."

3) In *Khatri and Others v. State of Bihar & Others,*[83]

"The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 of the Constitution and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. The State should provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for the purpose ha to be done by the State. It cannot avoid it constitutional obligation to provide free legal service to a poor accused by pleading financial or administrative liability."

4) In *State of Maharashtra v. Manubhai Pragaji Vashi*,[84]

The Court widened the scope of the right to free legal aid. The right to free legal aid is guaranteed fundamental right under Art 21 and 39A provide "equal justice" and "free legal aid".

4.2.13. RIGHT AGAINST SOLITARY CONFINEMENT:

1) In *Sunil Batra* vs. *Delhi Administration and Ors*[85]

"Constitution - Solitary confinement - Sections 30 and 56 of Prisons Act, 1894 - Petitioners-were served with an order of detention – Hence, this Petition - Whether, solitary confinement imposed on Batra was valid - Held, Article 21 forbided deprivation of personal liberty except in accordance with procedure established by law and curtailment of personal liberty to such an extent as to be a negation of it would constitute deprivation - However, Sub-section (2) of

[82] AIR 1978 3 SCC 81
[83] AIR 1981 SC 262
[84] AIR 1995 5 SCC 730
[85] AIR1978SC1675

Section 30 permitted solitary confinement, when a prisoner under sentence of death - Classification according to sentence for security purposes was valid - Therefore, Section 30(2) did not violate Article 14 and requirements of Section 30(2) did not appear to be unreasonable - Appeal disposed of. Constitution - Detention – Whether, power conferred on Superintendent by Section 56 was unguided and uncanalised - Held, power to confine in iron could be constitutionalized only if it was hemmed in with severe restrictions - Power under Section 56 could be exercised only for reasons and considerations, which were germane to objective of statute, which took in considerations regarding character and propensities of prisoner - Therefore, putting bar fetters for an unusually long period without due regard for safety of prisoner and security of prison would be not justified under Section 56 - However, there were sufficient guidelines in Section 56 which contained a number of safeguards against misuse of bar fetters by Superintendent - Hence, such circumscribed peripheral discretion with duty to give reasons which were revisable by higher authority could not be violative of Article 14 - Hence, Section 56 was not violative of Article 14 or 21 - Petition disposed of."

2) In *Kishore Singh Ravinder Dev and Ors . vs . State of Rajasthan*[86]

"Criminal - Solitary Confinement - Rule 1(f) Part 16 and Rule 79 of Rajasthan Prison Rules,1951-Petitioners,complained of insufferable, illegal solitary confinement punctuated by periods of iron fetters, however, High Court directed prisoners to be liberated from solitary confinement and freed them from fetters .Held, Petitioners were been kept in separate solitary rooms for long periods from 8 months to 11 months-spells long enough to be regarded as barbarous - Cross-bar fetters were put on Petitioners for several days. Moreover, Superintendent of Jail submitted his explanation and also produce proceedings relating to enquiry resulting in solitary confinement - Rules, 1951 support administrative absolutism of prison boss. Thus, Court direct Respondents to act accordingly in compliance of Rules."

4.2.14. <u>RIGHT AGAINST INHUMAN TREATMENT:</u>

1) In *Khedat Mazdoor Chetna Sangath* vs . *State of M . P . and others*.[87]

[86] AIR1981SC625
[87] AIR1995SC31

"Some activists of petitioner organisation were arrested and paraded throughout town by police .They were brutally beaten up in police custody hand cuffing prima facie inhuman - it violative of Article 21 to subject to humiliation by hand cuffing - petitioners were educated persons and had no tendency to escape from jail custody - they voluntarily submitted themselves for arrest - conduct of escort party arbitrary and unreasonable in hand cuffing and parading petitioners throughout town.

2) In *Francis Coralie Mullin* vs . *Administrator , Union Territory of Delhi and Ors*.[88]

Constitution - detention - Articles 14, 19 and 21 of Constitution of India - petitioner challenged restrictions imposed on interviews by prison authorities - detention order of prison authority prevented accused form interviews with family and legal adviser - restrictions found to be violative of Articles 19 and 21 - detenue entitled to interviews with family and legal adviser with

permission of jail authority at reasonable hour - permission of District Magistrate not required - presence of customs officer not mandatory - petition allowed."

3) In *Prem Shankar Shukla* v . *Delhi Administration*.[89]

"Constitution - hand cuffing - Articles 14, 19, 21 and 32 of Constitution of India, Sections 46 and 49 of Criminal Procedure Code, 1973 and paras 26.21A and 26.22 of Chapter 26 to Punjab Police Manual - petition against handcuffing - handcuffing cannot be made routinely - handcuffing to be made on reasonable grounds - escorting officer has to inform the reason for handcuffing to Judicial Officer before whom accused produced - escorting officer has to get approval from such Officer - handcuffing should not be made in case of non-approval of same by Judicial Officer - paras 26.21-A and 26.22 which discriminates prisoners for the purpose of handcuffing declared ultra vires."

4) In *D . K . Basu* vs . *State of West Bengal*.[90]

"Criminal - Conviction - Section 304/34 of Indian Penal Code, 1860 - Respondents were convicted for offences of culpable homicide and fine was directed to be paid to heirs of deceased

[88] AIR1981SC746a
[89] AIR1980SC1535
[90] AIR1997SC610

by way-of compensation - Hence, this Appeal - Whether, conviction of Respondent was justified - Held, claim of citizen was based on principle of strict liability to which defence of sovereign immunity was not available - Thus, citizen could receive amount of compensation from State, which had right to be indemnified by wrong doer - In assessment of compensation, emphasis had to be on compensatory and not on punitive element - However, monetary or pecuniary compensation was appropriate and indeed effective - Sometimes only suitable remedy for redressal of established infringement of fundamental right to life of citizen by public servants and State was vicariously liable for their acts - Thus, said amount of compensation could be adjusted against amount awarded to claimant by way of damages in civil suit - Appeal disposed of."

4.2.15. RIGHT AGAINST HANDCUFFING:

1) In *Prem Shankar Shukla* vs. *Delhi Administration*.[91]

The Court held that-"Handcuffing is prima facie inhuman and, therefore, unreasonable, is overharsh and at the first flursh, arbitrary. Absent of fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Art.21…."

2) In *Sunil Gupta and Ors* . vs . *State of Madhya Pradesh and Ors*[92]

"The petitioners were educated persons and social workers, who were remanded to judicial custody were taken to Court from jail and back from court to the prison by the escort party handcuffed. They had staged a 'dharna' for a public cause and voluntarily submitted themselves for arrest. They had no tendency to escape from the jail. In fact, they even refused to come out on bail but chose to continue in prison of the public cause. It was held that this act of the escort party was violative of Article 21 of the Constitution."

3) In *Citizen for Democracy through its President* vs . *State of Assam and others.*[93]

"The Supreme Court expressed serious concern over the violation of the law laid down by that Court in *Prem Shankar Shukla's* case against handcuffing of undertrial or convicted prisoners by

[91] AIR1980SC1535
[92] (1990)3SCC119
[93] AIR1996SC2193

the police authorities. In the instant case, Mr. Kuldip Nayar an eminent journalist in his capacity as President of 'Citizen for Democracy' through a letter brought out to the notice of the Court that the seven TADA detenue lodged in the hospital in the State of Assam were handcuffed and tied with a long rope to check their movement. Security guards were also posted outside the hospital. The Court treated the letter as a petition under Art.32 of the Constitution and held that handcuffing and in addition tying with rope of the patient-prisoners who are lodged in the hospital is inhuman and in violation of human rights guaranteed to an individual under international law and law of the land."

4.2.16. <u>RIGHT TO FOOD:</u>

1) In *PUCL* v. *Union of India*,[94]

"The Supreme Court has held that the people who are starving because of their inability to purchase foodgrains have right to get food under Art.21 and therefore they ought to be provided the same free of cost by the States out of surplus stock lying with the States particularly when it is unused and rotting. The Court held that under such a situation foodgrains be provided to all those who are aged, infirm, disabled, destitute women, destitute men, pregnant and lactating women and destitute children. Accordingly, the Court directed the States to make surplus foodgrains lying in godowns available to all them immediately through PDS shops to avoid starvation and mal-nourishment."

2) In *Kishen Pattnayakni Indian People's Front v. State of Orissa*,[95]

"The Supreme Court treated letter of too social and political workers written to CJI at a writ petition the matter related to the miserable condition of the inhabitants of the district of Kalahandi in the State of Orissa on account of extreme poverty. It was alleged that in order to save themselves from starvation, death, people were compelled to subject themselves to distress sell of labour on a large scale resulting in exploitation of landless labours by the well to do landlords. The distressed sell of labour and paddy resulted into deprivation of legitimate price of paddy by the poor people who anyhow eke out their daily existence. The situation was so serious that they had become victims of 'chill penury' resulting into forced sell of their children. The

[94] 2000 (5) SCALE 30.
[95] AIR 1989 SC 677

court took serious note of the situation and directed the State Government to take effective measures to save people from starvation, death and ensure fair price produced by the poor people."

4.2.17. RIGHT AGAINST DELAYED EXECUTION:

The Supreme Court has taken note of the mental agony and torture suffered by the convicts awaiting execution. It has also taken note that fire burns the dead body but anxiety and agony burns the living bodies. Therefore, the Court has changed the punishment of death into life imprisonment. The following cases are illustrative of this judicial human approach with respect to convicts awaiting execution of capital punishment.

1) In *T.V. Vatheeswaran* v. *State of Tamil Nadu*,[96]

A two-Judges Bench of the Supreme Court held that "delay in execution of death sentence exceeding two years would be sufficient ground to invoke the protection of Art.21 and the death sentence would be commuted to life imprisonment."

2) In *Sher Singh* v. *State of Punjab*,[97]

"The three-Judges Bench of the Court agreed with the view that prolonged delay in the execution of a death sentence was an important consideration for invoking Art.21 for judging whether sentence should be allowed to be executed or should be converted into sentence of imprisonment. Prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the death sentence. However, the Court held that this cannot be applied as a rule in every case and each case should be decided on its own facts. The court should consider whether the delay was due to the conduct of the convict (where he pursues series of legal remedies), the nature of offence, its impact on the society, its likelihood of repetition, before deciding to commute the death penalty into a sentence of life imprisonment. In the instant case the delay was found to be due to the conduct of the convict and therefore it was held that the death sentence was not liable to be

[96] AIR 1981 SC 643
[97] AIR 1983 SC 465

quashed. Accordingly, the court overruled the decision in T.V. Vatheeswaran v. State of Tamil Nadu.[98]"

3) In *Javed Ahmad* v. *State of Maharashtra*,[99]

The Court held that "where there is delay in execution of death sentence of more than 2 years and the conduct and behavior of the accused in the jail, evident from the report of the jail authorities show that he was showing genuine repentance it was held that the death sentence should be commuted to life imprisonment."

4) In *Triveni Ben* v. *State of Gujarat,*[100]

"A five Judges Bench of the Supreme Court has set the matter at rest and held that undue long delay in execution of the death sentence will entitle the condemned person to approach the Court for conversion of death sentence into life imprisonment, but before doing so the Court will examine the nature of delay and circumstances of the case. No fixed period of delay could be held to make the sentence of death inexecutable. In the present case the death penalty of the accused was converted into life imprisonment. It has been held that a person sentenced to death is also entitled to procedural fairness till his last breath of life. Art.21 demands that any procedure which takes away the life and liberty of such person must be reasonable, just and fair. Undue delay in execution of death sentence due to delay in disposal of mercy petition by the President would certainly cause mental torture to the condemned prisoner and therefore would be violative of Art.21."

5) In *Madhu Mehta* v. *Union of India*,[101]

"The mercy petition of the petitioner who was sentenced to death was pending before the President of India for about 8 or 9 years. This matter was brought to the notice of the court by one Madhu Mehta, the National Convenor of Hindustan Andolan." Following Triveniben's decision the "Court directed the death sentence to be commuted to life imprisonment as there was no sufficient reasons to justify such a long delay in disposal of the convict's mercy petition.

[98] AIR 1981 SC 643
[99] AIR 1985 SC 231
[100] AIR 1989 SC 142
[101] (1989) 4 SCC 62

Speedy trial is implicit in the broad sweep and content of Art.21. This principle is no less important for disposal of mercy petitions."

"The Supreme Court in earlier cases firm the opinion that delay in execution of capital punishment entitles the convict to get the sentence commuted to life imprisonment but in *Sher Singh v. State of Punjab*, the Court departed from the earlier view and ruled that no such kind of time limit could be fixed for execution of death sentence. Every case has to be decided on its facts. A Constitution Bench of the Supreme Court expressly overruled the two year time limit fixed in TV Vatheeswaran case and held that, "it may consider the question of inordinate delay in light of all circumstances of the case to decide whether the execution of sentence could be carried out or should be altered into imprisonment for life." The judicial flexibility on the point has been prompted due to the cases of convict of terrorist activities[102]. However in normal cases the inordinate and unreasonable delay in execution has been treated to attribute torture leading to violation of Article 21 and thereby entails the ground for commutation of sentence."

4.2.18. RIGHT TO PRIVACY:

1) In *MP Sharma* v. *Satish Chandra,*[103]

SC held that "constitution-makers did not recognize the fundamental right to privacy, analogous to the American Fourth Amendment and the said right cannot be imported into the Constitution by some process of strained construction". Therefore under this judgment, right to privacy was not a Fundamental Right.

2) In *Kharak Singh* v. *State of U.P.*,[104]

"The issue of state surveillance as against the right to privacy was bought to the court when Kharak Singh, who was let off in a dacoity case due to lack of evidence challenged regular surveillance by police authorities on the grounds of infringement of his constitutionally guaranteed fundamental rights."

[102] *Devender Pal Singh Bhullar* v. *State* (NCT of Delhi), 2013 6 SCC 195
[103] 1954 AIR 300
[104] AIR 1963 SC 1295

"Provisions of the Uttar Pradesh police regulations allowed secret picketing of Singh's house, domiciliary visits at night, periodic inquiries by officers and tracking/verifying his movement. Claiming that this was an infringement of his fundamental rights, Singh filed a writ petition before the Supreme Court."

"A six-judge Constitution bench examined the issue of surveillance and validity of regulations governing the Uttar Pradesh police in the context of the scope of such powers being in violation of the freedoms guaranteed to citizens under the Constitution."

"The fundamental rights referred to in the challenge were Article 19(1)(d) (Right to move freely through the territory of India) and 21 (Right to life and personal liberty) of the Constitution."

"The main question for consideration before the bench was whether surveillance under the impugned Uttar Pradesh police regulations constituted an infringement of the citizen's fundamental rights as guaranteed by the Constitution."

"Police authorities took the stand that the regulations did not infringe upon fundamental freedoms and even if they did, they served as reasonable restrictions in the interest of the general public and to enable the police to discharge its duty in a more efficient way."

"In a majority judgment, the court ruled that "privacy was not a guaranteed constitutional right". It however, held that Article 21 (right to life) was the repository of residuary personal rights and recognized the common law right to privacy. The provision allowing domiciliary visits was however struck down as unconstitutional. It also noted that the bundle of fundamental rights under the were self-contained and mutually exclusive. However, Justice Subba Rao took a most progressive liberatarian approach accepting right to privacy as a fundamental right. In his very dynamic dissent, the learned Judge pointed out that even though the right to privacy was not expressly recognized as a fundamental right, it was an essential ingredient of personal liberty under Article 21. He also held all surveillance measures to be unconstitutional."

3) In *Govind* v. *State of M.P.,*[105]

[105] AIR 1975 SC 1378

"The Supreme Court recognized Right to Privacy as implicit in the Right to Life and Personal Liberty guaranteed by Article 21 of the Constitution. However, court made it clear that this was not an absolute right and reasonable restrictions can be imposed on basis of public interest."

4) In *R Rajagopal* v. *State of Tamil Nadu*,[106]

"An auto driver, who was sentenced to death in a case of murder, disclosed in his autobiography his relations with some public officials. The SC held that publication of any information without the consent of the person would be violation of Article 21.The only exception is when the information is based on public records." SC further said "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education, among other matters."

5) In *People's Union for Civil Liberties* v. *Union of India*,[107]

"The Supreme Court of India, while laying down the standards for telephone tapping had observed that the right to privacy is an integral part of the fundamental right to life enshrined under Art.21 of the Constitution."

6) In *District Registrar and Collector, Hyderabad and Another* v. *Canara Bank and Another*,[108]

"This Supreme Court judgment refers to personal liberty, freedom of expression and freedom of movement as the fundamental rights that further gives rise to the right to privacy."

7) In *Petronet LNG Ltd* v. *India Petro Group and Another*,[109]

"This was before the Delhi HC and it was established that firms cannot assert a fundamental right to privacy."

7) In *Selvi and Others* v. *State of Karnataka and Others*,[110]

"Interestingly, the SC made a difference between physical privacy and mental privacy. The case also established a connection of the right to privacy with Article 20(3) (self-incrimination)."

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[106] AIR 1995 SC 264
[107] 2004 2 SCC 579
[108] (2005) 1 SCC 496
[109] AIR 2009
[110] AIR 2010 SC 1974

8) In *Unique Identification Authority of India & Another* v. *Central Bureau of Investigation,*[111]

"The Central Bureau of Investigation sought access to the huge database complied by the Unique Identity Authority of India for the purposes of investigating a criminal offence. The SC, however, said that the UIDAI was not to transfer any biometrics without the consent of the person."

9) In *Justice K.S. Puttuswamy (Retd.) & Anr*. v. *Union of India & Ors.,*[112]

"A nine judge Bench, so far the largest bench on the point, delivered a remarkable and wide ranging 545 page judgment ruling unanimously that privacy is a constitutionally protected right in India."

"The case arose out of a challenge to a constitutional challenge to the Aadhaar project, which aims to build a database of personal identity and biometric information covering every Indian. More than a billion Indians have so far been registered in the Aadhaar programme, which sees citizens issued with a 12-digit number that aligns to specific biometric data such as eye scans and fingerprints. Registration is now become mandatory for filing tax returns, opening bank accounts, securing loans, buying and selling property or even making purchases of 50,000 rupees (£610) and above."

"In 2012, Justice K.S. Puttaswamy (Retired) filed a petition in the Supreme Court challenging the constitutionality of Aadhaar on the grounds that it violates the right to privacy."

"The Government argued that there was no constitutional right of privacy in view of a unanimous decision of eight judges in *M.P. Sharma v. Satish Chandra* ([1954] SCR 1077) and a decision by a majority of four judges in *Kharak Singh v. State of Uttar Pradesh* ([1964] 1 SCR 332)."

"The case came before a three judge Bench of the Court which, on 11 August 2015, ordered that the matter should be referred to a larger Bench of the Court. On 18 July 2017, a five judge Constitution Bench ordered the matter to be heard by a nine judge Bench. While it awaited

[111] AIR 2015
[112] AIR 2017

clarification on the right to privacy, the bench hearing the constitutional challenge to Aadhaar passed an interim order restricting compulsory linking of Aadhaar for benefits delivery".

"The nine judges of the Court gave six separate opinions, producing what must be a contender for the longest reasoned judgment ever produced by a court. Here only a few key themes are picked out."

"The leading judgment is a tour de force, given on behalf of four judges by Dr D Y Chandrachud J in 266 pages. It deals, in detail, with the Indian domestic case law on privacy and the nature of constitutional rights. It also considers Comparative Law on Privacy (from England, the US, South Africa, Canada, the European Court of Human Rights and the Inter-American Court of Human Rights). Various criticisms of the privacy doctrine – from Bork, Posner and feminist critics – are addressed."

"No person shall be deprived of his life or personal liberty except according to procedure established by law"

"Chandrachud J points out that this provision has been interpreted as containing, inter alia, the rights to a speedy trial, legal aid, shelter, a healthy environment, freedom from torture, reputation and to earn a livelihood (for a list see [150]). Privacy is an incident of fundamental freedom or liberty."

In an important section of the joint judgment headed "Essential Nature of Privacy", Chandrachud J analyses the concept of privacy as being founded on autonomy and as an essential aspect of dignity ([168] to [169]):

"Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination" [169]

"The judgment refers with approval to the 2012 Report of the Expert Group on Privacy[pdf] – which sets out nine principles (which have much in common with the EU data protection principles)."

"The conclusions are set out at pages 260-265 of the joint judgment. It is held that privacy is a constitutionally protected right which emerges, primarily, from Article 21 of the Constitution. This is not an absolute right but an interference must meet the threefold requirement of (ii) Legality; (ii) the need for a legitimate aim and (iii) proportionality (p.264). It is also noted that, as informational privacy is a facet of the right to privacy the Government will need to put in place a robust regime for data protection."

Two other important points are dealt with in the joint judgment.

"Firstly, it emphasises the fact that sexual orientation is an essential attribute of privacy thus casting doubt on the case of *Suresh Kumar Koushal v. Naz Foundation* (2014) which upheld section 377 of the Indian Penal Code, which effectively criminalizes same-sex relationships between consenting adults. A reconsideration of *Suresh Koushal* is pending before a constitution bench of the Supreme Court."

"Secondly, Chandrachud J overturns the judgment of his father (Chandrachud CJ) in the notorious case of *ADM Jabalpur v Shivakant Shukla* (1976) which held that fundamental rights could be suspended during the Emergency ([121]). Though the *ADM Jabalpur* judgment was nullified by 44th constitutional amendment it has now finally been put to rest." In his concurring judgment Sanjay Kishan Kaul J commented

"the ADM Jabalpur case … was an aberration in the constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection"

"R F Nariman J gave a judgment of 122 pages and four other judges gave substantive concurring judgments."

"By its order the Court ruled that the right to privacy is protected as part of the right to life and fundamental liberty under Article 21. The case was referred back to the original bench three judges for decision on the merits."

"A striking feature of the joint judgment is the detailed treatment of issues of digital privacy which are of increasing importance both in India and internationally."

"The decision has been welcomed by Indian and international commentators, it puts the right to privacy at the heart of constitutional debate in the world's largest democracy and is likely to provide assistance and inspiration for privacy campaigners around the world."

4.2.19. PROTECTION OF THE RIGHT OF A FOREIGNER:

1) In *Railway Board v. Chandrima Das*,[113]

"S. Ahmad J extended the meaning of the right to life to include even the dignity and honour of a foreigner. In this case, a Bangladeshi woman on the way to Ajmer Sharif was gang raped by the railway staff in a room at Rail Yatri Nivas at Howrah Station of the Eastern Railway. Pointing out that the cherished right to life under Article 21 includes the right to live with dignity, S.Ahmad J said:

"On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions."

4.2.20. RIGHT TO MINIMUM WAGES:

1) In *People's Union for Democratic Rights* v. *Union of India,*[114]

"The Supreme Court held that non-payment of minimum wages to workers employed in various ASIAD Projects in Delhi was a denial to them to their right to live with basic human dignity and violative of Article 21 of the Constitution. Bhagwati J, speaking for the majority held that the rights and benefits conferred on the workmen employed by a contractor under various labour laws are 'clearly intended to ensure basic human dignity to workmen and if the workmen are

[113] (2000) 2 SCC 465: AIR 2000 SC 988
[114] AIR 1982 SC 1473

deprived of any of these rights and benefits, that would clearly be a violation of Article 21.'He held that the non-implementation by the private contractors and non-enforcement by the State Authorities of the provision of various labour laws violated the fundamental right of human dignity."

"This decision has heralded a new legal revolution. It has clothed millions of workers in factories, fields, mines and project sites with human dignity. They had fundamental right to maximum wages, drinking water, shelter crèches, medical aid and safety in the respective occupations covered by the various welfare legislations."

4.2.21. RIGHT AGAINST SEXUAL HARASSMENT:

1) In *Vishaka v. State of Rajasthan*,[115]

"The Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until a legislation is enacted for the purpose. The Court held that it is the duty of employer or other responsible person in work-places or other institutions, whether public or private, to prevent sexual harassment of working women. The judgment of the Court was delivered by J.S. Verma, C.J. on behalf of Sujata V. Manohar and B.N. Kirpal, JJ., on a writ petition filed by Vishaka, a non-governmental organization working for 'gender equality' by way of PIL seeking enforcement of fundamental rights of working women under Arts. 14, 19 and 21 of the Constitution. In holding so, the Court relied on International Conventions and norms which are significant in interpretation of guarantee of gender equality, right to work with human dignity in Arts. 14, 15, 19(1)(a) and 21 of the Constitution and the safeguards against sexual harassment implicit therein."

2) In *Apparel Export Promotion Council* v. *A.K. Chopra*,[116]

"The Supreme Court applied the law laid down in the case of *Vishaka v. State of Rajasthan*,[117]and upheld the dismissal from service of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate

[115] AIR 1997 SC 3011
[116] AIR 1999 SC 625
[117] ibid

female employee at the place of work on the ground that it violated her fundamental right guaranteed by Art.21 of the Constitution."

4.3. JUDICIAL INNOVATION TO SAFEGUARD THE LIBERTIES OF WEAK, MEEK AND BEWILDERED PEOPLE:

"A very revolutionary change has been brought by the judiciary in the enforcement of fundamental rights of those who are deprived and bewildered and cannot go to the court." The change in the traditional approach where only the party aggrieved can approach the court was very well expressed in *Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India*.[118]Krishna Iyer J. observed:

"The narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions. Whether the petitioners belong to a recognized union or not, the fact remains that a large body of persons with a common grievance exists and they have approached this Court under Article 32. Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people oriented and envisages access to justice through 'class-actions', 'public interest litigation' and 'representative proceedings'."

"In several cases, the Supreme Court has entertained public interest litigation (PIL) on the initiative of public-spirited social activists, organizations and societies and noticeable expansion of *locus standi* has benefited the despaired and bewildered and weaker sections of the society."

"It is because of the activist role played by the judiciary that the weaker sections of the people could avail justice instead of their financial constraints. For instance in *Hussainara Khatoon* v. *State of Bihar*[119], the Supreme Court pronounced the landmark judgment on free legal aid to victim."

It is the result of this judgment that the Legal Services Authority Act, 1987 came into being.

4.4. NEW DIMENSION ADDED TO PROTECTION OF LIBERTY THROUGH COMPENSATORY MEASURES AND INTERIM RELIEF:

[118] (1981) 1 SCC 246
[119] AIR 1979 SC 1369

"The State stands for providing security to all, but there are many ways through which people may be victimized or affected as they may fall prey to State police and army or other officials. Under the concept of State parentalism, the State is also expected to provide safeguards from certain undesirable situations like riots, terrorism and so on so forth. In light of this, the Indian Supreme Court has introduced a new concept of compensatory justice jurisprudence in the domain of public law. In addition to fixing the liability of State the Supreme Court has gone ahead in some cases even holding an individual liable for violation of personal liberty under Art.21 and treating it amenable to writ jurisdiction. "

"The Indian Supreme Court has articulated the concept of compensatory jurisprudence for the flagrant violation of fundamental rights of people implicit in Article 21. This view was evolved for the first time in *Rudul Shah v. State of Bihar*,[120]where compensatory justice was being provided in cases of illegal arrest and unwarranted detention by the Supreme Court by awarding Rs. 30,000 as interim compensation in addition to the sum of Rs.5000 already paid by the government. In *Boma Charan Oraon v. State of Bihar*[121] (unreported), for illegal detention in a Ranchi Mental Assylum for over 6 years even after the fitness certificate for discharge, the Division Bench of the Supreme Court consisting of Bhagwati and Mukherjee Judges, expanded the scope of compensation for illegally detained persons treating it as violation of personal liberty under Article 21 of the Constitution."

"In *Bhim Singh v. State of Jammu & Kashmir*,[122]the Supreme Court award a compensation of Rs.50,000 to the petitioner for the violation of constitutional right of personal liberty under Article 21 of the Constitution."

"Compensatory justice has been provided in cases of police atrocities, custodial deaths and fake encounters. For instance, in *Khatri v. State of Bihar*,[123] the Supreme Court considered the question of jurisdiction for granting monetary compensation to the victims of police excesses. Similarly, in *Saheli v. Commr. Of Police*,[124] the Supreme Court awarde a compensation of Rs. 75,000 to the mother of the deceased. The Supreme Court awarded a sum of Rs. 1,50,000 as

[120] AIR 1983 SC 1086
[121] (Unreported) quoted in M.P. Jain and S.N. Jain, Principles of Administrative Law (1986) 781
[122] AIR 1986 SC 494
[123] AIR 1995 SC 117
[124] (1990) I SCC 422

compensation for custodial death in *Nilabati Behera v. State of Orissa*[125]. This is a peculiar case in which the person was taken from his home in police custody in connection with an offence of threat after sometime his dead body was found on the railway track. The Supreme Court treated it as a case of custodial death. It allowed compensation as a public law remedy." On the point of custodial death, Dr S Anand, J(as he then was) observed:

"The State is obliged to ensure that there is no infringement of the indefeasible right of a citizen to life, except in accordance with law while the citizen I in its custody…The duty of care on the part of the State is strict and admit of no exceptions. The wrongdoer I accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law."

"In *Sebastian M. Hongray v. Union of India*,[126]the judiciary treated the cases of non-traceable arrested persons as case of "custodial death" and awarded compensation there for. The deplorable nature of custodial torture and death was very well exposed *in D.K. Basu v. State of West Bengal*,[127]where Justice Anand delivering the judgment of the court summed up the position regarding remedies and compensation to the victims of custodial torture." Said, the learned Judge:

"…it is now well accepted proposition in most of the jurisdiction that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts."

"The learned Judge also pointed out that the claim of the citizen is based on the principle of strict liability and defence of sovereign immunity is not available to the State."

There is plethora of cases regarding compensation to victims of police atrocities, custodial deaths and fake encounters.[128]

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[125] AIR 1993 SC 1960
[126] AIR 1984 SC 1026
[127] (1997) 1 SCC 416
[128] *R.Gandhi* v. *Union of India*, AIR 1989 Mad 205.; *MCD* v. *Assn. of Victims of Uphaar Tragedy*, (2005) 9 SCC 586.

"The most revolutionary and valuable contribution of the Supreme Court was in *Bodhisattwa Gautam v. Subhra Chakraborty,*[129]where the Supreme Court asserted the power to award interim compensation even against private bodies or individuals in exercise of its writ jurisdiction. The court introduced a new concept of public law remedy, holding an individual liable for violating Article 21 and holding such cases amenable to writ jurisdiction. Thus, in rape cases, fundamental rights can be enforced not only against a State but also against private individuals by a writ court *suo motu* or through PIL or by victims."

"In *Bodhisattwa Gautam* case, it distinguished with the special mark that the Court extended public law remedy through compensation against the individual violating the dignity of the women. It also provided for interim relief and ordered payment of a sum of Rs. 1000 per month to the victim Subhra Chakravarty during the pendency of the criminal proceedings. It also directed Bodhisattwa Gautam to pay arrears of compensation at the same date from the date on which the complaint was filed till date."

4.5. <u>SOME NOT SO CLEAR RIGHTS:</u>

<u>RIGHT TO DIE -</u>

1) In *State of Maharahtra* v. *Maruty Sripati Dubal*[130],

"The question whether the right to die is included in Art.21 of the Constitution came for the first time before the Bombay High Court. The Bombay High Court held that "the right to life guaranteed by Art 21 includes a right to die, and consequently the court struck down Section 309 of IPC which provides punishment for attempt to commit suicide by a person as unconstitutional. The Judges felt that the desire to die is not unnatural but merely abnormal and uncommon. They listed several circumstances in which people may wish to end their lives, including disease, cruel or unbearable condition of life, a sense of shame or disenchantment with life. They held that everyone should have the freedom to dispose of his life as and when he desires. In this case a Bombay Police constable who was mentally deranged was refused permission to set up a shop and earn a living. Out of frustration he tried to set himself afire in the corporation's office room."

[129] AIR 1992 SC 992
[130] 1987 CrLJ 549

2) In *Chenna Jagadeeswar* v. *State of A.P.*[131] ,

The Andhra Pradesh High Court held that *"the right to die is not a fundamental rightwithin the meaning of Art. 21 and hence Section 309, IPC is not unconstitutional".*

3) In *P.Rathinam* v. *Union of India,*[132]

"A Division Bench of the Supreme Court comprising MR.Justice Hansaria agreeing with the view of the Bombay High Court in *Maruti Sripati Dubal* case held that a person has a 'right to die' and declared Section 309 of the IPC unconstitutional which makes 'to commit suicide' a penal offence. The 'right to live' in Art.21 of the Constitution includes the 'right not to live', i.e., right to die or to terminate one's life. In the present case the petitioners had challenged the validity of Section 309 on the ground that it was violative of Arts. 14 and 21 of the Constitution and prayed for quashing the proceedings initiated against the petitioner(Nagbhushan) under Section 309 pending in the Court Sub-Judge, Gunpur in the District of Koraput, Orissa for attempting to commit suicide."

4) In *Gian Kaur* v. *State of Punjab,*[133]

A Five Judge Constitution Bench of the Supreme Court has now overruled the *P.Rathinam's* case and rightly held that "right to life" under Art 21 of the Constitution does not include "right to die" or "right to be killed". "The right to die", is inherently inconsistent with "the right to life" as is "death with life".

Delivering the unanimous judgment of the Court Mr.Justice J.S. Verma, observed:

"Any aspect of life which makes it dignified may be read into Art.21 of the Constitution but not that which extinguishes it and is, therefore inconsistent with the continued existence of life resulting in effacing the right itself".

"Right to life" is a natural right embodied in Art.21 but suicide is an unnatural termination or extinction of life and, incompatible and inconsistent with the concept of "right to life".

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[131] 1988 CrLJ 549
[132] (1994) 3 SCC 394
[133] (1996) 2 SCC 648

5) In *Aruna Ramchandra Shanbaugh v. Union of India*,[134]

"A writ petition was filed by Ms. Pinki Virani of Mumbai claiming to be the next friend of the victim with a prayer for direction to the respondent to stop feeding and let her die peacefully. Her parents were dead and her close relatives had no interest in her since he had unfortunate assault on her. Regarding the withdrawal of life support to a person in PVS or was otherwise incompetent to take a decision in this connection, the Supreme Court in a two Judge Bench decision, Justice Markandey Katju and Justice Gyan Sudha Mishra, laid down the law of passive euthanasia to continue till the law made by the Parliament."

The process of euthanasia has been accepted worldwide but it has not been fully accepted in India. Very soon a day may come when the Supreme Court may fall in line with it.

CHAPTER-5

[134] AIR 2011 SC 1290

A CRITICAL APPRAISAL OF JUDICIAL ACTIVISM WITH REFERENCE TO ARTICLE 21

It is common knowledge that the term judicial activism as such has always been subject to debate. The very idea of judicial review and especially judicial activism have been subject to acrimonious criticism in view of the doctrine of separation of powers, non-democratic nature of judiciary and some other grounds. But the use of judicial activism in the present study has been preferred with creative, positive and innovative "interpretation of right to life and personal liberty". Many arguments which go against judicial activism in other areas are not apt for the present purpose. The judiciary has safeguarded the rights of life or "personal liberty against the arbitrary actions of the executive" and unjust laws prescribed in procedure to regulate personal liberty. It has also been possible for judiciary to acquire credibility and confidence of the people for safeguarding the rights of the person where the other branches have miserably failed to provide any safeguard to people.

"Since the judiciary has played very positive role and has expanded the protection of life and personal liberty beyond imagination, a critical appraisal of judicial activism with reference to Article 21 is most desirable. As a matter of fact, in post-Maneka period, judiciary has expanded the scope of Article 21 to such an extent that now the question is being asked what is not covered under the expression "life or personal liberty" used in Article 21. Some people have gone to say that even all the other articles of Part III are taken away the purpose of the protection of fundamental rights could be appropriately served by Article 21 of the Constitution."

"In the way of securing good governance, judicial activism has played an important role in protecting human rights. In other words, it has indeed proved to be a boon to the victims of arbitrary, illegal and unconstitutional actions of state as well as of public servants."

"The judicial interpretation in light of Directive Principles of State Policy inspired and compelled the government to incorporate Article 21-A in the Indian Constitution[135] i.e. Right to education as a fundamental right and Article 51A (k) as a fundamental duty[136]."

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[135] The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

[136] to provide opportunities for education by the parent the guardian, to his child, or a ward between the age of 6-14 years as the case may be.

"It is the activist role played by the judiciary which provided protection of personal liberty even to the foreigners. S. Ahmad J in the case of *Railway Board v. Chandrima Das,*[137] extended the meaning of the right to life to include even the dignity and honour of a foreigner. In this case, a Bangladeshi woman on the way to Ajmer Sharif was gang raped by the railway staff in a room at Rail Yatri Nivas at Howrah Station of the Eastern Railway." Pointing out that the cherished right to life under Article 21 includes the right to live with dignity, S.Ahmad J said:

"On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions."

"One of the contributions of the judiciary is the introducing of a new concept of compensatory justice jurisprudence in the domain of public law by holding an individual liable for violating Article 21 and treating it amenable to writ jurisdiction.[138]"

"Compensatory justice has been provided in cases of illegal arrest and unwarranted detention. For instance, in *Rudul Sah v. State of Bihar,*[139] the Supreme Court awarded Rs. 30,000 as interim compensation in addition to the sum of Rs.5000 already paid by the government."

"Compensatory justice has been provided in cases of police atrocities, custodial deaths and fake encounters. For instance, in *Khatri v. State of Bihar,*[140] the Supreme Court considered the question of jurisdiction for granting monetary compensation to the victims of police excesses. The Supreme Court awarded a sum of Rs. 1,50,000 as compensation for custodial death in *Nilabati Behera v. State of Orissa*[141]. *"*

"The most revolutionary and valuable contribution of the Supreme Court was in *Bodhisattwa Gautam v. Subhra Chakraborty,*[142]where the Supreme Court asserted the power to award interim compensation even against private bodies or individuals in exercise of its writ jurisdiction. The court introduced a new concept of public law remedy, holding an individual liable for violating Article 21 and holding such cases amenable to writ jurisdiction. Thus, in rape cases, fundamental

[137] AIR 2000 SC 988
[138] Bodhisattwa Gautam v. Subhra Chakravarty, (1996) SCC 490
[139] AIR 1983 SC 1086
[140] AIR 1995 SC 117
[141] AIR 1993 SC 1960
[142] AIR 1992 SC 992

rights can be enforced not only against a State but also against private individuals by a writ court *suo motu* or through PIL or petition filed by victims."

"It is the creativity of the judiciary and active role played by it which led to change in certain societal norms and acceptance by the society such as the live in relationship. For instance, in *Badri Prasad* v. *Dy Directorate of Consolidation*[143], the Supreme Court of India recognized live in relationship and interpreted it as a valid marriage. In *D. Veluswamy v. D.Patchaiammal*[144], the court relied on the concept of palimony used in USA."

"It is because of the activist role played by the judiciary which led to the recognition of gay rights. For instance, in *Naz Foundation v. Govt. of NCT of Delhi*[145], the High Court found in favour of the NAZ Foundation and accepted its arguments that consensual same-sex sexual relations between adults should be decriminalized, holding that such criminalization was in contravention of the Constitutional rights to life and personal liberty, equality before the law and non-discrimination. The Court also held that Section 377 offends the guarantee of equality enshrined in Article 14 of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class. The Court also noted that the right to life under Article 21 includes the right to health, and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts.24 The Court did not strike down Section 377 as a whole. The section was declared unconstitutional in so far it criminalizes consensual sexual acts of adults in private."

The court held- "Section 377 criminalizes the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution".

[143] 1978 AIR 1557
[144] (2010) 10 SCC 469
[145] 2010 Cr LJ 94 Delhi (DB)

"But in *Suresh Kaushal v. Naz Foundation*[146], the Supreme Court reversed the judgment of the Delhi High Court and held that section 377 does not violate the constitution and is therefore valid."

Time and again the issue is agitated before the Supreme Court and a final decision is awaited in light of latest case on right to privacy i.e. Justice Puttaswamy v. Union of India.

"Judicial activism is being greatly accepted by the people as it safeguards the protection of life and liberty. But the expansive role of judiciary may sometimes create social problems."

"In some cases the judiciary has ordered to do something against the government which does not appear possible in near future and lacks practicability. The Supreme Court's direction to constitute a special committee to pursue the outdated plan of linking India's rivers is not appreciable. The matter caught the attention of The Hindu. On 2nd March, 2012 The Hindu in its Op-ed page published one article under caption "With all due respect My Lords". Its subheading was "It is not for the Supreme Court to decide how the government should ensure the right to water, in any case, the connection between this right and the river-linking project is tenuous".[147]"

Likewise "in some cases the Court" direction to check health hazards and save the life of people by directing the executive to completely stop the burning of paddy straw causing pollution up to Delhi. The order could not be enforced due to lack of civic sense among the farmers and inability of administration to enforce such orders.

In some other areas also the expansive role of judiciary to interpret life or personal liberty in present day global scenario may cause some tension in society, as the judicial recognition of inter-caste and inter-religion marriages are inviting undesirable decision of Khap Panchayats, are elimination of the couple or either of them in the name of ill conceived and legally impermissible the so-called honour killing (which has got unnecessary propagation, there is no honour in such feelings rather they are brutal murders). Such rights have been recognized even by the great leaders like Mahatma Gandhi and Ambedkar but society is not ready to accept such rights to marry by changing its social modes and mindset. It will take time to attract social acceptability

[146] AIR 2014 SC 563
[147] See KK Venugopal, "Separation of Powers: Drawing the Dividing Line" (in) P Ishwar Bhat (Ed) Constitutionalism and Constitutional Pluralism, Lexis Nexis, 2013 pg 96

through public education and broad mindedness. Some new rights may emerge after Puttawamy decision and may also invite social trouble.

"But such cases are very tiny and few. They cannot lessen the important creative role played by the judiciary in protection of personal liberty under Article 21 of the Constitution. The subsequent chapter will try to express the ways and means adopted by the judiciary by taking inspiration from different corners to safeguard the life and personal liberty of the persons."

CHAPTER-6

CONCLUSION

The study started with the proper appreciation and delineation of the concept of judicial activism with reference to it positive role to give the society a lead in a democratic country by protecting the rights of the persons. The life or personal liberty are of prime value in any civilized society. The study in different chapters has revealed how judicial activism has

played a positive, constructive and creative role in expansion of the concept of right to life or personal liberty.

The study will conclude how the judiciary has got legitimacy, credibility and people's approval in exercise of judicial activism with reference to Article 21. The judiciary has not done all this things adventurously but out of necessity of the society, democratic principles and modern developments widening the scope of life or personal liberty.

First, the judiciary has given meaning to life or personal liberty where the executive and legislature have failed to perform their duties. Legislature has not been able to enact proper law. The situation had been appropriately demonstrated in Laxmikant Pandey's[148] case and Vishaka v. State of Rajasthan[149] where the Court had to issue the guidelines. Likewise, executive has miserably failed to perform its duty required under different laws like the situation observed in Ratlam Municipality[150] case, dereliction of duty to protect the people from riots, active involvement in custodial death[151] and encounters[152]. Thus, judicial activism in context of life or personal liberty has been appreciated and acclaimed due to the non-action or ill-action of the other branches of the government.

Second, judiciary has played active role as a part of democratic setup. It has ensured the basic requirement of impressive that is deliberation. Judiciary has taken note of and has spoken the voice of those which voice is suppressed by the majoritarian government. The judiciary has taken counter-majorotarian stand and heard the voice of weak, meek and bewildered persons,[153] poor workers[154] and women[155].

Third, the judiciary is more alive, alert and aware of the felt necessities of the time and as appreciated the wind of change blowing on the global plain as recognized right to potable

[148] AIR 1984 SC 469
[149] AIR 1997 SC 3011
[150] 1980 AIR 1622, 1981 SCR (1) 97
[151] Nilabati Behera v. State of Orissa, (1993) 2 SCC 746; Sebastian M Hongray v. Union of India, AIR 1984 SC 1026; D.K. Basu v. State of West Bengal, (1997) 1 SCC 416
[152] People's Union for Civil Liberties v. Union of India, AIR 1997 SC 1203
[153] Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India, (1981) 1 SCC 246; Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1369
[154] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802
[155] Vishaka v. State of Rajasthan, AIR 1997 SC 3011; Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC625

water[156], right to healthy environment[157], right to food[158], right to noise free environment[159] and so on so forth.

Fourth, the judiciary has played activist role in interpretation of life or personal liberty not on the basis of judicial hunch, personal views of judges or any assertion of judicial superiority. The judiciary has searched sound basis to support its activist role. It has interpreted Directive Principles of State Policy in such a way as to allow the withering away of the distinction between the Directive Principles of State Policy i.e. unenforceable norms and fundamental rights i.e. enforceable norms. It has taken lead to interpret Article 45 of the Constitution so as to convert right to education from Directive Principles to Fundamental Rights under Article 21 and compelled the legislature to add Article21-A dealing with right to education of all the children of the age of six to fourteen years and Article 51-A (k) casting fundamental duty on a parent or guardian to provide opportunities for education to a child, as the case may be, ward between the age of six to fourteen.

Fifth, the judiciary has actively widened the scope of Article 21 and protection to different segments of society adopting latitudinarian attitude toward *locus- standi* and permitting public interest litigations to safeguard the rights of the weaker sections of the society.

Sixth, the judiciary has played active role to give meaningful application and safeguards to the victims of the violation of personal liberty through awarding compensation in appropriate cases.[160]

Seventh, the judiciary has taken broad vision of personal liberty and person used in Article 21 of the Constitution. In its most active attitude in Railway Board v. Chandrima Das[161], it allowed ten lakh compensation to the victim of rape of a Bangladeshi woman by railway

[156] Subhas Kumar v. State of Bihar, AIR 1991 SC420; MC Mehta v. Union of India, (1987) 4 SCC 463
[157] Rural Litigation and Entitlement Kendra v. State of U.P, (1985) 2 SCC 431
[158] PUCL v. Union of India, 2000 (5) SCALE 30
[159] Re: Noise Pollution, AIR2005SC3136
[160] Christian Community Welfare Council of India v. Govt. of Maharashtra, 1994 Mah LJ 1769; Lawyers' Forum for Human Rights v. State of W.B. (1997) I CHN 485; Inder Singh v.State of Punjab, (1995) 3SCC 702; Vinod Kumar v. State of Punjab 1996 Cri LJ 1037 (P&H); Civil Liberties and Human Rights Organization v. G.O.C. (1997) I Gau LT 91; People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433; People's Union for Democratic Rights v. State of Bihar, (1987) ICC 265*;* R.Gandhi v. Union of India, AIR 1989 Mad 205.; MCD v. Assn. of Victims of Uphaar Tragedy, (2005) 9 SCC 586.

[161] AIR 2000 SC 988

employees. Thus it extended the protection of Article 21 even to cover the foreigner visiting India.

Eight, the judiciary has also taken note of worldwide development regarding the protection of even flora and fauna. Not to great surprise, the Supreme Court has interpreted the duty of State to protect even the rights of the creature other than the human being. It has changed the anthropocentric environmental jurisprudence to the eco-centric jurisprudence. Thus in N. R. Nair v. Union of India, it protected the right of circus animals from torture during training. Not only this, the Supreme Court in a number of cases has declared that it is duty of the State to protect endangered species like those of Asiatic buffaloes, white tigers and even Red sandal. Though these rights have not been crystallized but its showed the judicial appreciation of the protection of all the creatures which has become concern of the whole world after Rio Summit.

In a nutshell, it can be concluded that judicial activism in relation to Article 21 has not been controversial, it has been approved, appreciated and accepted by the people at large.

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