



JUDICIAL ACTIVISM AND ITS ROLE IN PROTECTING FUNDAMENTAL RIGHTS

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ABSTRACT

One of the most significant developments in the Indian constitutional experience has been judicial activism which has converted the Supreme Court and the High Courts not only from adjudicator of individual cases, but even into the active protectors of fundamental rights and sometimes even quasi-legislative and administrative actors. This paper analyses the concept of judicial activism, its genesis, its implications and its scope in the Indian context, specifically in the context of the scope of fundamental rights, such as the right to life and personal liberty (art. 21). The paper is arranged around five short thematic headings — the constitutional basis of judicial review, expansion of Article 21, public interest litigation as an instrument of activism, judicial activism in socio-economic and environmental rights and the countervailing principles of judicial restraint and separation of powers — each of which sets out the relevant constitutional provisions and statutory provisions in point form. A separate chapter then examines ten seminal court rulings that brought to the fore the promises and challenges of judicial activism from *Kesavananda Bharati v. State of Kerala* to *Hussainara Khatoon v. State of Bihar*. The paper contends that judicial activism has played a vital role in fulfilling the meaning of fundamental rights for the poorest and the most marginalised among the citizens of India, however, unchecked expansion of judicial power may be raising legitimate concerns of separation of powers and the Indian judiciary would continue to rely on judicial restraint to maintain its institutional legitimacy.

KEYWORDS

Judicial Activism; Fundamental Rights; Article 21; Public Interest Litigation; Basic Structure Doctrine; Judicial Review; Separation of Powers; Judicial Restraint; Constitution of India; Judicial Interpretation.

INTRODUCTION

Judicial activism means the judicial function in an active way to make policy in a manner that transcends the traditional limited role of the judge in the narrow confines of the statutory and constitutional text, to fill legislative gaps and enforce rights in novel procedural and substantive ways. In India the judiciary has come to be synonymous with judicial activism — the extension of the scope of Part III of the Constitution (which guarantees fundamental rights) and its unprecedented assertiveness in issues from the environment to prison reform, electoral integrity to governance accountability. Judicial activism in India has its roots in the design of the Constitution itself. Articles 32 and 226 give the Supreme Court and High Courts, respectively, a broad writ



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jurisdiction to ensure adherence to fundamental rights and Article 13 allows courts to invalidate any legislation that conflicts with fundamental rights. In Article 141, the Supreme Court has declared the law to be binding on all other courts, while Article 142 grants the Supreme Court the power to make orders of any kind in any case before them "for doing complete justice. The Supreme Court gradually took a more activist stance, as in *A.K. Gopalan v. State of Madras* (1950) and in *Kesavananda Bharati v. State of Kerala* (1973) which introduced the basic structure doctrine and in *Maneka Gandhi v. Union of India* (1978) where the Court broadened the scope and substance of Article 21 from a narrow procedural right to a substantive and expansive right to life and liberty. Public Interest Litigation, perhaps the most unique institutional development of judicial activism in India, was introduced in the 1980s, with the introduction of a new doctrine of locus standi, whereunder the Courts can invoke their jurisdiction by the presentation of letters and newspaper reports, which was called epistolary jurisdiction. During this period, the judiciary was finding and interpreting an ever-growing number of unenumerated rights in Article 21, including the right to a speedy trial, to legal aid, to livelihood, to a clean environment and to education, among others, in cases filed by pavement dwellers, bonded labourers, victims of environmental pollution and undertrial prisoners who otherwise had no real access to the judiciary system.

The paper will be divided into five short thematic Parts with each bringing in the governing constitutional and statutory provisions in point form: Part I – The constitutional basis of judicial review and judicial activism; Part II – The expansion of Article 21; Part III – Public Interest Litigation as a weapon of judicial activism; Part IV – Judicial activism in socio-economic and environmental rights; and Part V – Judicial activism, separation of powers and critique of judicial overreach. Part VI reviews ten of the most important cases and tenures under the five headings and ultimately concludes with the assessment of the overall contribution and future scope of judicial activism in safeguarding fundamental rights in India. In terms of method, the paper is based on the doctrinal analysis of the primary constitutional and statutory text and reported Supreme Court decisions, as well as academic commentaries on the theory and practice of judicial activism. Comparisons of judicial activism in other jurisdictions are occasionally mentioned for background purposes but are not a primary focus of the present paper, which is limited to a discussion of Supreme Court and High Court activism in the Indian Constitution.

I. CONSTITUTIONAL BASIS OF JUDICIAL REVIEW AND ACTIVISM

The judicial review is the constitutional power of the Supreme Court and High Courts to review legislation, the acts of the executive and administrative decisions and to set them aside or limit them if they are in conflict with constitutional provisions. Judicial activism in this context is a relatively lively interpretation and application of judicial authority, whereby judges give their interpretation to constitutional provisions in a broad sense, create new legal principles, give directives of an institutional nature and award remedies when the law lacks at least some concrete provisions or when the government fails to act within them. Judicial review therefore is an



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explicitly acknowledged constitutional duty, while judicial activism simply refers to the way and to the extent to which the duty can be performed. Both ideas have a common objective of maintaining the supremacy of the Constitution, the rule of law, limited government and the good protection of individual rights (Seervai, 1991).

1. Supremacy of the Constitution

The judicial review is based on the principle that the constitution is the supreme law of the land. The powers of Parliament, State Legislatures, executive and judiciary is derived from the Constitution and they must function within the boundaries set by the Constitution. In the British parliamentary system, the legislature has absolute power, but in India, the Parliament has limited legislative powers. A law can then be ruled unconstitutional when it is incompetent, infringes upon the Fundamental Rights, is inconsistent with another constitutional requirement or harms the basic character of the Constitution. Judicial review allows constitutional courts to care for these limitations to ensure that public institutions are not the last to decide on the legality of their own actions (Khosla, 2020).

2. Article 13 and Review of Legislation

The most direct textual basis for the review of the laws that infringe Fundamental Rights is given in Article 13. Article 13(1) renders pre Constitution laws unconstitutional insofar as they conflict with Part III and Article 13(2) bans the state from taking away or abridging Fundamental Rights by enacting laws. If a law is passed in contravention of this prohibition, it will be unenforceable to the extent of the violation. The word 'law' means ordinances, orders, rules, regulations, notifications, customs and usages of law. Article 13, therefore, enables courts to review primary legislation and subordinate legal instruments under constitutional guarantees (Thiruvengadam, 2017).

Judicial invalidation under article 13 does not necessarily mean that an entire act should be destroyed. Courts can give effect to severability only removing the unconstitutional provision where the rest of the provisions can stand on their own. They also might adopt the doctrine of reading down to construe ambiguous words in a manner that is consistent with the Constitution. Where there is an inconsistent provision in relation to certain pre-Constitution laws the doctrine of eclipse does not render the provision inoperative against those who already have the Fundamental Right, but rather it does not become extinguished. These doctrines allow for the courts to save the valid legislative policy and correct or expunge the constitutional flaw (Choudhry, 2016).

3. Article 32 and the Supreme Court's Writ Jurisdiction

Explain article 32 of the Indian Constitution which gives the right to approach the Supreme Court for enforcing Fundamental Rights. The Court shall give appropriate directions, orders and writs such as habeas corpus, mandamus, prohibition, certiorari and quo warranto. Dr B.R. Ambedkar called Article 32 as the "heart and soul" of the Constitution because a declaration of rights is of



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no value if there is no remedy. In this jurisdiction, the Supreme Court has the power to grant relief to an unlawfully detained person, enforce legal duties of the public authorities, set aside unconstitutional orders and also restrain the institutions from exceeding their jurisdiction (Mehta, 2007). Article 32 is also a Fundamental Right and the primary relief granted under this article is for enforcement of Fundamental Rights enumerated in Part III. It has been invoked by the Supreme Court in cases related to unlawful detention, bonded labour, custodial violence, environmental degradation, discrimination, sexual harassment and violation of dignity among others. It does not just have to declare a violation of a right; if necessary, the Court may provide directions, making the guarantee effective. This remedial flexibility has laid the groundwork for judicial activism and public interest litigation (PIL) (Sathe, 2002).

4. Article 226 and the High Courts' Writ Jurisdiction

The directions, orders and writs may be issued by all High Courts under Article 226 for the enforcement of Fundamental Rights and “for any other purpose”. The subject matter of High Courts is therefore wider than Article 32 as it covers violation of statutory as well as other rights. High Courts have the power to review laws, sub-ordinate rules, administrative orders and judicial and tribunal actions within their territorial jurisdiction. However, exercise of Article 226 jurisdiction is discretionary and the High Court may take into account the following factors: delay, availability of an effective alternative remedy, disputed factual issues and conduct of the petitioner (Wade & Forsyth, 2014). Article 226 and 227 further guarantee that tribunals and sub-ordinate adjudicatory bodies continue to be under the constitutional control. *L Chandra Kumar v Union of India*, (1997) 3 SCC 261 was a seven judge Constitution Bench judgment that the power of judicial review conferred on the High Courts under articles 226 and 227 of the Constitution and the Supreme Court under article 32 of the Constitution was integral to the basic structure of the Constitution. Tribunals can act as an adjunct and resolve issues within the scope of their powers but the finding of these tribunals are subject to review by the relevant High Court. Sadly, Parliament cannot set up an adjudicatory system that entirely denies constitutional judicial review (Krishnaswamy, 2009).

5. Appellate and Remedial Powers of the Supreme Court

The Supreme Court has the power, in its discretion, to grant special leave to appeal against a judgment, decree, determination or sentence or order passed by any court or tribunal (but not those under the Armed Forces law). It is a most extraordinary residuary jurisdiction designed not to establish an unlimited ordinary right of appeal, but to serve a purpose of “preventing grave injustice. The Supreme Court has the authority to reconsider its judgments and orders under Article 137 and the curative-jurisdiction doctrine has the power to do so in exceptionally limited cases to avoid a “gross miscarriage of justice” (Robinson, 2013). According to Article 141, the law framed by Supreme Court will have precedence in all courts across the country as it is the Supreme Court that gives it the force of law. Under Article 142 the Court can issue the orders required for



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“complete justice” in a case before it. The power allows for flexible solutions when a statutory remedy is not adequate, but it is not intended to override the substantive prohibitions of the statute or to establish a new statutory regime that is not connected with the dispute at hand. Together, Articles 141 and 142 augment the Supreme Court's ability to make constitutional principles actionable and to ensure judicial discipline (Chandrachud, 2020).

6. Basic Structure Doctrine

Another and unique, basis for judicial review of constitutional changes is provided by the Basic Structure Doctrine. In *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, this thirteen-judge Bench held that the amending powers of the Parliament under Article 368 is wide but cannot lead to the destruction of the basic structure of the Constitution. While the Court did not specify, these basic features are recognised in later decisions as constitutional supremacy, republican and democratic government, secularism, federalism, separation of powers, rule of law and dignity and liberty of the individual (Andhyarujina, 2012).

In *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, the Supreme Court used the doctrine to strike down a constitutional amendment which sought to exclude certain high constitutional office holders from the range of judicial review. In *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, the Court has observed that Limited Amending Power and Harmony between the Fundamental Rights and the Directive Principles are part of Basic Structure. The decisions conclude that even constitutional amendments can be challenged if they infringe on the identity or constitutionally-essential principles of the Constitution (Baxi, 1985).

7. Judicial Activism and Public-Interest Litigation

Public interest litigation came to the fore as an aspect of judicial creativity in the late 1970s and 1980s. Courts began to deviate from the strict criterion of locus standi and permitted the approach of public-spirited persons and organisations on behalf of the individuals who were unable to access justice due to the factors such as poverty, detention, disability, social marginalisation etc. Letters and reports were often considered writ petitions and courts set commissions to determine facts. This changed the face of constitutional adjudication from a purely bilateral dispute resolution mechanism to a tool for dealing with systemic rights violations (Bhuwania, 2017).

Constitutional courts have responded to issues of bonded labour, prison conditions, custodial violence, environmental protection, shelter, food security, sexual harassment and governmental accountability through public interest litigation. The Supreme Court in *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81, linked a speedy trial under Article 21 of the Constitution with prolonged pre-trial detention.

In *Bandhua Mukti Morcha v. Union of India*, 1984 3 SCC 161, it introduced several flexible methods to safeguard bonded labourers. In these cases, the judges' interpretation of the Fundamental Rights had a more practical dimension and ensured that access to remedies was available to disadvantaged communities (Cunningham, 1987).



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II. EXPANSION OF ARTICLE 21

Nothing better exemplifies the spirit and philosophy of judicial activism in India than the modification of Article 21. No article better illustrates judicial activism in India than the following two points of the transformation of Article 21.

From a narrow interpretation of the guarantees in *A.K. Gopalan v. State of Madras* (1950) that by Article 21 a person could be deprived of life or personal liberty only on the basis of procedure established by law, it has broadened the scope of the protection provided by the Constitution. Since the *Maneka Gandhi* case (1978) discussed in Part VI, courts have introduced an implicit requirement in the procedure that deprives a person of his life and/or liberty that it be "fair, just and reasonable" thus also importing a substantive due process requirement and linking Article 21 with Article 14 and Article 19.

The right to life has been progressively expanded to include a wide variety of rights which were not enumerated in the text of the Constitution and have come to be known as Judicially Recognised Unenumerated Rights, with Article 21 becoming the "heart" of the fundamental rights chapter.

Judicial activism, in the form of a purposive and expansive reading, has transformed a narrowly drafted procedural safeguard into the foundation and main thrust of the support provided to human dignity and welfare by the Indian judiciary, wherever it has felt an obligation to step in to fill the gaps left by the constitutional texts. Both of these points together show how judicial activism, by its purposive and expansive approach, has turned a procedural guarantee, which has been drafted narrowly, into the primary tool of the Indian judiciary for the protection of human dignity and welfare, where the constitutional text has been silent.

III. PUBLIC INTEREST LITIGATION AS A TOOL OF ACTIVISM

Public Interest Litigation (PIL) is a judicial process by which an individual or an organisation who has some public interest or the rights of people who can't access justice on their own can approach a constitutional court for protection of collective interest or the rights of the public. A PIL is not a litigative remedy to enforce the petitioner's private interest, rather it is more concerned with the public interest. It is meant to remedy a public wrong or an infringement of constitutional rights, an omission of action or a systemic injustice suffered by a disadvantaged or marginalized group. In India PIL has emerged as one of the most powerful weapons for judicial activism as it allows the courts to review issues beyond the scope of a normal litigation between two private persons (Epp, 1998).

1. Constitutional Foundation of PIL

Articles 32 and 226 of the Constitution are the main pillars of PIL. Article 32 gives the Supreme Court more powers to issue directions, orders and writs for the enforcement of Fundamental Rights and Article 226 gives High Courts more powers for Fundamental Rights and other purposes. The public interest litigation is not a constitutional term, but the Supreme Court had evolved it by



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interpreting the provisions of the Constitution with the constitutional commitments of equality, dignity, social justice and effective access to remedies (Bhagwati, 1985).

PIL is also linked to Article 39A which calls upon the State to promote equal access to justice and not to deny access to justice on grounds of economic or other disabilities. Strict procedural rules can be an obstacle to justice where an affected person cannot approach the court due to poverty, illiteracy, detention, bonded labour, social exclusion or fear. PIL aims at eliminating these obstacles by allowing for representative actions, flexible procedures and judicial inquiry into systemic violations (Galanter, 1984).

2. Relaxation of the Rule of Locus Standi

A general principle of locus standi is that the petitioner must have some legal interest that has been infringed. PIL changed this by allowing it to be brought on behalf of people who are unable to bring it themselves and who have a proper interest and concern. It is a relaxation, but not a nullification of the need for a real legal grievance, it is just who is allowed to take a grievance to court. The petitioner must seek to pursue the petition in the public interest and not for his or her own benefit, political advantage, publicity or private commercial gain (Cassels, 1989).

In *S.P. Gupta v. Union of India*, 1981 Supp SCC 87, the Supreme Court has shown a flexible attitude towards the concept of standing and concluded that where a legal wrong is committed against a person or a class of persons who may not be able to approach the court due to poverty or disability or social disadvantage, the public may approach the court for his or her redress. The decision laid the foundation for representative litigation under the Constitution and changed the nature of access to the Supreme Court from being an individual remedy to one of social justice (Baxi, 1985).

3. Epistolary Jurisdiction and Procedural Flexibility

One of the salient aspects of PIL in India is the use of epistolary jurisdiction whereby, in appropriate situations, the Supreme Court and High Courts have deemed letters, post cards, newspaper articles and other informal communications to be acts of writ petitions. This innovation was designed to allow for judicial consideration of important wrongs even if technical requirements made it impossible to file. Moreover, courts have decided to establish commissions, expert committees, amicus curiae to research facts and ensure compliance (Agrawala, 1985). But, evidentiary reliability and fairness cannot be sacrificed for procedural flexibility. The notice shall, ordinarily, be given and shall provide an opportunity to respond to the allegations and to establish facts by the use of reliable material. Commissions and expert reports may be used to help the court, but are subject to review by the parties. The aim of flexible procedure is to make justice easier and not to weaken the natural justice or predetermine the liability. (Desai & Muralidhar, 2000)

4. PIL and the Protection of Disadvantaged Groups

Initial PILs were related to prisoners, bonded labourers, pavement dwellers, children, undertrial detainees and workers who are working in an exploitative manner. In *Hussainara Khatoon vs State*



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of Bihar, (1980) 1 SCC 81, the Supreme Court did touch upon the issue of prolonged detention of undertrial prisoners and upheld the speedy trial as a facet of Article 21. The proceedings showed how PIL could expose the general failure of the institutions to which the people who would not have been able to seek individual remedies would belong. (Singh, 2000)

In *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, a petition was filed regarding bonded labourers which was approached by the Court in an investigative and remedial manner. It considered the protection of labour as a constitutional responsibility of the State under Article 21, 23 and the Directive Principles. The judgment demonstrates how PILs have an activist character – the Court not only rendered a verdict on narrow points of the dispute but also passed orders relating to identification, release and rehabilitation of bonded labour cases (Ahuja, 1997).

5. PIL and Environmental Protection

Environmental PIL has been a significant contributor to the growth of environmental jurisprudence in India. Courts have taken this to mean the right to live in a healthy environment and have applied sustainable development, polluter pays, precautionary principle, public trust. PIL cases have been pertaining with industrial pollution, forest conservation, hazardous industries, vehicular emissions, waste management and protection of the ecologically sensitive areas (Divan & Rosencranz, 2001). In the series of the case *M.C. Mehta v. Union of India*, Supreme Court had given important instructions regarding the hazards in industries, pollution control, environmental awareness and protection of environment and natural resources. The Court established the doctrine of "absolute liability" of enterprises conducting dangerous activities in the case of a gas leak in *Oleum*. While environmental PIL has led to substantial doctrinal developments, continued judicial oversight of technologically intricate environmental issues has created questions on the nature of institutional expertise, implementation and on distributional consequences of judicial orders (Rajamani, 2007).

IV. ACTIVISM IN SOCIO-ECONOMIC AND ENVIRONMENTAL RIGHTS

Judicial activism in socio-economic and environmental rights is the active part played by the constitutional courts in turning the vague notions of welfare, dignity and environmental protection in the constitution into legally binding obligations. The Constitution contains numerous socio-economic guarantees, which are non-justiciable, such as work, education, public assistance, health, nutrition and humane working conditions and that are included in the Directive Principles of State Policy. However, the Supreme Court has interpreted the meaning of the right to life under Article 21 in view of these Directive Principles and has also come to the conclusion that life is not just limited to the physical existence. It has the conditions demanded for a human life to be dignified (Bilchitz, 2007).

1. Constitutional Foundation

This constitutional dimension of socio-economic judicial activism is based on the interconnection of Fundamental Rights with the DPSP. Article 38 and 39 mandate the State to foster social welfare, address inequalities, ensure adequate living and prevent the accumulation of wealth and



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safeguarding of the workers. Under Article 41, the right to work, education and public assistance, Article 42, the right to work in a just and humane working environment and maternity relief and Article 47, the right to nutrition, living conditions and public health are the primary duties of the State. Using these provisions, courts have shed light on the positive obligations implicit in Articles 14 and 21 (Fabre, 2000). Article 21, Article 48A and Article 51A(g) supports for environmental rights. The State shall have the duty to protect and improve the environment and to safeguard the forests and wildlife, as provided in Article 48A and a fundamental duty shall be imposed on citizens to protect the environment and to show compassion towards living creatures in Article 51A(g) of the Indian Constitution. While these provisions are not a Fundamental Right in themselves, they have been read together with Article 21 and courts have found that when the environment is seriously degraded, it can affect life, health, livelihood and dignity (Leelakrishnan, 1999).

2. Expansion of Article 21

The right to socio-economic rights was primarily stated in Article 21, which was expanded to provide a key doctrinal route to enforcement. Following this position in Maneka Gandhi's case, which was decided in 1978, in the case of *Union of India v. Maneka Gandhi*, (1978) 1 SCC 248, the right to life and personal liberty could not be denied through an arbitrary, unfair or unreasonable procedure. Later decisions defined "life" as the physical and social environment that is essential to enable people to lead meaningful lives. This helped the courts to link Article 21 to livelihood, housing, medical care, education, food, clean water and environmental protection (Iyer, 1984). Judicial recognition does not mean that all socio-economic demands are transformed into claims to a specific benefit which are immediately enforceable. Courts tend to determine whether the State has breached a pre-existing constitutional or statutory task, whether the State has been arbitrary in its allocation of resources or whether it has denied the 'minimal conditions of dignity'. The ingredients of the remedy may thus be dependent on legislation, government schemes, resources and the nature of the deprivation itself (Pillay, 2014).

3. Right to Livelihood and Shelter

In *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545, the Supreme Court held that there is also a right to livelihood as there is no life without means of subsistence. The case was of the eviction of pavement and slum dwellers in Mumbai. While the Court did not establish a 'right to stay' on public property, it did establish an obligation for the state to do so in a fair, legal way and noted the direct link between eviction, livelihood and survival (Baxi, 1986).

The right to shelter has also been discussed as being more than just a provision of shelter. privacy, safety, health, sanitation and participation in social life are associated with adequate shelter. In some instances, judges have ordered rehabilitation or 'safeguards designed to prevent displacement, especially in the case of state-related projects impacting on vulnerable communities.



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But statutory land-use considerations, environmental hazards and the rights of others also need to be factored in when designing relief (Ramanathan, 2006).

4. Right to Health and Medical Care

The judicial activism has acknowledged healthcare as one of the components of the right to life in Article 21. In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, 1996 4 SCC 37, a man or a woman who is seriously injured was refused treatment in a number of government hospitals due to failure of apparently facilities. The Supreme Court stated that the right to timely treatment under article 21 had been infringed upon by the government hospital and ordered the State to make arrangements for providing timely treatment in emergencies. The lack of adequate treatment would not have been justified on financial grounds (Nundy, 2005). The Supreme Court has highlighted in *Parmanand Katara* (1989) 4 SCC 286 that every doctor, irrespective of whether he is working in a government or private hospital, has a professional duty to provide immediate assistance required for life saving. Police formalities should not interfere with the provision of emergency medical care. In this way, judicial interpretation has turned public health from a policy goal into a legal one, when it comes to situations that pose an immediate threat to life (Muralidhar, 2004).

5. Right to Education

In *Mohini Jain vs State of Karnataka* (1992) 3 SCC 666, the Supreme Court tied access to education with dignity and meaningful exercise of Fundamental Rights. In the case of *J.P. v. State of Andhra Pradesh* (1993) 1 SCC 645, this principle was elaborated and the Court held that children had a fundamental right to free education till 14 years of age and that higher education was subject to the economic capacity of the State, as well as its development. This jurisprudence has helped in facilitating the insertion of Article 21A via Constitution (Eighty-sixth Amendment) Act, 2002 and the enactment of the Right of Children to Free and Compulsory Education Act, 2009 (Juneja, 2003). The right to education is a case in point of the relationship between judicial activism and democratic law-making. Education was first picked up by judicial interpretation as a right to life with dignity; Parliament later followed suit by introducing an express Fundamental Right in its legislative framework and a detailed legislative structure. The example illustrates how judicial activism can lead to legislative change with policy design, standards and policy implementation processes being left to the elected representatives (Jha & Parvati, 2010).

V. LANDMARK CASE LAWS

The judicial interpretation discussed above has significantly influenced, in some cases created, the statutory and constitutional provisions. This Part provides a survey of some key cases under five respective headings.

A. Foundational Judicial Review

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, was decided by a 13-judge bench, the largest that the Supreme Court had ever assembled and considered that though Parliament may



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derogate from the Fundamental Rights as per Article 368 of the Constitution, it cannot, without violating the Constitution's "basic structure" (which includes, among other things, supremacy of the Constitution, rule of law and judicial review, etc.) amend or destroy the basic structure. The verdict is the most important of judicial activism in Indian constitutional history because no explicit text was used to make it.

In *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, the basic structure doctrine was applied to invalidate provisions of the Forty-Second Amendment Act, 1976, which sought to give the Directive Principles higher priority than the fundamental rights and that constitutional amendments cannot be reviewed by the courts and the court held that the balance between the fundamental rights and the Directive Principles and the presence of judicial review itself form part of the constitution's basic structure, thereby inculcating the judiciary's own ability to review the legislative curtailment of the fundamental rights.

B. Expansion of Article 21

In *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, the Supreme Court overruled the narrow "procedure established by law" interpretation of Article 21 as made in *A.K. Gopalan* and held that the requirement of Article 21 is that any procedure infringing upon a person's life or personal liberty is fair, just and reasonable and that Article 21 is not an independent right but a "golden triangle" of rights with Articles 14 and 19. It is considered as the greatest single factor that led to the further expansion of Article 21 as discussed in Part II by the judiciary.

A nine-judge bench in *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, had expanded Article 21 beyond its traditional boundaries into the digital era and had established informational privacy and decisional autonomy as a part of the right to life and personal liberty under Article 21, providing constitutional backing for subsequent data protection and reproductive autonomy jurisprudence.

C. Public Interest Litigation and Locus Standi

The case of *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 81, which arose from a newspaper report on the situation of thousands of undertrial prisoners languishing in prisons of Bihar for periods exceeding maximum sentences for their alleged offences, led to the Supreme Court recognizing the right to speedy trial as an inherent part of the right to life and personal liberty guaranteed by Article 21 of the Constitution and ordering the release of thousands of undertrial prisoners, which was one of the earliest and most influential cases in India involving PIL and epistolary jurisdiction.

The doctrine of "sufficient interest" was expanded in *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 ("Judges' Transfer Case"), which held that any member of the public who had sufficient interest in the case could file a PIL for judicial review of a legal wrong done to a class of individuals who would be unable to seek that review themselves due to poverty, disability or socially and economically disadvantaged status. The doctrine of "sufficient interest" was



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substantially broadened in *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 ("Judges' Transfer Case"), which held that any member of the public who had sufficient interest in a case could file a PIL for judicial review of a legal wrong done to a class of individuals who because of poverty, disability or socially or economically disadvantaged position, would be unable to seek judicial review themselves.

D. Socio-Economic and Environmental Rights

In the case of *Olga Tellis vs. the Bombay Municipal Corporation*, (1985) 3 SCC 545, the judiciary extended the concept of "right to livelihood" to Article 21, which means no one could live without the means of livelihood and decided that the eviction without notice and hearing violated the principles of natural justice, thereby acknowledging the court's willingness to interpret Article 21 to safeguard the basic economic survival of the urban poor in the context of eviction.

The *Oleum Gas Leak case*, *M.C Mehta v. Union of India*, (1987) 1 SCC 395, which was decided following an oleum gas leak at a Delhi factory, broke from the traditional understanding of strict liability and was a representative of the Court's 'activist' approach to environmental and industrial-safety jurisprudence in the larger body of judgments in the *M.C Mehta* series of cases dealing with environmental protection.

E. Judicial Restraint and Overreach

The Supreme Court in *Aravali Golf Club* (2008) 1 SCC 683, in a recent and cited judgment, reiterated that the Courts, while exercising judicial review in rights protection matters may do so within their own jurisdiction and not trespass on the domain of the legislature and executive by directing the creation of a post or the framing of a policy.

In *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1 (the NJAC case), the Court has struck down the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014, which intended to eradicate the collegium system of judicial appointments and introduce a body with representation from the executive, a move that itself underscores the contested nature of the relationship between the protection of judicial independence and criticism of judicial entrenchment.

CONCLUSION

Activism has been an integral and to a large extent positive part of the judiciary in the protection of fundamental rights in India. The study from the five thematic headings and five corresponding lines of case law in this paper highlights how, through a process of purposive interpretation of the core of both Articles 13 and 21, the Indian judiciary has made the guarantees of Part III meaningful for the constituencies that would have had only minimal access to constitutional remedies: undertrial prisoners, bonded labourers, slum dwellers and victims of environmental harm and harm to their lives. The basic structure doctrine laid down in *Kesavananda Bharati* and reiterated in *Minerva Mills* is the most important individual result of this activist tradition, securing the



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'permanence' of judicial review and fundamental rights, even from constitutional amendments which are properly passed.

Concurrently, this paper argues that there are real institutional dangers to judicial activism. Though the textual discipline required for constitutional interpretation has been aided by the expansion of Article 21 into an open-ended repository of unenumerated rights, it has also been challenged at times. In other areas, the continuing-mandamus method has been a subject of legitimate criticism because it takes the place of legislative and executive policy judgment in issues that are inherently polycentric in nature and are not ideally suited to resolution by the courts. The NJAC case reveals that the very exercise of judicial activism in the interest of judicial independence is too contestable to be a safe ground on which to anchor the accountability and the proper bounds of self-referential constitutional interpretation.

A balanced assessment would indicate that judicial activism and judicial restraint are not mutually exclusive choices that can be made in favor of one or the other, but rather postures which can be calibrated in accordance with context: where the rights of the marginalised have been ignored by the ordinary political processes, a robust judicial activism is called for and the converse, a greater degree of restraint, where other aspects of polycentric policy, resource allocation or institutional design are more appropriately left to the legislature and executive branch, within constitutional boundaries. The judiciary must continue to display this calibrated judgment and also retain its transformative legacy and separation-of-powers foundations to earn and maintain the public trust that it is the guardian of fundamental rights.

Finally, the review of the ten decisions and five thematic areas in this paper highlights that the Indian judiciary is not a body of judges who are just interfering with the government, but judges who are willing to intervene in a judicious and reasoned manner. When it has been based on a clear constitutional framework and reserved for instances or failures of political action in respect of fundamental rights, activism has deepened the principle of individual liberty and the rule of law; when it has been encroached upon into detailed policy administration more appropriate to elected institutions, it has opened the door for legitimate questions of its own democratic accountability. The on-going challenge for the Indian courts is to maintain this separation while dealing with new sets of rights claims in the coming decades.

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