

JUDICIAL ACTIVISM V. JUDICIAL OVERREACH: A CRITICAL ANALYSIS IN THE INDIAN SCENARIO

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ABSTRACT

Lord Hewart is well known for the adage, “It is fundamentally important that justice not only be done but also be clearly and undeniably seen to be done.” And this brought forth the idea of judicial activism. Judicial activism has always been a bone of contention in India due to its controversial past. The genesis of judicial activism can be tracked down to the theory of social want. In 1893, a significant judgment was delivered by the Allahabad High Court, in which Justice Mahmud expressed a strong dissenting opinion. This judgment is considered to be one of the early instances of the judiciary playing an active role in shaping the legal and political landscape of India. Nowadays, judicial activism has become an immensely popular instrument for criticizing the role of judges. The transformation of the Indian judiciary from a conservative one to an activist one has been a protracted and complicated process. In recent times, there have been several judgments delivered by both the Supreme Court and High Courts that have sparked intense debates, with some arguing that these judgments have exceeded the traditional boundaries of the judiciary and ventured into areas that are the domain of the legislative or executive branches of government. The main criticism behind this is that a judge is appointed and not elected. And “There cannot be too much arrogation of power into the hands of the people who are not elected by the people.” (Advocate Sai Deepak J.) We can hardly forget what Justice Robert H. Jackson eloquently commented about the Supreme Court of the U.S.A., “We are not final because we are infallible, but we are infallible because we are final.”¹ In this paper, the researcher aims to study the timeline of judicial activism in India with its evolving dimensions and its relevance in the present context.

Keywords: *Judicial activism, judiciary, court, judges, transformation*

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¹ Austin Granville, *The Indian Constitution- Cornerstone of the Nation*, 169

INTRODUCTION

The Indian Constitution is a document that stands out from others as it is not only the longest-written Constitution in the world but also displays an intriguing uniqueness. The substantial size of the Indian Constitution is attributed to the fact that its drafters endeavoured to address the diverse range of issues that had afflicted India over the course of a decade. The democratic system of government rests on mainly three dominant pillars which are the legislature, executive and judiciary. The judicial system in India has a pyramidal structure with the Supreme Court of India as the apex institution.

The judiciary is considered to be “sentinel on the qui vive” and also the highest authority in interpreting the Indian Constitution. According to G. Austin², “The Supreme Court has been called upon to safeguard civil and minority rights and play the role of 'guardian of the social revolution.’” Each of the pillars is assigned its own role by the Constitution of India. The legislative wing is responsible for making laws, while the executive branch is tasked with enforcing them, and the judiciary has the role of interpreting the laws. The Constitution of India establishes the fundamental principle of separation of powers and clearly delineates the powers vested in each branch of government. When the legislative vacuum is created, the judiciary steps in and the judges start playing a proactive role in society. In this context, the doctrine of judicial review becomes relevant. The doctrine of judicial review refers to the distinctive power of the Courts to decide on the constitutional validity of legislative and executive actions. “The power of judicial review is a basic structure of the Indian Constitution”³. It traces its origin to the American judiciary where it was first introduced in the well-celebrated case of *Marbury V. Madison* in 1803. Chief Justice Marshall remarked in *Marbury V. Madison*, “It is emphatically the powers and duty of the Judiciary to say what the law is.” **Article 13** of the Indian Constitution vests with the Courts the power of judicial review. It states that the judiciary has the power to declare an act void if it contravenes Part III of the Indian Constitution. Additionally, Articles 32, 131-136, 143 and 226 of the Indian Constitution also lays down the principle of Judicial review. Judicial activism is an inherent part of judicial review. Addressing a conference of Chief Ministers and Chief Justices of the High Courts, the former Prime Minister of India, Dr. Manmohan Singh, stated that⁴,

² L. Chandra Kumar V. Union of India, (1997) 3 SCC 261 (India).

⁴ R Shunmugasundaram, Judicial Activism and Judicial Overreach in India,

“Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that.... There is growing dissatisfaction regarding the functioning of the executive and the legislature and their ability to deliver effective governance to meet the needs and challenges of our times. In this background, it is a matter of great satisfaction that the public at large continues to hold our judiciary in high esteem. The judiciary as custodians and watchdogs of the fundamental rights of our people has discharged its responsibility very well indeed.”

Judicial activism can thus be defined as a kind of judicial philosophy where the Courts *proactively and positively interpret various* existing provisions to consider the broader societal implications. It involves the power of the Court to step into the shoes of the legislature to review and potentially declare a statute ultra vires. *Justice J.S. Verma in 1996 defined judicial activism as, “Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skillful surgeon to cure the malady. Not as a Rampuri knife which can kill.”* Arthur Schlesinger Jr. coined the phrase "judicial activism" in an article titled "The Supreme Court, 1947" which was published in the Fortune magazine in January of that year.

The noble actions of J. P.N Bhagwati, J. V.R. Krishna Iyer, J. D.A. Desai and J. ChinappaReddylaid the foundation for judicial activism, which was further reinforced by the provisions of Article 13.⁵In the annals of judicial activism in India, Public Interest Litigation is widely regarded as a significant milestone. In 1976, the first case of public interest litigation was initiated in *Mumbai Kamgar Sabha v. M/S. AbdulbhaiFaizullabhai and others*. Soon after this, the concept of PIL flourished with the active efforts of Justice Bhagwati in India. The Court through various landmark developments provided us with the doctrine of prospective overruling and the doctrine of basic structure in India.

Judicial activism in India can be both positive and negative. The difference between activism and overreach is a narrow and delicate one. When judicial activism becomes judicial adventurism and eventually takes the form of judicial overreach or judicial anarchy, it sets a dangerous precedent for democracy. Sometimes under the veil of activism, the judges put forward their own personal opinions which undermine the legislative wing of the government. The Supreme Court of India in the case of *The Indian Drugs & Pharmaceuticals Limited V. Workmen* (2007) 1 SCC 408⁶ commented that *“the Supreme Court cannot*

³ AtishaSisodiya, Ayush Gupta & Afshan Nazi, Recent Activist Trends in Judiciary, June 2018, 119

⁶<https://theindiankanoon.org/doc/505590/>

arrogate to itself the powers of the executive and the legislature.... There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits.”

HISTORICAL DEVELOPMENT OF JUDICIAL ACTIVISM

During its early years, the Supreme Court of India was primarily focused on an interpretative role and had a more technocratic approach. For around a decade, the judiciary remained relatively inactive while the executive and legislative branches of the government took the lead and interfered with the functioning of the judiciary. Starting from the mid-1970s, the judiciary gradually evolved into an activist entity, as it became more involved in interpreting laws and statutes. The Apex Court slowly stood up against legislative and executive inactions and failures. Our honourable Courts have taken numerous astounding stands, be it the preservation of human rights or prevention of sexual harassment of women at the workplace or the protection of the environment and likewise.

CONSTITUTIONAL PROVISIONS

The two primary sources of law are legislative enactments and precedents, i.e., judge-made laws. The Indian Constitution provides various provisions that empower the judiciary to take a proactive stance and assert its authority. One such provision is Article 13, which prohibits the State from enacting any law that infringes upon the fundamental rights of its citizens. The Supreme Court opined⁷ “The inclusion of Article 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights are infringed by any legislative enactment, the Court has the authority to declare the enactment to the extent that it transgresses the limits, invalid.”

The Supreme Court has the authority to issue any orders or writ for the enforcement of fundamental rights under Article 32. In the case of *Fertilizer Corporation Kamgar Union v. Union of India*, the Supreme Court of India ruled that the authority under Article 32 is an essential component of the fundamental framework of the Indian Constitution. “because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.” Article 226 of the Constitution of India grants the High Courts of each state the power to issue writs, orders or directions to any individual,

⁷ A.K. Gopalan V. State of Madras, (1950)

authority, or government within their respective jurisdiction, for the enforcement of fundamental rights or for any other legal purpose. Article 226 of the Indian Constitution provides the High Courts with a broader jurisdiction in issuing writs, orders, or directions as compared to Article 32 of the Constitution. Article 227 confers upon every High Court the authority to exercise superintendence over all other courts and tribunals under its jurisdiction.

Article 136 of the Constitution of India grants the Supreme Court the power to grant special leave to appeal against any judgment, decree, or order passed or made by any court or tribunal in the country, including the High Courts, subject to certain limitations and conditions. Under Article 142, the Supreme Court is provided with discretionary powers and it draws sweeping authority to exercise executive and legislative responsibilities in order to do "complete justice in any cause or matter pending before it."

DEVELOPMENT OF JUDICIAL ACTIVISM IN INDIA

In *A.K. Gopalan vs State of Madras*⁸, Article 21 was given a narrow interpretation by the Apex Court. The verdict, in this case, was pronounced by a six-member constitutional bench of the Supreme Court, with a majority of six judges in favor and five against it. The dissenting opinion was given by Justice Fazl Ali. Barrister M.K. Nambiar, in this case, advocated for a conjoined reading of Articles 19 and 21, arguing that "a common thread" ran through all the liberties enshrined in Part III. The court while rejecting all the contentions, held that personal liberty means freedom of the physical body only and nothing else. The court gave a restrictive meaning of Article 21 of the Constitution on the basis of "mutual exclusivity of Fundamental rights."

Later, in *Rustom Cavasjee Cooper vs Union of India* (1970), the "theory of mutual exclusivity" got rejected which was in use for 20 years prior to this case right from the time of *A.K. Gopalan*. The Court ruled that it cannot dismiss a petition that unequivocally demonstrates that people's fundamental rights are being infringed based only on technicalities. The Court also established the "Effect" test and abolished the "Object" test.

The case of *Maneka Gandhi v. Union of India* saw a seven-member bench of the Supreme Court overturning the earlier verdict of the *A.K. Gopalan* case, which had been delivered by a five-judge bench. The ruling in the *Maneka Gandhi* case also introduced the concept of the

⁸ AIR 1950

due process clause in the Indian Constitution. Overruling the *Gopalan case*, it was held as follows:⁹ “... 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 been raised to the status of distinct fundamental rights and given additional protection under Article 19....”

The Supreme Court therefore, in the *Maneka Gandhi case*, endorsed the due process clause which had been previously dismissed in the *Gopalan case*. Additionally, it was ruled that fundamental rights are interconnected and cannot be interpreted in isolation from each other. They should be interpreted as a unified whole. Consequently, Article 21 must be interpreted in conjunction with Articles 14 and 19. Additionally, it was held that “procedure established by law” must be “fair, just and reasonable” and it should not be “fanciful, oppressive and arbitrary.”



THE DOCTRINE OF BASIC STRUCTURE

Just two years prior to the declaration of emergency, the Indian Supreme Court ruled in the famous *Keshavananda Bharti case*, that the executive branch lacked the authority to intervene in the constitutional matters and alter their fundamental design. Although the judiciary was unable to stop the emergency, the idea of judicial activism began to acquire greater traction. “In a 7:6 verdict, a 13-judge Constitution Bench ruled that the ‘basic structure’ of the Constitution is inviolable, and could not be amended by Parliament.”¹⁰ The Court finds a statute invalid if it damages or destroys the “basic characteristics of the Constitution.” The test is used to determine if a constitutional amendment will weaken the principles of the Constitution itself. Since it provides significant restrictions on the ability to modify the Constitution, the test is commonly considered as a check on the majority inclinations of the Parliament.

⁹Maneka Gandhi V. Union of India, (1978), 1 SCC 248,280

¹⁰V-P Jagdeep Dhankhar sparks debate with remarks on Basic Structure of Constitution; what is it?
<https://the Indianexpress.com/article/explained/explained-law/vp-jagdeep-dhankar-basic-structure-the Indian-constitution-explained-8377438/>

THE EMERGENCY PERIOD

The Emergency Period has been divided by Upendra Baxi into three phases in his book “The Indian Supreme Court and Politics.”¹¹ The internal emergency was declared by Indira Gandhi in 1975 after she had been removed from her office by Justice Jagmohan Lal Sinha of the Allahabad High Court for electoral malpractices. The 39th Constitutional Amendment Act introduced Article 329-A to the Constitution, which prohibited the Supreme Court from hearing cases related to elections, including those involving the President, Prime Minister, Vice-President, and Speaker of the Lok Sabha. This amendment effectively made such elections immune to legal scrutiny.

The constitutional validity of the 39th Constitutional (Amendment) Act, 1975 was contested in the Supreme Court in the landmark judgment of *Indira Gandhi vs Raj Narain*. It was evident that this amendment altogether eliminated the doctrine of separation of powers and judicial review, both of which are essential components of the Constitution's fundamental design. It shattered the idea of equality since there shouldn't be any distinctions between those who are elected to the Parliament and those who occupy high positions. “In the 21-month period from 1975 to 1977, the nation saw strikes from lawyers’ associations, anti-government verdicts from various high courts, transfer of judges, demotions, demolitions and a supersession so grave that it immortalised the judge and is still used as an example highlight the perils of executive interference in judicial independence.”¹² Progressive judicial activism commenced with *Golaknath* and *Kesavananda* and culminated “in a wholly different genre of social action activism”.¹³

POST-EMERGENCY PERIOD

The question of basic features of the Constitution once again came up in *Minerva Mills V. Union of India*, AIR 1980. The *Minerva Mills* case is noteworthy because it ensured that the Supreme Court was a crucial pillar of India's constitutionalism while upholding the basic structure theory. *State of Rajasthan V. Union of India* and the seminal *S.R. Bommai V. Union of India* are the two other most important verdicts which highlighted the importance basic structure of the Constitution as well as placed limitations on the president’s ability to oust

¹¹ Nitu Mittal And Tarang Aggarwal, *Judicial Activism in India*, Vol. 1.1, 86, 90

¹² Can judiciary stand up to all-powerful executive? How judges did it during Emergency, (Jan. 30th, 2023, 5:46pm), <https://theprint.in/india/governance/can-judiciary-stand-up-to-all-powerful-executive-how-judges-did-it-during-emergency/1027493/>

¹³ Ravi P. Bhatia, *Evolution of Judicial Activism in India*, Vol.45, 262, 264

State governments. In the State of Rajasthan V. Union of India, the Supreme Court upheld the Janata government's 1977-era decision to dissolve three state governments in accordance with Article 356 of the Constitution. The Supreme Court in S.R. Bommai clarified the circumstances under which state governments may be overthrown and established the process by which proclamations made by the President must be approved by both houses of Parliament within two months, failing which the dismissed governments may be restored. With this ruling, the court has ended the practice of often dismissing state governments in violation of Article 356.

In KihotoHollohan V. Zachillhu, the 10th schedule of the Indian Constitution was challenged. The main concern before the Supreme Court in this issue was whether the powerful position of the Speaker violated the theory of basic structure. The speaker's broad discretionary powers are outlined in paragraph 6(1) of the 10th schedule of the Indian Constitution, "If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final." The Supreme Court held that though the Speaker acts as a tribunal under paragraph 6 and the orders which are passed by Speaker are final yet the order passed can be subject to judicial review on four grounds: mala fides, perversity, violation of constitutional mandate and order passed in violation of natural justice.¹⁴

In S.P. Gupta V. Union of India, AIR 1982, it was held that "the judge has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonize the law with the prevailing concepts and values and make it an effective, instrument for delivery of justice."

IMPLICATIONS OF JUDICIAL ACTIVISM

"According to G. Austin, the Supreme Court of India has to safeguard the rights and future of The Indian minorities of socio-economic and religious clothing."¹⁵ "The Indian judiciary is considered to be the defender of The Indian democracy and the holy grail of the land which is

¹⁴ An overview on 10th Schedule of the Constitution, available at:

<https://economictimes.indiatimes.com/blogs/et-commentary/an-overview-on-tenth-schedule-of-the-constitution/> (last visited on February 1,2023)

¹⁵ Adding the Dimension of Judicial Activism to the role of The Indian Judiciary, *available at:*

<https://www.juscorpus.com/adding-the-dimension-of-judicial-activism-to-the-role-of-the-the-Indian-judiciary/#:~:text=Judicial%20activism%20has%20expanded%20the,enforceable%20by%20law%20%E2%80%93%20whilst%20being> (last visited on February 1,2023)

the Indian Constitution.”¹⁶ Judicial activism has significantly expanded the role of the Indian judiciary by empowering it to use its authority to promote social and economic equality through the enforcement of the directive principles of state policy outlined in Part IV of the Indian Constitution.¹⁷

CONCEPT OF PUBLIC INTEREST LITIGATION

Justice B.N. Kirpal, the former Chief Justice of India, once famously said, “*Ordinary people have a feeling that PIL is the pill for all that is wrong with our country.*”¹⁸

Public interest litigation or social interest litigation is the primary vehicle through which judicial activism has flourished in India, “especially in the arena of constitutional and legal treatment” for “unrepresentative and under-represented”.¹⁹ All human beings are conferred some basic fundamental rights by virtue of different international conventions.

PIL was essentially started to safeguard the fundamental rights of the oppressed sections of society who are in precarious economic or social positions. Public Interest Litigation is dissimilar from regular litigation since it is filed by one private individual against another for the enforcement of their personal rights. PIL is based on the liberalized locus standi rule where any public-spirited individual can approach the Court on behalf of the downtrodden sections of society in matters of public interest. “Degraded bonded laborers, humiliated inmates of protective homes, women prisoners, the untouchables, children of prostitutes, victims of custodial violence and rape and many other oppressed and victimized groups are attracting remedial attention of the courts.”²⁰ The concept of public interest litigation in India was introduced by Justice P.N. Bhagwati. The Apex Court held in *S.P. Gupta v. Union of India and others*, that any public-spirited individual can approach the court for enforcing the Constitutional or legal rights of those, who cannot approach the court because of economic disabilities.

One of the earliest public interest litigations was brought by G. Vasantha Pai against S. Ramachandra Iyer, the then-sitting Chief Justice of the Madras High Court after it was found

¹⁶*ibid*

¹⁷*ibid*

¹⁸PIL Pil for all Ills, available at: <https://www.tribuneindia.com/2007/20070311/spectrum/main1.htm>, (last visited on February 3,2023)

¹⁹5 Landmark Cases of Public Interest Litigation,available at:<https://knowledgesteez.wordpress.com/2020/03/24/5-landmark-cases-of-public-interest-litigation/> (last visited on 1st February,2023) (last visited on February 1,2023)

²⁰ Rakesh Kumar, “Public Interest Litigation”,

that the judge falsified the date of birth to avoid his retirement age. The judge resigned at the request of the then Chief Justice of India as it could have tainted the image of the judiciary.

A Public Interest Litigation (PIL) was initiated in 1979 against the cruel and degrading treatment of undertrial prisoners. Advocate Pushpa Kapila Hingorani filed a PIL in *Hussainara Khatoon v. State of Bihar*²¹ on the basis of a news article that was featured in The Indian Express and highlighted the plight of thousands of under-trial convicts who were being held in various jails around Bihar. The judgment highlighted the “importance of timely justice as a part of a fair trial.”²² More than 40,000 convicts awaiting trial were released on the basis of these proceedings. The State of Bihar was instructed to categorise inmates into two groups according to the severity of the offences and provide an updated chart clearly displaying a year by year of prisoners. However, the State failed to produce such a chart.

In *Bandhua Mukti Morcha V. Union of India &Ors*²³, a public interest litigation case (PIL) was filed via Article 32 of the Indian Constitution before the Supreme Court of India and petitioned the Court to direct the State of Uttar Pradesh (UP) to take urgent steps to put an end to child labour. The Apex Court in order to curb the menace of child labour, directed the State government of Uttar Pradesh to eliminate child labour in the carpet industry and issue welfare directives banning child work under the age of 14 and providing access to educational and medical services.

The Supreme Court's ruling in *Vishakha v. State of Rajasthan*²⁴ was a game-changing one since it established comprehensive rules to address the problem of sexual harassment of women at work. A three-judge panel, consisting of Chief Justice Verma, Justice Sujata V. Manohar, and Justice B.N. Kripal, issued the decision. Sexual Harassment is defined as an uninvited/unwelcome sexual favour or sexual gesture from one gender towards the other gender.²⁵ The PIL was filed by Bhanwari Devi who was a social activist in the Rajasthan's village. She worked in a rural area at a program that intended to stop child marriages. She worked diligently to stop the marriage of the Ramkaran Gujjars' daughter while she was less

²¹ 1979 AIR 1369, 1979 SCR (3) 532

²² *Hussainara Khatoon V. Home Secretary, State of Bihar: The Right to Speedy Justice*, available at: <https://www.legalserviceindia.com/legal/article-8850-hussainara-khatoon-vs-home-secretary-state-of-bihar-the-right-to-speedy-justice.html> (last visited on February 2, 2023)

²³ AIR 1997 10 SCC 549

²⁴ AIR 1997 SC 3011

²⁵ Case Analysis- Vishaka and others V/s State of Rajasthan, available at: <https://www.legalserviceindia.com/legal/article-374-case-analysis-vishaka-and-others-v-s-state-of-rajasthan.html> (last visited on February 2, 2023)

than a year old. Despite the fruitless attempts to prevent the marriage, it took place; and she was subjected to social boycott and stigma as a result of her actions. In September 1992, she was mercilessly gang raped by Ramkaran Gujjar and his five friends. The court observed that every profession, trade, or occupation must offer a safe working environment to its workers in accordance with Articles 14[2], 19[3](1)(g), and 21[4] of the Indian Constitution since it interfered with people's ability to exercise their right to life and their right to a dignified existence. The provision of a safe working environment in the workplace was a fundamental prerequisite.²⁶ Chief Justice Verma penned down in the Vishakha²⁷ judgment: *“With the increasing awareness and emphasis on gender justice, there is an increase in the effort to guard such violations; and the resentment towards incidents of sexual harassment is also increasing.”* “The judgement brought to fore the evil of sexual harassment even though it was brushed under the carpet for a very long time till then.”

In the landmark judgment of *D.K. Basu V. State of West Bengal*²⁸, this court laid down certain basic "requirements" to be followed in all cases of arrest or detention till legal provisions are made on that behalf as a measure to prevent custodial violence.²⁹

Public interest litigation works as an effective tool for social change however there are several issues with it. In the opinion of former Attorney General, Soli Sorabji³⁰, three basic rules should be followed in order to regulate the filing of Public Interest Litigations. They are:

1. Not hearing doubtful Public Interest Litigations and imposing high costs on them so it acts as a deterrent for them in the future.
2. When crucial projects or socioeconomic rules are contested after egregious delays, such petitions should be rejected outright on the basis of laches.
3. If the PIL is finally dismissed, the petitioners should be in precise terms, such as offering indemnification or giving the court a sufficient commitment to making good the damage.

²⁶*supra note at 24*

²⁷*Vishakha v. State of Rajasthan, AIR 1997 SC 3011*

²⁸ *AIR 1997 SC 610*

²⁹*Shri Dilip K. Basu Etc. Ashok K. ... vs State Of West Bengal & Ors, AIR 1997 SC 610.*

³⁰*supra note at 19*

ACTIVISM AND HUMAN RIGHTS

Human Rights are the basic rights that belong to every person in the world. Human Rights are rights inherent to all human beings. Rights are not nearly speaking about biological needs but also those conditions of life which allow us to freely develop and use our human qualities of intelligence and conscience and to satisfy our spiritual needs. They represent fundamental principles of our society including justice, respect, equality, and decency. They are a crucial safeguard for all of us, but especially for those who could experience abuse, neglect, or solitude.

It is the constitutional mandate that the judiciary is going to protect the delicate human rights of the people of the country. The Supreme Court and High Courts are empowered under Articles 32 and 226 and also provide mechanisms for remedy. For the preservation of his or her fundamental rights, the redressal of grievances and the enjoyment of their fundamental rights, an aggrieved person may spontaneously approach the Supreme Court or High Court of the relevant state. The court has the authority to issue the proper orders, directives, and writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

The case of *ADM Jabalpur v. Shivakant Shukla*³¹ is regrettable in the annals of The Indian legal precedent. In this judgment, four out of the five judges ruled that all basic rights would be suspended during an emergency. The rule that the state cannot deny anybody their right to life and personal liberty without following due process of law was established by Justice H.R. Khanna's dissenting judgement.

In *Maneka Gandhi v. Union of India*³², the Supreme Court construed the right to life in order to broaden its application and infer unlisted rights such as the "right to live with human dignity." The Supreme Court developed the "emanation" theory "to make the existence of the fundamental right meaningful and active"³³. In subsequent judgements, the courts have ruled that the right to life also includes the right to live with dignity, as in *People's Union for Civil Liberties and another v. State of Maharashtra*³⁴ and others and *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*³⁵. As a result, even though some rights are not

³¹AIR 1976 SC 1207

³²AIR 1978 SC 597; (1978) 1 SCC 248

³³Amamrtish Kaur, "PROTECTION OF HUMAN RIGHTS IN INDIA: A REVIEW", 2 Jamia Law Journal 25

³⁴AIR 1997 SC 568, (1997) 1 SCC 301

³⁵1981 AIR 746, 1981 SCR (2) 516

expressly stated in Part III of the Constitution, they have still been acknowledged via judicial interpretation.³⁶

In *People's Union for Democratic Rights & Others v. Union of India & Others*,³⁷ it was held that the reach of Article 23 is extensive and unrestricted; it targets "human trafficking" and "beggar and other types of forced labour" anywhere they occur. Since a person in need has no other option but to do labour or supply service even if the compensation is less than the minimum wage, the term "force" must thus be interpreted to encompass not just physical or legal force but also force deriving from economic conditions.

In *Sheela Barse v. State of Maharashtra*³⁸, the court held that impoverished people who are being detained should be given legal help as it is required under Articles 14, 19, and 39A of the Indian Constitution. The Court further instructed the social workers to report any mistreatment of female detainees in the jails.

The Constitution Bench of the Supreme Court in *Shayara Bano vs Union Of India And Ors* held by a 3:2 majority, the instant Triple Talaq, also known as Talaq-e-biddat, is illegal under Article 14 read with Article 13(1) of the Indian Constitution.

WOMEN EMPOWERMENT AND SUPREME COURT

Chief Justice N.V. Ramana remarked, "One of the marks of a progressive nation is the condition of its female population. Women too are stakeholders in this system and must become a substantial part of it."³⁹

"The Constitution of India has taken a long leap in the direction of eradicating the lingering effects of such adverse forces so far as women are concerned."⁴⁰ Affirmative action for women is specifically included in our constitution. It establishes the groundwork for ensuring equal opportunity for women in all spheres of life, including education, employment, and participation. It forbids all forms of discrimination against women. The judiciary, in addition to the legislature, also plays a crucial and significant role in the em

³⁶*supra note at 33*

³⁷A.I.R.1982 3 SCC 235

³⁸ A.I.R. 1983 SC 378

³⁹ Editorial, "5 times the Supreme Court upheld the rights of women in 2022", The Indian Express, December 21, 2022

⁴⁰Judicial Activism and Women Empowerment in India, *available at*: <https://www.legalservicesindia.com/article/1862/Judicial-Activism-and-Women-Empowerment-In-India.html> (last visited on 3rd February, 2023)

powerment of women. The judiciary can empower women by the broad interpretation of the provisions of the Constitution. Some of the significant cases are listed below.

Air India vs. NargeshMeerza, AIR 1981 SC 1829: The Supreme Court judgment in the case of Air India v. NergeshMeerza is one of the pioneering instances in The Indian equality law with regard to sex discrimination. The court held that the retirement and pregnancy provisions are illegal and ordered them to be removed. Regulation 47 also met a similar fate since it was discovered that there were too many powers delegated to it without any appropriate rules to govern them.

Laxmi Vs Union of India 2014 SCC 4 427: In this case, Laxmi, an acid attack survivor, filed a PIL against the Union of India, which resulted in the publication of recommendations for the benefit of acid attack survivors. The Supreme Court's ruling placed limitations on the selling of acid and awarded the victim compensation. In the past, acid assaults fell under the general category of crimes that resulted in "grievous harm." Following the Justice J.S. Verma Commission's recommendations the Criminal Amendment Act of 2013 passed a number of new laws, including one that classified acid violence as a separate offence punishable by a life sentence in prison and a fine. There was no restriction on the selling of acid for use on countertops prior to the Supreme Court's ruling.⁴¹

Secretary, Ministry of Defence V. Babita Puniya, (2020) 7 SCC 469: In this landmark judgment, the Apex Court ruled that all the serving female officers of short service commissions be taken into account by the army for the permanent commissions. This was followed by another judgment of Nisha Priya Bhatia V. Union of India, where the Supreme Court was disturbed about the legality of the conditions that the army had set in place to determine whether or not to award women who had served on short service commissions a permanent commission.

Rekha Sengar vs State of Madhya Pradesh (2021) 3 SCC 729: The Supreme Court in the aforementioned case observed that, if the scourge of female foeticide and injustice towards girl children is to be eradicated from our society, then a strict approach must be adopted. Prenatal sex determination is a grave offence with serious consequences for the society as a whole. A bench of Justices upheld the Madhya Pradesh High Court's decision to deny an

⁴¹ Laxmi vs. Union of India &ors., available at:<https://aishwaryasandeep.com/2022/02/04/laxmi-vs-union-of-indiaampors/#:~:text=This%20case%20was%20Laxmi%20vs,provide%20compensation%20to%20the%20victim> (last visited on: February 2,2023)

accused person's request for anticipatory bail and stated that the Pre Conception and Pre Natal-Diagnostic Techniques (Regulation and Prevention of Misuse) Act was necessary due to India's long-standing preference for having male children, which is rooted in a patriarchal web. The Bench observed, "*The unrelenting continuation of this immoral practice, the globally shared understanding that it constitutes a form of violence against women, and its potential to damage the very fabric of gender equality and dignity that forms the bedrock of our Constitution are all factors that categorically establish prenatal sex-determination as a grave offence with serious consequences for the society as a whole*"⁴²

Vineeta Sharma V. Rakesh Sharma (2020) 9 SCC 1: The Supreme Court held that daughters had equal coparcenary rights in Hindu Undivided Family (HUF) property. The Court ruled that the privilege is granted by birth. As a result, when a daughter is born, she is also entitled to the right. The court further explained that while the right to coparcenary is acquired at birth, the father of the coparcener need not still be alive as of September 9, 2005.

The Indian Young Lawyers Association vs The State Of Kerala (2019) 11 SCC 1: The Sabarimala Temple Entry issue was decided by a five-judge Supreme Court bench comprising Chief Justice Misra, Justice Nariman, Justice Chandrachud, and Justice Malhotra. A 4:1 majority ruled that it is unlawful for the temple to exclude women. It was decided that the practise infringed on the female worshippers' basic right to freedom of religion (Article 25(1)). The Kerala Hindu Places of Public Worship Rules, 1965, which permitted the exclusion of women based on tradition, were declared unlawful by the Bench. Justice Indu Malhotra offered the case's dissenting opinion.

PROTECTION OF ENVIRONMENT

In India, environmental pollution has increasingly become the focus. As a result, the architects of the Constitution had already incorporated Articles 47, 48, and 48A. Accordingly, the State has obligations to safeguard the environment and preserve the nation's natural resources. Since India was a signatory to the Stockholm Declaration of 1972, the Parliament inserted Article 51(1)(g) into the constitution. According to this article, people have a duty to protect and enhance the natural environment, which includes woods, lakes, rivers, and animals, as well as to show compassion for all living things. In addition, the Parliament

⁴² Supreme Court Judgments On Women Empowerment and Gender Equality 2021, available at: <https://www.livelaw.in/top-stories/supreme-court-judgments-on-women-empowerment-gender-equality-in-2021-188536> (last visited on: February 2,2023)

approved a number of anti-pollution measures, including the Environmental (Protection) Act 1986, the Water (Prevention and Control of Pollution) Act 1974, and the Air (Prevention of Pollution) Act 1990.⁴³ The Supreme Court of India in the landmark judgment of *Subhash Kumar Vs. the State of Bihar* interpreted Article 21 of the Indian Constitution to hold that the right to life includes the right to a healthy environment, which includes the right to pollution-free water and air for the full enjoyment of life. In this ruling, the Supreme Court declared that everyone has a fundamental right to a healthy environment.

“The Taj Mahal, the eternal symbol of love in India, has withstood the brutal force of the elements for centuries”. In *M.C. Mehta vs Union of India &Ors (Taj Mahal Case)*⁴⁴, the Supreme Court banned the use of coal and coke and ordered the units near the Taj to switch to compressed natural gas after it was noted in a PIL that the Taj Mahal, one of the finest ivory-white marble mausoleums, was facing a serious threat from pollution caused by the Mathura Refinery, iron foundries, glass, and other chemical industries (CNG).

In another case, the Supreme Court intervened and ordered the Agra Development Authority to immediately halt any commercial activity there. The Agra Development Authority was instructed by a panel of Justices Sanjay Kishan Kaul and AS Oka to ensure that its ruling was followed.

In the landmark judgment of *Vellore Citizens Welfare Forum v. Union of India*, the Apex court ordered all tanneries to deposit a sum of Rs. 10,000 as a fine in the collector’s office after ruling in favour of the petitioners. The State of Tamil Nadu was further ordered to give Mr. M. C. Mehta a reward of Rs. 50,000 in recognition of his efforts to conserve the environment.

In this instance, the court also made a point of highlighting the establishment of Green Benches in India, which expressly deal with issues connected to environmental protection and also for the prompt resolution of environmental problems.

⁴³ Role of The Indian judiciary in protection of the environment, available at: <https://blog.ipleaders.in/role-of-the-Indian-judiciary-in-protection-of-the-environment/#:~:text=The%20Supreme%20Court%20has%20recognized,from%20their%20factories%20in%20M.C> (last visited on: February 2,2023)

⁴⁴ AIR 1997 2 SCC 353

In the *Ganga River Pollution Case*⁴⁵, the Supreme Court issued an order to stop the Ganga's pollution. More than 250 municipalities and localities were urged to build sewage treatment plants in addition to hundreds of companies. Additionally, more than 600 tanneries that were located in a crowded residential neighbourhood of Kolkata were moved.

In the *Vehicular Pollution Case*⁴⁶, the Supreme Court established a group headed by a former SC judge in 1992 to make recommendations for policies to reduce vehicle pollution on a national scale. To reduce pollution, it mandated that lead-free gasoline be made available nationwide and that natural gas and alternative fuels be used.

In order to effectively defend human rights, the Indian judiciary even relaxed the locus standi norm, which paved the door for the notion of public interest litigation to emerge. Various instances of human rights violations have been brought before the courts through public interest litigation. The rights of women, workers, youngsters, prisoners, and other groups were upheld by the courts. In order for each person to live in dignity, the court is therefore acting as the people's messiah of their human rights.

In several landmark judgements, the Supreme Court espoused the cause of the protection of the environment at large. The Court through its judgement evolved various principles like the Precautionary Principle and Polluter Pays Principle, thereby, making them an integral part of the environmental jurisprudence of our country. The Supreme Court has assumed a proactive role in protecting fundamental environmental interests. "The judicial activism exercised by the Supreme Court for protection of the environment, in this case, demonstrates the increasing significance of environmental litigation in India."⁴⁷

RECENT CASES ON JUDICIAL ACTIVISM

The Indian judiciary has taken a very assertive role in providing justice to the general populace, ensuring that India develops into a thriving democratic nation. This includes creating the "basic structure" doctrine, bringing constitutional amendments under the scrutiny of the courts, and expanding the scope of the right to life and liberty by reading into it the

⁴⁵ M.C. Mehta V. Union of India, AIR 1988 SC 1037

⁴⁶ M.C Mehta VS Union of India, AIR 1991 SCR (1) 866

⁴⁷ M.C. Mehta (Taj Trapezium Matter) v. Union of India, (1997) 2 SCC 353 (Before the Supreme Court of India, Writ Petition (Civil) No. 13381 of 1984, Decided On: 30.12.1996), available at: <https://elsjournals.wordpress.com/2017/01/02/m-c-mehta-taj-trapezium-matter-v-union-of-india1997-2-scc-353-before-the-supreme-court-of-india-writ-petition-civil-no-13381-of-1984-decided-on-30-12-1996/> (last visited on February 3,2023)

non-justiciable directive principles of state policy such as the duty to promote education and the duty to preserve the environment.⁴⁸The judiciary has acquired considerable traction in recent years.

SUO MOTU CASES

On April 2021, in *Re: Distribution of Essential Supplies and Services During Pandemic*⁴⁹, the apex Court comprising of three-judge bench of Dr. DY Chandrachud, L. Nageswara Rao, and S. Ravindra Bhat, JJ. took note of the "grim" situation of the nation affected by the second wave of the COVID-19 pandemic and the lack of COVID-19 essentials was brought to the attention of the Court. The Supreme Court clarified that in a time of national crisis, it cannot stand as a mute spectator. The Court highlighted, among other reasons, that it is arbitrary and unreasonable for people between the ages of 18 and 44 to have to pay for vaccination when it is provided by the State/UT Governments and private institutions.

In *Delay in Release of Convicts After Grant of Bail*, the Supreme Court took up the suo-motu case on the subject of an inmate's delayed release after being granted bail. A news report stating that the prisoners held in the Agra Central Jail had not been freed even after three days following the ruling granting them bail served as the impetus for the cognisance.

RECOGNISING NEW FUNDAMENTAL RIGHTS:

In *BudhadevKarmaskar v. State of West Bengal*, the bench of Justices comprising L. Nageswara Rao, B.R. Gavai and A.S. Bopanna observed that "Notwithstanding the profession, every individual in this country has a right to a dignified life under Article 21" The Supreme Court ruled in this decision that consenting sex workers were entitled to dignity and equal protection under the law and recognised sex work as a "profession." Additionally, the Court used its inherent authority granted by Article 142 of the Constitution to give a few directives for the rehabilitation of sex workers and ordered UIDAI to provide Adhaar Cards to Sex Workers based on a proforma certificate.

⁴⁸ Atisha Sisodiya, Ayush Gupta and Afshan Nazir, "RECENT ACTIVIST TRENDS IN THE INDIAN JUDICIARY: JUDICIAL RESTRAINT AND JUDICIAL OVERREACH", 4 JOURNAL OF LEGAL STUDIES AND RESEARCH (2018)

⁴⁹ AIR 2021 SC 2904

In *Anuradha Bhasin V. Union of India*, the Supreme Court declared that the freedom of speech and expression on the Internet, as well as the freedom to engage in any profession, employment, trade, or business, is a constitutionally protected right. The Court further stated that continually prohibiting access to the Internet through orders issued in accordance with Section 144 of the Criminal Procedure Code amounted to an abuse of authority and was not permitted. The decision was made in a case contesting Kashmir's internet blackout.

UPHOLDING THE RIGHTS OF WOMEN

In *AishatSifha v. State of Karnataka (2022)* (popularly known as the Hijab Ban case), the verdict in the case was delivered by a bench consisting of Justices Hemant Gupta and Sudhanshu Dhulia, with each justice giving a different opinion. Justice Sudhanshu Dhulia observed, "The High Court took a wrong path. It is ultimately a matter of choice and Article 19(1)(a) and 25(1). It is a matter of choice, nothing more and nothing less," The decision of whether to refer the case to a 3-judge bench or a 9-judge bench now rests with the CJI.⁵⁰

In the *State of Jharkhand v. Shailendra Kumar Rai*, it was held that "The two-finger test has no scientific basis. It instead re-victimises and re-traumatises women." The Court noted that "The two-finger test must not be conducted... The test is based on an incorrect assumption that a sexually active woman cannot be raped. Nothing can be further from the truth, it is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active."⁵¹

JUDICIAL OVERREACH IN INDIA

There aren't enough kind words to describe the Indian judiciary's efforts to save the country from the worst emergency situation. Through a captive parliament, the Indira Gandhi administration attempted to deface and corrupt the Constitution both before and during the Emergency. People consider a strong, independent court that can challenge an authoritarian administration to be necessary in such situations.⁵²

The Indian court is frequently accused of judicial overreach and there are some instances which point out that it has gotten extremely assertive. Even inside the court system,

⁵⁰Top 10 Landmark Supreme Court Judgments of 2022, available at: <https://blog.finology.in/Legal-news/landmark-supreme-court-judgments-2022> (last visited on February 4,2023)

⁵¹*ibid*

⁵²*supra note at 50*

politicians and other proponents of the positivist conception of law frequently make this charge. Prior until today, supporters of Chief Justice Hidayatullah and H. M. Seervai have continued to criticise the judiciary's active attitude by claiming that it poses a threat to the separation of powers, which is the foundation of the constitution.

In his book, *Nature of the Judicial Process*, Justice Cardozo of the U.S. Supreme Court wrote, "The Judge is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness".⁵³ In recent years, the Supreme Court has tended to favour the sociological school of law over the positivist school of thought. In other words, it is troubling that the court is using judicial activism more often than judicial restraint.

Some of the glaring instances of judicial overreach have come into the limelight and they are as follows:

- The judgment of *Shyam Narayan Chouksey V. Union of India*(2018) that the national anthem should be played in movie halls.
- The censoring of the movie *Jolly LLB II* is considered to be a classical example of judicial overreach. The lawsuit, which was submitted as a writ petition, claimed that the movie mocked the court system and was, therefore, a provocation and an act of contempt. A three-person committee was established by the Bombay High Court to see the film and provide a report on it. Since the Board of Film Certification already exists and has the authority to censor, this was seen as redundant. Four sequences were cut by the filmmakers based on the committee's findings. It was deemed to be against Article 19(2) because it placed limitations on the freedom of speech and expression.
- In *Rajiv Sharma V. The State of West Bengal (2019)*, Supreme Court required Priyanka Sharma, a BJP Yuva Morcha Representative to apologise for posting such a meme in its bail ruling. The court ruled that when speech violates the rights of others, it is no longer protected by Article 19(1)(a) of the Indian Constitution.
- In the *State of Tamil Nadu V. K. Balu & others*, a public interest litigation was filed before the Supreme Court. The top court prohibited the sale of alcohol at retail establishments, restaurants, and bars within 500 metres of any national or state highway in response to a PIL about traffic safety. The state governments lost money

⁵³ The need for Judicial Restraint, available at: <https://www.thehindu.com/opinion/op-ed/the-need-for-judicial-restraint/article27141605.ece> (last visited on 5th February,2023)

as a result of this judgement, and jobs were also lost. Because it included an administrative issue that required executive understanding, the case was viewed as an overreach.

TRENDS OF JUDICIAL RESTRAINT

The concept of Judicial activism is thus the polar opposite of Judicial restraint. The principle of judicial restraint can be seen in various cases, such as the State of Rajasthan v Union of India, in which the court declined to hear a petition because it pertained to a political matter outside its jurisdiction. Similarly, in S.R. Bommai v Union of India, the judges acknowledged that there are instances where political considerations take precedence and judicial review is not feasible.

CONCLUSION

Throughout the history of the nation, it is evident that judicial activism has been a significant force in addressing social issues such as prison reform, environmental concerns, and individual liberties. Although the judiciary has an important role to play in addressing social issues, it is crucial that it recognizes its own limitations. Like other branches of government, the judiciary should not overstep its bounds by attempting to take on the responsibilities of the legislative and executive branches. While the judiciary can certainly intervene in extreme cases, such actions may upset the delicate balance of power outlined in the Indian Constitution. Rather than interfering in the domains of other branches, the judiciary can instead encourage the proper functioning of these branches.

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