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## EXPANSION OF ARTICLE 21 THROUGH JUDICIAL ACTIVISM

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### I. INTRODUCTORY

In democratic countries, the doctrine of judicial review is very important. It means that the Constitution is the Supreme law of the land. The Court performs the role of explaining the provisions of the Constitution. The doctrine of separation of powers is viable and sensible philosophy. The doctrine implies that the power of the chief organs of government be kept separate from each other. The legislature, the executive and the judiciary are three coordinating organs of the State with their sphere of activity clearly demarcated by the Constitution. Judicial review is justified by combination of the principle of rule of law and separation of powers.

The Supreme Court is one of the most powerful Courts in the world. The Supreme Court is vested with the power to decide the constitutional amendment. If the provisions of a law are found to be violative of any Articles of the Constitution, which is the touchstone of the validity of all laws, the court has the power to strike down the said provisions. It can declare invalid any law of the legislature or the actions of the executive, whether at the Union level or at the State level, if they find such a law or action is against the Constitution. The Supreme Court of India has also ruled that the core or basic principles of the Constitution cannot be changed by Parliament.

Under Indian Constitution, the Supreme Court acts as custodian of the rights of citizens and plays the role of "*Guardian of the Social Revolution*."<sup>2</sup> It is the final interpreter of the general law of the country. It is the highest Court at apex for appealing civil and criminal matters. The cases decided by the Supreme Court show that it has been playing a vigorous and a commendable role in this field. Its decisions provide a new direction with the changing needs of society. The Supreme Court has reversed its' judgement in a number of cases particularly in the interpretation of the power of amendment of Parliament.<sup>3</sup>

The expression *Judicial Activism* signifies the anxiety of courts to find out appropriate remedy to the aggrieved by formulating a new rule to settle the conflicting questions in the event of

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<sup>2</sup>Asutin, Granville (1966). *The Indian Constitution: Cornerstone of a Nation*. Clarendon Press Oxford, London. p. 169.

<sup>3</sup> Sharma, Sadhna (1986). *The Parliament and the Supreme Court*. Indira Publications, Gurgaon. p. 60.

lawlessness or uncertain laws. The judicial activism in India can be witnessed with reference to the review power of the Supreme Court under Article 32 and High Courts under Article 226 of the Constitution particularly in Public Interest Litigation.

## II. ARTICLE 21: PROTECTION OF LIFE AND PERSONAL LIBERTY

Right to life and personal liberty is the most important fundamental right guaranteed in Part III of the Constitution. The Supreme Court has been encountered with the task of interpretation of various terms used under Article 21 of the Constitution reads as under:

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

Though the phraseology of Article 21 starts with a negative word but the word ‘No’ has been used in relation to the word deprived. The object of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law.

## III. ARTICLE 21 OF THE CONSTITUTION IS AVAILABLE TO BOTH CITIZENS AND NON-CITIZENS

According to the theme of the language used in Article 21, it will be available not only to every citizen of this country, but also to be a “person” who may not be a citizen of the country. Thus, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to “Life” in this country.<sup>4</sup>

## IV. THE TRADITIONAL APPROACH OF THE SUPREME COURT

For a very long time, the Indian judiciary had taken an orthodox approach to the very concept of judicial activism. However, it would be wrong to say that there have been no incidents of judicial activism in India. Some scattered and stray incidents of judicial activism took place from time to time. But they did not come to the limelight as the very concept was unknown to India.

The court has been called upon to interpret the meaning of life, personal liberty and procedure established by law as they appear under Article 21 of the Constitution. It is pertinent to see that till 1978 i.e., till the landmark decision of *Maneka Gandhi v. Union of India*,<sup>5</sup> the Supreme Court had interpreted the above terms very narrowly.

It is hard to appreciate fully the extent of development of right to life without an overview of the traditional approach. *A.K. Gopalan v. State of Madras*,<sup>6</sup> the first case decided by the

<sup>4</sup>*Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 998.

<sup>5</sup>AIR 1978 SC 597.

<sup>6</sup>AIR 1950 SC 27.

Supreme Court of India involving the interpretation of right to life and personal liberty guaranteed under Article 21 of the Constitution, the apex court was called upon to determine the constitutional validity of the *Preventive Detention Act, 1950*. A Special Bench of the Court consisting of six judges held by majority that the Preventive Detention Act, 1950, minus its section 14 was *intra vires* the Constitution and valid. The Court has dealt with at great length, the scope of right to freedom and personal liberty as used in Articles 19 and 21 of the Constitution respectively, among other important constitutional issues.

As regards the inter relation between Articles 19 and 21 the court held that Article 19, guaranteeing various freedoms to the citizens, cannot be said to be dealing with substantive law merely, nor Article 21, with matters of procedure. The court further held that Articles 19 and 21 are not complementary to each other.<sup>7</sup> Thus, the earliest understanding of this provision was a narrow and procedural one. The State had to demonstrate the interference with the individual's right to life is accorded with the procedure laid down by properly enacted law. It didn't matter whether the law was just and fair.

Moreover, in *Gopalan's case* the court declined to infuse the guarantee of due process of law, contained in Article 21, with substantive content, holding that as long as the preventive detention statutes had been duly enacted in accordance with the procedures of Article 22, the requirements of due process were satisfied. The interpretation as made by the Court was nothing more than the freedom from arrest and detention, from false imprisonment or wrongful confinement of the physical body. Thus, "*personal liberty*" said to mean only liberty relating to person or body of individual and in this sense it was the antithesis of physical restraint or coercion.

In course of time, the traditional and narrow approach of the Supreme Court in interpreting Article 21 has been changed. In *Maneka Gandhi's case*, one can find the dramatic change of attitude by the Court in interpreting Article 21 in a manner so as to impliedly include 'due process of law' into the contents of Article 21.

## V. MANEKA GANDHI'S CASE: A WATERSHED IN INDIAN JUDICIAL ACTIVISM

The decision of Constitutional Bench of Seven judges (overruling *Gopalan's case*) in *Maneka Gandhi's case*<sup>8</sup> became the starting point, the springboard, for a spectacular evolution of the law relating to judicial intervention in individual's rights cases. Thus, the principle laid down by the Supreme Court in this case is that the procedure established by law for depriving a person of his right to life must be right, just, fair and reasonable.

The new interpretation of Article 21 in *Maneka Gandhi's case* has ushered a new era of expansion of the horizons of right to life and personal liberty. The wide dimension given to this right now covers various aspects which the founding fathers of the Constitution might or

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<sup>7</sup>AIR 1950 SC 27, in para 215.

<sup>8</sup>*Supra*, note 5.

might not have visualized. The expression “*procedure established by law*” resembles with the 5th Amendment of the U. S. Constitution.<sup>9</sup> Even though the word “due” is not specifically provided under Article 21 but the Supreme Court in its various judgments interpreted it in a wider and dynamic manner.

## VI. EXTENDED VIEW OF ARTICLE 21

The Supreme Court gave extended dimension to Article 21 in the post Maneka Gandhi era. Some of the landmark decisions are mentioned below:

### 1. Article 21 includes Right to Privacy

For the first time, the issue was raised in *Kharak Singh v. State of Tamil Nadu*.<sup>10</sup> Justice SubbaRao in his minority judgment said that the right to privacy flows from the expression personal liberty. This minority judgment paved path for the further development.

In *R. Rajgopal v. State of Tamil Nadu*<sup>11</sup> the Supreme Court observed that right to privacy is nothing but ‘right to be let alone’ and it is implicit in right to life and personal liberty guaranteed under Article 21 of Constitution.

### 2. Article 21 includes Right to Education

Right to education is considered as third eye of man without which no one can lead good, decent and dignified life. Earlier right to education was a part of Directive Principles of State Policy.<sup>12</sup> However, as per the changing needs of society Supreme Court in *Mohini Jain v. State of Karnataka*<sup>13</sup> and *Unni Krishna v. State of Andhra Pradesh*<sup>14</sup> rule that right to education is fundamental right because it directly flows from right to life.

Earlier the courts interpreted ‘Right to Education’ under Article 21 but in the year 2002 by constitutional Amendment, Article 21A<sup>15</sup> was inserted in the Constitution and right to education was expressly made as a fundamental right.

### 3. Article 21 includes Right to Livelihood

Right to livelihood is borne out of right to life as no person can live without the means of living that is livelihood. If right to livelihood is not treated as part and parcel of right to life, the easiest way of depriving a person of his right life would be deprived him of his means of livelihood. Deprivation of livelihood would not only denude the life of his effective content

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<sup>9</sup>5th Constitution Amendment is USA: “No person shall be deprived of his life, liberty or property without due process of law”.

<sup>10</sup>AIR 1963 SC 1295.

<sup>11</sup>AIR 1995 SC 264.

<sup>12</sup>Art. 51 A of the Indian Constitution.

<sup>13</sup>AIR 1992 SC 1858.

<sup>14</sup>AIR 1993 SC 2178.

<sup>15</sup>86th Constitutional Amendment, 2002.

and meaningfulness but it would make life impossible to live. The Supreme Court in *Olga Tellis v. Bombay Municipal Corporation*<sup>16</sup> held that the concept of “right to life and personal liberty” guaranteed under Article 21 of the Constitution includes the “right to live with dignity” which in turn includes right to livelihood.

#### **4. Article 21 includes Right to Free Legal Aid**

In *M.H. Hoskot v. State of Maharashtra*<sup>17</sup> the Supreme Court has invoked Article 39A and held that State under Article 21 should provide free legal aid to a prisoner who is indigent and or otherwise disabled from securing legal assistance where the ends of justice call for such service.

#### **5. Article 21 includes Right to Speedy Trial**

The Supreme Court held in *Hussainara Khatoon v. Home Secretary, State of Bihar*<sup>18</sup> that speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution and any accused who is denied this right of speedy trial is entitled to approach Supreme Court under Article 32 for the purpose of enforcing such right and the Supreme Court in discharge of its constitutional obligation have the power to give necessary directions to the State.

#### **6. Article 21 includes Right to Health and Medical Care**

Article 21, as well as Directive principles of State policy,<sup>19</sup> obligates State to preserve the life of person. In a landmark decision of *Parmanand Katara v. Union of India*<sup>20</sup> the Supreme Court held that in medico legal cases preservation of life is of paramount importance, therefore, it is the primary duty of doctor to give immediate aid to the victims either he is a criminal or innocent person and shall not wait for the completion of legal formalities.

Similarly in *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*<sup>21</sup> the Supreme Court awarded compensation to the victims aggrieved by the services provided by the government hospitals.

#### **7. Right to Life under Article 21 does not include Right to Die**

Human life is precious one. The Supreme Court has shown radical change in its view. In *Gian Kaur v. State of Punjab*<sup>22</sup> while deciding the validity of Section 309 of I.P.C, the Court overruled the earlier view which was taken in *P. Rathinam's case*<sup>23</sup> and held that “right to

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<sup>16</sup>(1985) 3 SCC 5.

<sup>17</sup>AIR 1978 SC 1548.

<sup>18</sup>(1980) 1 SCC 81.

<sup>19</sup>Articles 46 and 47 of Constitution.

<sup>20</sup>AIR 1989 SC 2039.

<sup>21</sup>AIR 1996 SC 2426.

<sup>22</sup>AIR 1996 SC 953.

<sup>23</sup>*P. Rathinam v. Union of India*, AIR 1994 SC 1844.

life” does not include “right to die” and the “extinction of life” is not included in “protection of life” thus, provision penalizing attempt to commit suicide is not violative to Article 21 of the Constitution.

## 8. Article 21 guarantees Freedom from Police Atrocities

The Supreme Court has shown its great concern in cases of maltreatment of prisoners. As far as mode of punishment is concerned in *Prem Shankar v Delhi Administration*<sup>24</sup> the Supreme Court held that handcuffing is a prima facie inhuman in nature, therefore, it must be the last refuge as there are other ways for ensuring security.

Similarly in *D.K.Basu v. State of West Bengal*<sup>25</sup> the Supreme Court held that any form of torture or cruel inhuman or degrading treatment during the investigation, interrogation or otherwise is violative of Article 21 of the Constitution. In *SheelaBarsev. State of Maharashtra*<sup>26</sup> the Supreme Court has given directions to prison authorities to ensure rights of women against torture and maltreatment in police lockup.

## 9. Article 21 includes Right to Claim Compensation

The Supreme Court of India has also shown its dynamic and activist role in compensatory jurisprudence. For the first time in *NilabatiBehera v. State of Orissa*<sup>27</sup> the Supreme Court held right to compensation as a fundamental right under Article 21 of the Constitution. Earlier it was the discretion of the Court wherein it has awarded compensation to the victim.<sup>28</sup>

In *Rudal Shah v. State of Bihar*<sup>29</sup> the Supreme Court awarded Rs. 35000/- to the petitioner who was kept in jail for 14 years despite of his acquittal order. In *Chairman, Railway Board v.Chandrima Das*<sup>30</sup> the employees of the Railway Board had gang raped a Bangladeshi Women for which the Central Government was directed to award compensation under Article 21 of the Constitution.

## 10. Right of Prisoners

The protection of Article 21 is available even to convicts in jail. The convicts are not by mere reason of their conviction deprived of all their fundamental rights which they otherwise possess. Following the conviction of a convict is put into a jail he may be deprived of fundamental freedoms like the right to move freely throughout the territory of India. But a convict is entitled to the precious right guaranteed under Article 21 and he shall not be deprived of his life and personal liberty except by a procedure established by law.<sup>31</sup>

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<sup>24</sup>AIR 1980 SC 1535.

<sup>25</sup>AIR 1997 SC 610.

<sup>26</sup>AIR 1983 SC 378.

<sup>27</sup>AIR 1993 SC 1960.

<sup>28</sup>*Khatri v. State of Bihar*, AIR 1981 SC 928.

<sup>29</sup>AIR 1983 SC 1086.

<sup>30</sup>AIR 2000 SC 998.

<sup>31</sup>Pandey, J. N. (2010). *The Constitutional Law of India*.47th Ed., Central Law Agency, Allahabad. p.269.

In *Charles Sobraj case*,<sup>32</sup> and *Sunil Batra case*,<sup>33</sup> it was held that a prisoner was not denuded of his fundamental rights such as right to equality or right to life or personal liberty beyond what has been taken away by the nature of the imprisonment itself.

### **11. Imposing Capital Punishment is not violation of Article 21**

The validity of death sentence has been raised in various cases before Supreme Court. In *Jagmohan Singh v. State of Uttar Pradesh*<sup>34</sup> the Supreme Court held that freedom to live could not be denied by a law unless it is reasonable & in public interest. However in *Bachan Singh v. State of Punjab*<sup>35</sup> it was held that, the death penalty is an alternative punishment of murder in section 302 of I.P.C. Hence it is not unreasonable & is in public interest. It should be imposed only in “rarest of rare Cases.”

The most respected public institution in India is the Supreme Court, respected by the elite and the illiterate alike. If the court has come increasingly effective in its role as the final arbiter of justice, it is because of the confidence the common man has placed in it. The court has no army at its command. It does not hold any purse strings. Its strength lies largely in the command it has over the hearts and minds of the public and the manner in which it can influence and mould public opinion.

### **12. Ban on Smoking in Public Places**

*Murali S.Deora v. Union of India*,<sup>36</sup> The Congress leader Murali S.Deora filed a PIL in the Supreme Court seeking orders for banning smoking in public places and the Supreme Court seeing the ill effects of smoking held that public smoking is banned and it directed all States and Union Territories to immediately issue orders banning the smoking in public and this ruling of the Court is to boost the public health. Thus the Centre has introduced an Anti-Smoking Bill in the Parliament and it is being implemented in many parts of the country but not effective at present.

Smoking in public area not only causes harm to the person smoking but to others as well. In a research, it was found that even non-smokers are affected by the harmful effects of smoking because of other people smoking around them. Thus, to preserve life of the people from harmful effects of smoking this law came into view. It is considered as a boon by some people as it promotes smoke-free environment and healthy lifestyle.

### **13. Right to live in a Pollution Free Environment**

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<sup>32</sup>*Charles Sobraj v. Superintendent, Central Jail*, AIR 1978 SC 1514.

<sup>33</sup>*Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.

<sup>34</sup>AIR 1973 SC 947.

<sup>35</sup>AIR 1980 SC 898.

<sup>36</sup>AIR 2002 SC 40.

*Doon Valley case*<sup>37</sup> is the first example or first indication of the right to a healthy environment. In this case a letter sent by and NGO to the Supreme Court was treated as a writ petition under Article 32 of the Constitution. It was alleged in that letter that the illegal limestone mining in the Doon Valley was destroying the fragile eco-system. The Supreme Court held that even if the limestone quarry contractors have invested large sums of money and expended considerable time and effort, the right of people around to live in a healthy environment must be protected and safeguarded.

In *Vellore Citizens Welfare Forum v. Union of India*,<sup>38</sup> Supreme Court held, the constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment. But the source of the right is the inalienable common law right of clean environment.

#### 14. Sexual Harassment of Working Women: Violative of Articles 14 and 21

In case of *Vishakha v. State of Rajasthan*,<sup>39</sup> the Supreme Court has made it clear that the sexual harassment of working women amounts to violation of right of gender equality and right to life and personal liberty.

#### 15. Aadhaar Case

In the recent case of *K.S. Puttaswamy v. Union of India*,<sup>40</sup> a landmark judgement of the Supreme Court of India, which holds that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India.<sup>41</sup> The judgement of the 9-judge bench contains six concurring opinions affirming the right to privacy of Indian citizens. The judgement explicitly overrules previous judgements of the Supreme Court in *Kharak Singh v. State of U.P.*<sup>42</sup> and *M.P. Sharma v. Satish Chandra*,<sup>43</sup> which had held that there is no fundamental right to privacy under the Indian Constitution.

### VII. CONCLUSION

Judiciary is the main institution on which the responsibility of administering justice is laid upon in a free government. Without justice being freely, fully and impartially administered, neither persons or rights, nor property of anyone can be protected. In the present era of constitutionalism, the judiciary occupies a vital position. It plays important role of interpreting and applying the law and adjudicating upon controversies between a citizen and

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<sup>37</sup> *Rural Litigation Entitlement Kendra Dehradun v. State of U. P.*, AIR 1985 SC 652.

<sup>38</sup> (1996) 5 SCC 281.

<sup>39</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

<sup>40</sup> The first challenge to Aadhaar was filed in 2012 by retired justice K.S. Puttaswamy, former judge in the Karnataka High Court. Puttaswamy's name will now forever be associated with the historic privacy judgment in August 2017. Privacy is one of the major considerations with regards to the Aadhaar project, the other being the denial of rights due to Aadhaar.

<sup>41</sup> 1 WP (C) 494 of 2012.

<sup>42</sup> *Supra*, note 10.

<sup>43</sup> AIR 1954 SC 300.

the state. It is the guardian of the fundamental law, which it interprets and of the liberties of the people.

Article 21 has become the means by which to create new rights and entitlements. The Supreme Court of India played a significant role while interpreting Article 21 of the Constitution. In this way the Supreme Court has expanded the liabilities, duties and responsibilities of the State and its authorities through its interpretative and activist judicial process. It is quite possible that in course of time, the Court may possibly be able to imply some more rights for the people in interpreting Article 21 of the Constitution because the concept of dignified life guaranteed by Article 21 seems to be inexhaustible in range and scope.

Activism can easily transcend the borders of judicial review and turn into populism and excessivism. Activism is populism when doctrinal effervescence transcends the institutional capacity of the judiciary to translate the doctrine into reality, and it is excessivism when a court undertakes responsibilities normally discharged by other co-ordinate organs of the government.

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. It also must function within the limits of the judicial process. Within those limits, it performs the function of legitimizing or, more rarely, stigmatizing the actions of the other organs of government. The judiciary is the weakest organ of the State. It becomes strong only when people repose faith in it. Such faith of the people constitutes the legitimacy of the Court and of judicial activism. Courts have to continuously strive to sustain their legitimacy. They do not have to bow to public pressure, rather they have to stand firm against any pressure. While it is imperative to exercise justifiable restraint and caution to ensure that judicial activism does not become judicial adventurism or tyranny, this power should be exercised only in exceptional circumstances and that too, only in public interest.