

# HUMAN RIGHTS, MODERNITY AND PROSPECTS FOR THE FUTURE

Article

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## Judicial Activism as an Essential Tool for the Protection and Expansion of Human Rights in India

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**Abstract:** The Indian judiciary has been the sentinel of democracy and assiduously upholds the values of Indian constitutionalism. Thus, the Court is the interpreter, protector, and guardian of the Indian Constitution. The active and trustworthy role of the judiciary makes it the country's only institution whose acceptability seems to be a national consensus. This paper discusses that judicial activism is a part of judicial review and does not violate the doctrine of separation of powers; instead, it protects and promotes constitutionalism. Further, this paper illustrates that judicial activism has played a vital role in protecting and promoting human rights in India.

**Keywords:** separation of powers; judicial review; judicial activism; human rights

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## I. Introduction

The enjoyment of human rights is the most cherished value of human beings. Human life without human rights is nothing but a dead shell. Human rights are indispensable for the growth and development of human personality (Fahed, 2002). Therefore, after India got freedom from autocratic and exploitative British rule, the framers of the Indian Constitution enunciated the provisions related to fundamental rights. Further, the Directive Principles of State Policy (DPSP) in the Indian Constitution assures the faith in people for a better future by promising them to provide social, economic and political justice.

The judiciary was empowered to enforce and protect these rights under any circumstances to ensure that these rights should not remain just mere promises (Tope, 2010). The Indian judiciary, since its inception, diligently not only protected and enforced fundamental rights but also transformed certain directive principles into fundamental rights. The judiciary in India decided each case as justice demanded without any outside interference. The freedom of the press, right to livelihood, right to education, right to compensation, right to a clean environment, and many more as fundamental rights by the Indian judiciary through interpreting various provisions enshrined in Part IV of the Indian Constitution (Bhatia, 2016). Such an active and trustworthy role of the judiciary makes it the only institution in the country on whose acceptability there seems to be a national consensus. Although, the active role of the Indian judiciary is criticized by a few people

asserting that the judiciary is overstretching its jurisdiction. Despite such a critical assertion, one cannot deny that the independent and upright judiciary is the vital feature of any democratic welfare state, on which certainty of law and justice depends (Denning, 2005, p. 3).

This paper conceptualizes that judicial activism does not run afoul of the doctrine of separation of powers. Indeed, the application of this doctrine in the Indian Constitution emphasizes that judicial review and independence of the judiciary are indispensable to protecting democratic principles. Further, the paper espouses that the judiciary in India, through judicial activism, provides justice and has emerged as the custodian of fundamental rights as perceived by the makers of the Constitution.

## **II. Independence of Judiciary and International Perspective**

The judiciary's independence can determine the predominance of the Rule of Law in a particular country. The United Nations Charter emphasizes the principle of the Rule of Law. The Charter's Preamble states, "We, the people of the United Nations, are determined... to establish conditions under which justice and respect for obligations arising from treaties and sources of international law can be maintained." Further, many other significant international instruments supported such endeavor of the United Nations. For example, the Universal Declaration of Human Rights, 1948 (UDHR) provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him."<sup>1</sup> Further, Article 8 of the UDHR provides any person's fundamental right to seek effective remedy in case his rights are infringed before the competent adjudicative authority. The effective implementation of such fundamental rights highly depends on an independent judiciary.

The opening statements of the 1959 International Conference of Jurists, held in India, are noteworthy in this context. The message states, "The ultimate protection of the individual in a society governed

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<sup>1</sup> Art. 10 of the UDHR, 1948.

by the Rule of Law depends upon the existence of an enlightened, independent and courageous judiciary and adequate provisions for the speedy and effective administration of justice.” Similarly, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms provides: “In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Furthermore, Article 14 of the International Covenant on Civil and Political Rights, 1966 also highlights the significance of judiciary independence in protecting an individual’s rights.<sup>2</sup> Article 8 of the American Convention of Human Rights, 1969, states, “Everyone has the right to a hearing by an independent, impartial tribunal, previously established by law.” In light of the above-mentioned international instruments, it can be reckoned that an independent judiciary is indispensable in protecting human rights and imparting justice. Furthermore, the UN General Assembly endorsed the Basic Principles on the Independence of the Judiciary.<sup>3</sup> It recommended that “member states should guarantee judicial independence and their constitution and laws should enshrine judicial independence.”<sup>4</sup>

The Indian judiciary has upheld the ideals of India’s Constitutional architects, who envisioned the protection and enforcement of fundamental rights and other democratic norms. The judiciary in India has played a significant role as the protector of fundamental rights. It has expanded the scope and content of fundamental rights by bringing the Directive Principles of State Policy (DPSP) within the ambit of justiciable rights. Consequently, the non-justifiable nature of the DPSP remains on the books only for academic purposes (Verma, 2004, p. 18).

The judiciary’s activism has drawn criticism. Some have claimed that the judiciary has overreached its power and trespassed into the

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<sup>2</sup> Art. 14 of ICCPR, 1966 provides’ “All person shall be equal before the courts and tribunals. In the determination of any criminal charge against him [of her] rights and obligations in a suit at law, everyone shall be entitled to fair and public hearing by a competent, independent and impartial tribunal established by law.”

<sup>3</sup> UNGA Resolution 40/146 of 13 December 1985.

<sup>4</sup> See Art. 2 of the UN Basic Principles, 1985.

domain of the executive and the legislative branches of government, violating the doctrine of separation of powers. The power of judicial review and its increasingly expansive sweep (described as judicial activism) has been compared by critics to a child who, given a hammer, believes everything under the sun is worth pounding (Ranjan, 2019, p. ix). Therefore, it is essential to discuss the separation of powers and judicial review under the Indian Constitution and whether the judiciary merely interprets existing laws or creates new ones.

### **III. The Concept of Separation of Powers and Independence of the Judiciary under the Indian Constitution**

The doctrine of Separation of Powers was thought to be first enunciated by Montesquieu around three centuries ago. According to this doctrine, a government's powers to enact, administer, and enforce the law should be strictly delegated to distinct organs of government (Shukla, 1990, p. A36). The doctrine is based on the hypothesis that merging all powers under one body leads to autocracy and the negation of individual liberty (Jain, 2003, p. 218). Further, these branches of government should be co-equal, acting as checks and balances on the other branches. While Montesquieu articulated this ideal, the principle underlying the "Separation of Powers" doctrine, while widely embraced, has not been adopted strictly under any constitution, including that of India (Rao, 2005).

Disapproving of the strict implementation of the doctrine of separation of power, Justice Aharon Barak aptly observed that:

*"An enlightened democracy is a regime of separation of powers. However, this separation does not mean that every branch is an authority unto itself, not taking the other branches into account. Such a perspective would profoundly harm the foundation of democracy itself since it means a dictatorship of every branch within its own sphere. On the contrary, the separation of power means reciprocal checks and balances among the various branches – not walls among the branches but bridges that balance and control"* (Reddi, 2019, p. 109).

In crafting India's particular system of government, the framers of the Indian Constitution studied other democratic constitutions and their operations. After reviewing the Constitutions of several democracies, the framers consciously designed a system that steers clear of a rigid separation of powers (Lok Sabha Secretariat, Government of India, 1989, p. 959).<sup>5</sup> To illustrate this, in the case of *Ram Jawaya Kapur v. State of Punjab*,<sup>6</sup> Chief Justice B.K. Mukherjee observed that

*The Indian Constitution has not recognized the doctrine of separation of power in its absolute rigidity. The power and responsibilities of the various wings of the government have been reasonably separated. Thus, it can be alleged that the Indian Constitution does not contemplate the assumption by one organ or part of the State of functions that essentially belong to another.*<sup>7</sup>

This case and its progeny allocated responsibility for upholding the Constitution among the branches of government. However, in a different line of cases, the Supreme Court has drawn a more finessed definition of India's separation of powers doctrine. For example, In the case of *Chandra Mohan v. State of UP*,<sup>8</sup> The Supreme Court observed that

*[t]he Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States... Indeed, it is common knowledge that there was a strong agitation to separate the judiciary from the executive and legislature in pre-independence India. It was apprehended that the independent judiciary would be a mockery at the power levels if not separated from the executive and legislators.*<sup>9</sup>

The Court has recognized the importance of the independence of the judiciary.

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<sup>5</sup> See Constituent Assembly Debates, Book No. 2, Vol. No. VII. Second Print 1989. P. 959.

<sup>6</sup> AIR 1955 SC 549.

<sup>7</sup> AIR 1955 SC 556. See also following cases to get the real position of doctrine of separation of powers prevailing in India. In re Delhi Law Act case (AIR 1951 SC 332); Ram Krishna Dalmia v. Justice Tendolkar (AIR 1958 SC 538); Jayanti Lal Amrit v. S M Ram (AIR 1964 SC 649).

<sup>8</sup> AIR 1966 SC 1987.

<sup>9</sup> AIR 1966 SC 1987, p. 1993.

While the executive, legislative, and judicial branches of the State each function independently in their spheres, the Constitution of India provides an independent judiciary to uphold constitutional principles exercising a broad jurisdictional mandate over the acts of the legislature and the executive (Shukla, 1990, p. A36). In the case of *S.P. Gupta v. Union of India*,<sup>10</sup> the Supreme Court observed that “the concept of Independence of judiciary is not limited only to independence from executive pressure or influence but a much wider concept that takes within its sweep independence from many others.” The Supreme Court observed that “Under the Constitution, the Judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged.”<sup>11</sup> The views of Sir Francis Bacon support this observation of the Supreme Court.

Sir Francis Bacon, in “The Essays,” while arguing the importance of the “Temple of Justice” observed that “Lions on both sides supported Solomon’s Throne: Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.”<sup>12</sup> Here “the expression ‘Solomon’s Throne’ symbolizes the majesty of our justice system, and the word ‘Lions’ represents the Legislature and the Executive. In short, it means that the ‘Majesty of Justice System’ is supported by the Legislature and the Executive from both sides; nevertheless, these Legislature and Executive are under the control of the judiciary.”<sup>13</sup> Indian jurisprudence has recognized this role distinguishing the judiciary’s role in protecting the Constitution from the roles of the executive and legislative branches.

In this role, the judiciary acts as a *sentinel on the qui vive* when a branch of State exceeds its authorized power (Reddi, 2019, p. 113).<sup>14</sup> The Supreme Court observed that

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<sup>10</sup> 1981 Supp. SCC 87.

<sup>11</sup> SC Advocates-On-Record Association v. Union of India, AIR 1994 SC 268 at p 338.

<sup>12</sup> Quoted in SC Advocates-On-Record Association v. Union of India, AIR 1994 SC 268, p. 301.

<sup>13</sup> Quoted in SC Advocates-On-Record Association v. Union of India, AIR 1994 SC 268, p. 301.

<sup>14</sup> *Supra n. 6* at 113.

*Justice has to be administered through the courts. Such administration of justice would relate to social, economic, and political as stipulated in the Preamble of the Constitution. Therefore, the judiciary becomes the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the Constitution. Further, it is the judiciary's responsibility to keep a vigilant watch over the functioning of the other constitutional functionaries within the commands of the Constitution. Therefore, the independence of the judiciary plays an important role in maintaining the democratic set-up of any country.*<sup>15</sup>

Moreover, the principle underlying an independent judiciary is not an absolute conception but arises from faith in constitutional values.<sup>16</sup> These principles are evident in the exercise of judicial review (Austin, 2008).

#### **IV. Extent of Judicial Review under the Indian Constitution**

The most crucial function of the judiciary under any written constitution is to keep authorities within constitutional limits by way of judicial review. In the literal sense, judicial review means reviewing the decree or sentence of an inferior court by a superior court. However, according to S.P. Sathe, there are two models of judicial review. One is a technocratic model in which Judges act merely as technocrats and hold a law invalid if it is *ultra vires* the legislature's powers. In the second model, a court interprets the provisions of a constitution liberally and in the light of the spirit underlying it keeps the Constitution abreast of the times through dynamic interpretation (Sathe, 2010, p. 6).

This second model is the basis for judicial activism. Thus, judicial review has more technical significance in public law in countries having written constitutions, meaning that the Court has the power to test the validity of legislative and executive actions on the touchstone of the Constitution. Essentially, courts determine the constitutionality of legislative acts. Accordingly, the fact that a constitution is a legal

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<sup>15</sup> Subhash Sharma v. Union of India 1991 Supp (1) SCC 574.

<sup>16</sup> State of Tamil Nadu v. State of Kerala, (2014) 12 SCC 696.



instrument provides the basis for judicial review. The legal instrument is basic, superior, and overwhelming in status to the laws enacted by the legislature, which is itself established by, and therefore subordinate to, the Constitution (Lakshminath, 2016, p. 22).

The Indian Constitution embodies the values of constitutionalism, which are not static but evolve along with changing times and mores of contemporary society. By conferring fundamental rights, constitutionalism in India established nationalism, independence, democracy, secularism, and limited government. The right to form its government through the universal adult franchise, liberty, equality, and unity of the nation are the catchwords of Indian constitutionalism. It is in this sphere that the judiciary emerges, duty-bound to uphold the values of Indian constitutionalism through judicial review (Lakshminath, 2016, p. 24).

The Constitutional Assembly members envisioned the Indian judiciary as defenders of rights and justice (Austin, 2008, p. 217). In their view, the judiciary is an extension of the Fundamental Rights that ensures the proper enforcement of these rights. Furthermore, they visualized the judiciary as a device to revolutionize Indian society by upholding equality and justice. Therefore, the Constitutional Assembly members went to great lengths to acknowledge judicial review as an essential element of fundamental democratic values upon which the constitutional edifice of India is based (Austin, 2008, p. 164).

In recognizing the judiciary envisioned by the constitutional assembly, Justice Bhagwati observed that the judiciary has to play a crucial role in preventing and remedying abuse and misuse of power, and also in eliminating exploitation and injustice. For this purpose, it is necessary to make procedural innovations to meet the challenges posed before the committed judiciary. The committed judiciary in India, keenly alive towards its social responsibility and accountability, has liberated itself from the shackles of western thought. It made innovative use of the power of judicial review and developed new tools, devised new methods, and fashioned new strategies to bring justice for socially and economically disadvantaged groups.<sup>17</sup>

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<sup>17</sup> AIR 1993 SC 892.

As a result, the Indian judiciary has appeared in a new avatar yielding several beneficial developments over the last few decades (Shourie, 2018). Under this blanket of constitutional freedom, and to meet society's changing needs, a new trend has emerged through the conscious exercise of the power of the judicial review. This is the essential underpinning of judicial activism.

Judicial activism is an inherent feature of judicial review and has been exercised as a result of several factors. According to Antony Lewis, the progress of the judiciary in Britain towards judicial activism has been due to: (1) the other organs of the government not obeying their mandates and doing injustice to the public at large; (2) the arbitrariness and ambiguity nature of legislation; and (3) the view of the judiciary's role as beyond fixing rules and instead treating rules as ripe for future expansion (Lewis, 1961). These factors also have let to and supported a similar emergence of the activist role of the Indian judiciary.

## **V. Judicial Activism and an Expansion of Human Rights in India**

The concept of human rights is based on the dignity and worth of the individual, the unit of creation and without reference to colors, race, sex, religion, etc. Human rights are essential for the realization of the true potential of every human being. The United Nations Charter of 1946 reaffirms faith in human rights, including dignity and worth of the person and equality of man and woman. The United Nations Charter promotes social progress and better standards of life and encourages respect for human rights and freedoms for all without distinction to race, sex, language or religion (Verma, 2004, p. 191). This was followed by the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly on 10th of December 1948, which codified human rights. The UDHR was subsequently followed by a series of covenants and conventions related to human rights. All the member states of the UN were recommended to protect and enforce fundamental rights.

Nearly a year after the adoption of UDHR, independent India adopted the Constitution of India on 26th of November 1949. As a UN member, India incorporated the provisions guaranteeing basic freedoms

as Fundamental Rights and Directive Principles of State Policy in Part III and IV of the Indian Constitution and appointed judiciary to protect and enforce these inalienable rights.

This embrace of judicial activism has brought with it great strides in human rights in India. There has been a legislative vacuum in human rights in India and the judiciary has actively stepped into to fill that void (Dhawan, 2002, p. 326). Moreover, over the last three decades, the Indian judiciary has become a vibrant force in bringing the Constitution in line with the essential characteristics of constitutionalism (Lakshminath, 2016, p. 15). From its inception and soon after its inauguration in 1950, the Supreme Court has decided many cases involving human rights issues (Basu, 2005). These court decisions have essentially held that human rights are at the core of modern liberal democracy.

This trend began with decision in *AK Gopalan v. Madras*,<sup>18</sup> holding that this power of judicial review was ingrained in the written Constitution itself. According to Article 13, the State shall make no law that takes away or abridges fundamental rights. Referring to this article, the Supreme Court opined,

*The inclusion of Articles 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 always has the power to declare the enactment to the extent that it transgresses the limits invalid.*<sup>19</sup>

In other words, the Court shouldered the responsibility of judicial interpretation of the Constitution and judicial review of legislative enactments and recognized the preeminent role that such review has in protecting fundamental human rights.

The Indian judiciary has guarded this role to achieve the dream of great Indian leaders of making India an egalitarian nation, artfully interpreting several provisions of the Constitution to this end. Such judicial craftsmanship has not only protected the rights of the people but has also spawned the evolution of several rights protecting vulnerable populations. Justice Subba Rao argued that the majority of

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<sup>18</sup> AIR 1950 SC 27.

<sup>19</sup> AIR 1950 SC 34.

the population in India is economically downtrodden and educationally unenlightened and hence, politically ignorant of their fundamental rights. These vulnerable populations cannot therefore stand against any instrumentality of State. It is therefore incumbent on the Court, in such circumstances, to protect their fundamental rights.<sup>20</sup> Consequently, the Indian Court has propounded various fundamental rights including the right to education, the right to live with dignity, and the right to live in a clean environment, by construing several clauses framed in Parts III and IV of the Indian Constitution (Tope, 2010, pp. 225–234).

This construction in furtherance of human rights, prompted the Supreme Court of India, in the *UPSE Board's* case,<sup>21</sup> to observe that the judiciary should propagate, declare, and approve rules of interpretation in order to promote and achieve the objectives specified in Chapter IV of the Indian Constitution. In this line, Justice Ahmadi emphasized that when non-observance of constitutional responsibilities and grave violations of human rights are brought to the knowledge of the Supreme Court, it cannot be expected to split hairs to maintain the delicate balance of power between the organs of government. But it must act and act in a positive manner that will provide relief, which is real and not imaginary, to the parties who exercise their fundamental right in invoking its jurisdiction (Ahmadi, 1996).

The Court has the authority to grant relief, and it should always be ready to utilize its judicial review tools and devise innovative principles for protecting valuable fundamental rights. Perhaps, the judiciary, like an explorer, must always be prepared for future advents.<sup>22</sup>

This evolution of the judiciary from a positivist court to an activist one has been painfully slow (Sathe, 2010, p. 6). In the beginning, the Supreme Court of India was essentially technocratic in nature. This all changed during the 1970s, however, when some exceptional judicial decisions were handed down that liberally interpreted the term “personal liberty” as enshrined in Article 21, transforming the entire notion of what personal liberties embody. The Supreme Court’s liberalization was

<sup>20</sup> *Waman Rao v. Union of India*, (1980) SCC 587.

<sup>21</sup> AIR 1979 SC 65.

<sup>22</sup> *State of Bengal v. Committee for Protection of Democratic Rights* (2010) 3 SCC 57.

mobilized by recognizing socio-economic realities. Through its strong-willed interpretation of constitutional provisions, particularly those provisions guaranteeing fundamental rights emerged as the savior of fundamental freedoms of the (poor) people.

After shedding its conventional role, the Indian judiciary has consciously exercised the power of the judicial review to meet the changing needs of society by protecting and enlarging the spectrum of fundamental right (Salve, 2008, p. 367). In this vein, not only has the Court broadened the scope of fundamental rights through judicial activism, but it has also ventured into unknown territory where no law previously existed (Bhatia, 1988).

This human rights jurisprudence was not haphazard or intellectually lazy, but rather developed assiduously through judicial craftsmanship. Several unwritten and unspecified rights have been extracted from the enumerated fundamental rights, especially Article 21 of the Constitution, by deploying the purposeful interpretation and a rights-oriented approach. Recognizing the judiciary's willingness to embark on the exploration of judicial activism for the sake of protecting fundamental rights, public interest litigation (PIL) has emerged as a procedural tool for judicial creativity. Further, the Indian judiciary has discovered a roadmap of the directive principles of state policies (DPSP) to amplify the scope and content of the fundamental rights to promote the public good.

In taking this judicial mandate out for a ride, in the case of *Chandra Bhavan v. State of Mysore*,<sup>23</sup> Justice Hegde observed that the provisions of the Constitution are not erected as the barriers to progress. On the contrary, they provide a plan for orderly progress towards the social order contemplated by the Preamble to the Constitution. They do not permit any slavery, social, economic, or political. While rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country... They are complementary and supplementary to each other. The mandate of the Constitution is to build a welfare society. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met.

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<sup>23</sup> AIR 1970 SC 2042.

Thus, Directive Principles were used as the Rosetta Stone for and expansive interpretation of Fundamental Rights (Reddy, 2010, pp. 262–274).

The notion of equality under Article 14 and the definition of terms like “life,” “liberty,” and “law” mentioned under Article 21 have been substantially broadened by the judiciary (Jaswal, 2002). However, equality and liberty have not been the only focus of the Court’s concern; other individual rights have also been expanded or created anew as the Court became even more sanguine in its reading of the Constitution. From the day of inauguration until now, many cases can be cited, demonstrating that the Indian judiciary has emerged as a dynamic force in expanding human rights.

The judiciary has, through judicial interpretation expanded the pantheon of fundamental liberties. For instance, privacy, as a fundamental right, is evolved through the expansive construction of Article 21.<sup>24</sup> Expressive freedoms have also been bolstered, for example, the freedom of speech and expression provided under Article 19(1)(a) was further construed to include “Right to know.”<sup>25</sup> By interpreting Article 19(1)(a), the Court broadened the right of freedom of Press/Media.<sup>26</sup> Even further, the rights granted in Articles 14 and 21 of the Indian Constitution were made applicable to non-citizens.<sup>27</sup> The Court held that child labor is an infringement of fundamental rights and further directed that the State must abolish child labor.<sup>28</sup> Also, to protect the citizenry from exploitation, the Court abolished bonded labor by construing Article 24 of the Constitution and directed the State

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<sup>24</sup> Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295; Govind v. State of Madhya Pradesh, AIR 1975 SC 1378; State of Maharashtra v. Madhukar Narayan Madikar, AIR 1991 SC 207.

<sup>25</sup> Lily Thomas v. President of India, AIR 1982 SC 149.

<sup>26</sup> Express Newspaper (P) Ltd. v. Union of India, AIR 1958 SC 578; Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, AIR 1986 SC 515; Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305; Express Newspapers Pvt. Ltd. v. Union of India, AIR 1986 SC 872.

<sup>27</sup> National Human Rights Commission v. State of Arunachal Pradesh, AIR 1996 SC 1234.

<sup>28</sup> M.C. Mehta (Child Labour Matter) v. State of Tamil Nadu, AIR 1997 SC 699. See also Peoples’ Union for Democratic Rights v. Union of India AIR 1982 SC 1473.

to rehabilitate those harmed.<sup>29</sup> Importantly, the judiciary has expanded these fundamental rights to include many vulnerable and cast-aside populations.

The judiciary has also shown the temerity to stand up for the rights of the least sympathetic members of society. For example, the right to speedy trial has become ensconced as a check on power of the government.<sup>30</sup> Additionally, the State now must safeguard the fundamental right of every person, even offenders, by facilitating medical care.<sup>31</sup> An accused person has a right to the bare necessities of life, such as adequate nutrition, clothing, shelter, and meeting his family members and relatives but within the limitation of the prison regulations.<sup>32</sup> The Court in addressing the dignity of even the accused further laid down strict guidelines regarding the handcuffing of an under-trial or prisoner when commuted to a court.<sup>33</sup> The Court held that an accused person was entitled to free legal aid as part of the right guaranteed by Article 21.<sup>34</sup> In the case of *Joginder Kumar v. State of UP*,<sup>35</sup> the Court held that Article 21 and 22 of the Constitution has a built-in provision requiring the police to inform a person and his relative or friend of his arrest and inform them the place of detention. These demonstrate the Court's willingness to adhere to basic principles of human rights.

The right to live in a healthy environment has also been interpreted as a facet of the right to life.<sup>36</sup> The Supreme Court stated that the

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<sup>29</sup> *Banhua Mukti Morcha v. Union of India* AIR 1984 SC 802; *Neeraja Chaudhary v. State of Madhya Pradesh*, AIR 1984 SC 1099.

<sup>30</sup> *Common Cause v. Union of India*, (1996) 4 SCC 33; AIR 1996 SC 1619; *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360; *Saraawati Seshgiri v. State of Kerala*, AIR 1982 SC 1165.

<sup>31</sup> *Paramanand Katara v. Union of India*, AIR 1989 SC 2039.

<sup>32</sup> *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981 SC 746; *A.K. Roy v. Union of India*, AIR 1982 SC 710.

<sup>33</sup> *Prem Shanker v. State of Delhi*, AIR 1980 SC 1535. See *President, Citizens for Democracy v. State of Assam* AIR 1996 SC 2193; *State of Maharashtra v. Ravikant S. Patil* (1991) 2 SCC 1675.

<sup>34</sup> *Khatri v. State of Bihar*, AIR 1981 SC 928.

<sup>35</sup> (1994) 4 SCC 260.

<sup>36</sup> *Buffalo Traders' Welfare Association v. Smt. Maneka Gandhi*, (1996) 11 SCC 35; *T.N. Godavarman Thirumulkpad v. Union of India*, 1997 (2) SCC 267; *Research*

right to education is concomitant to fundamental freedoms and rights enshrined under Part III of the Constitution. The Court also has imposed restrictions and prohibitions on the manufacturing and selling of drugs that are detrimental to human health and life.<sup>37</sup> It is clear that through judicial activism the Court expanded human rights by liberally construing the bare text of the written Constitution.

The Supreme Court of India also applied the provisions of international conventions and treaties in cases where domestic law provides no remedy. Thus, it has stretched the spectrum of fundamental rights. The Court ordered compensation as a legal remedy and acknowledged it as a mechanism for executing the fundamental rights provided in the Constitution.<sup>38</sup> Consequently, in several cases, the Court awarded compensation in cases of infringement of fundamental rights, including victims of rape.<sup>39</sup> In the context of sexual harassment, the Supreme Court acknowledged and relied to a great extent on international conventions that have not been transformed into municipal law and norms in CEDAW.<sup>40</sup>

## **VI. Judicial Activism and Human Rights: Recent Development**

The recent past Supreme Court's judgements, transformed Indian democracy and redefined our fundamental human rights and which highlights the way and manner in which the judiciary in India has performed its role and protected the fundamental liberties of millions of citizens throughout India. For example, the Court defended the rights

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Foundation for Science v. Union of India (Hazardous Waste Matter) Writ Petition (Civil) No. 657 of 1995; M.C. Mehta v. Union of India, AIR 1987 SC 1086.

<sup>37</sup> Drug Action Forum v. Union of India (Drugs Ban Matter) Writ Petition (Civil) No. 698: (1997) 9 SCC 609.

<sup>38</sup> Nilabati Behera v. State of Orissa, AIR 1993 SC 1960; T.C. Pathak v. State of U.P. (1995) 6 SCC 357; Gulab Bai v. Nalini Narsi Vohra (1991) 3 SCC 482.

<sup>39</sup> Delhi Domestic Working Women's Forum v. Union of India, 1994 (4) SCALE 608. Chairman, Railway Board v. Chandrima Das (2000) 2 SCC 465.

<sup>40</sup> Vishaka v. State of Rajasthan, AIR 1997 SC 3011; Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625; D.S. Grewal v. Vimmi Joshi (2009) 2 SCC 210).



of Muslim married women by declaring triple *talaq* unconstitutional. The Apex Court observed that it was manifestly irrational and arbitrary that a marital tie could be allowed to be broken so capriciously and whimsically and observed that such a form of divorce pronounced by a Muslim husband on his wife violated Article 14 of the Constitution.<sup>41</sup>

While entertaining a Public Interest Litigation (PIL) Supreme Court said that life and liberty as envisaged in Article 21 of the Constitution were meaningless unless they encompassed within it “individual dignity” and adopting the principles applied by courts around the world, the Court held that though “the right to die was not a fundamental right, but the right to live with dignity as envisaged in Article 21 included necessarily the smoothening of the process of dying in case of terminally ill patients with no hope of recovery and thus recognized the concept of passive euthanasia.”<sup>42</sup>

The Court has marched to decriminalize homosexuality between consenting adults. The Supreme Court, in the case of *Navtej Johar v. Union of India*,<sup>43</sup> observed that the LGBTQ community deserves equal rights as everyone else, and discriminating against someone because of their sexual orientation is incredibly disrespectful to that person’s dignity and sense of self-worth.

While scraping the crime of adultery,<sup>44</sup> Justice Deepak Misra observed that any system treating a woman with indignity, inequity and inequality, or discrimination invites the wrath of the Constitution. Any provision that might have, a few decades back, got the stamp of serene approval may have to meet [its own] epitaph with the efflux of time and growing constitutional precepts and growing perception. A woman cannot be asked to think like a man or how society desires. Such a thought is abominable, for it slaughters her core identity. Moreover, it is time to say a husband is not a master. Equality is a governing parameter. All historical perceptions should evaporate, and their obituaries should be written.

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<sup>41</sup> *Shayara Bano v. Union of India*, 2017 (9) SCC 1.

<sup>42</sup> *Common Cause v. Union of India*, 2018 (4) SCALE Pages 1.

<sup>43</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; 2014 SCC OnLine SC 328.

<sup>44</sup> *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676.

Further, in the case *Independent Thought v. Union of India*, the Supreme Court of India observed that Exception 2 of Section 375 should apply to a married child below the age of 18 years. The Court stated that the exception clause arbitrarily and unreasonably discriminates between a married and an unmarried girl child. The Court noted that such discrimination is against the spirit of the Constitution and emphasized the significance of the right to self-determination, privacy and bodily integrity. The Court's observation, in this case, may turn out to be a significant step in the battle against marital rape.

The judiciary opened the doors of Sabarimala shrine to women of all ages. The Court held that Article 25 of the Indian Constitution provides the right to religion to every person, irrespective of gender or sex. Thus, a discriminatory customary practice that denies women entry at religious places infringes on women's right to enter a public temple, practice Hinduism freely, and demonstrate devotion to Lord Ayyappa.<sup>45</sup> Further, in the Hadiya case, the Supreme Court recognized the right to change faith as a fundamental right of choice.<sup>46</sup>

While acting as a savior of fundamental rights and constitutionalism, the Supreme Court of India, in the Aadhaar case, struck down several exasperating implementations of this concept while reading it down.<sup>47</sup> On whether the Aadhaar Act violated the right to privacy, the Court referred to the 2017 decision in Puttaswamy I, where privacy was declared a fundamental right.<sup>48</sup> The Court stated that any invasion of the right to be justifiable must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of legitimate State interest; and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. In the Court's opinion, the existence of the Aadhaar Act, coupled with the aim of delivery of welfare benefits, passed the first two prongs of the test. Thus, Section 139AA of the Income Tax Act, which provided for mandatory Aadhaar-PAN linkage, was upheld; the mandatory linkage of Aadhaar with bank

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<sup>45</sup> Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

<sup>46</sup> Shafin Jahan v. Asokan, K.M, 2018 SCC OnLine SC 343.

<sup>47</sup> K.S. Puttaswamy v. Union of India, 2018 SCC OnLine SC 1462.

<sup>48</sup> K.S. Puttaswamy (I) v. Union of India, (2017) 10 SCC 1.

accounts was held not to satisfy the test of proportionality and was struck down. Similarly, the mandatory linkage with mobile numbers was not upheld. The Court expounded with elocution the contours as well as nuances of the conceptual framework of right to privacy under the Indian Constitution.

The Court took a savior's stand, protecting freedom of speech, and refused to ban the Malayalam novel *Meesha*.<sup>49</sup> Former Chief Justice Deepak Misra quoted Voltaire's famous dictum: "I may disapprove of what you say, but I will defend to the death your right to say it."<sup>50</sup> In the case of *Shreya Singhal v. Union of India*,<sup>51</sup> the Supreme Court struck down Section 66A of the Information Technology Act 2000 and protected freedom of speech and expression provided to the people under Article 19(1)(a) of the Indian Constitution. Thus, restricting the irrational application of power by the country's executives. Additionally, it has given the government crystal-clear rules for how to pass laws pertaining to freedom of speech and expression with some enforceable limitations. In each case, the individual's right was upheld over the dissenting demands of the wider community.

## VII. Conclusion

The cornerstone of the rule of law in India has been the independence of the judiciary. It is the only way in which we make a perfect separation of powers. There is no rigid separation between legislature and executive. Still, judicial power is separate in a true sense, as no government member can influence any court decision. Judicial independence, a *sine qua non* for the protection of human rights. However, it must not be equated with judicial showmanship in striking down laws whose policy and objectives judges disapprove. As a word of caution, Lord Justice Stephen Sedley remind us in his 1998 Hamlyn Lectures titled *Freedom, Law and Justice* that: "Aspiring village Hampdens sometimes forget it that the protection of good government is as much the High Court's job as the castigation of misgovernment" (Soarbjee, 1999). If the rule of law

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<sup>49</sup> N. Radhakrishnan v. Union of India, 2018 SCC OnLine SC 1349.

<sup>50</sup> N. Radhakrishnan v. Union of India, 2018 SCC OnLine SC 1349.

<sup>51</sup> (2015) 5 SCC 1.

is the keystone of the Welfare State, then the judiciary is an essential body that provides certainty and justice to the people.

In a nation that respects the Rule of Law, the judiciary has enormous responsibilities, and people have great expectations. In India, where the other two parts of the government cannot perform their functions in a manner expected by the people, the judiciary is preserving the fundamental human rights of the people, especially vulnerable sections of society. The courts have pushed not only back attempted sabotage but also direct subversion from the other branches of the government. It has struck down arbitrary laws violating Fundamental Rights and thus protected the people's basic human rights. At the same time, by interpreting the various provisions of Part III and Part IV of the Constitution of India and even applying international instruments in cases where domestic laws are silent, the judiciary is protecting and preserving the rights of the people of India.

A review of the decisions of the Indian judiciary concerning human rights indicates that the judiciary is playing the role of savior in crisis. Where the executive and legislature failed to address the people's genuine problems, the Court came forward to take corrective measures and provide necessary directions to the executive and legislature. However, while taking note of the contributions of the judiciary, one must not forget that judicial pronouncements cannot be a protective umbrella for inefficiency and laxity of the executive and legislature. It is the foremost duty of a democratic society and all its organs to provide justice and correct institutional and human errors affecting the basic needs, dignity and liberty of human beings. Fortunately, India has a proactive judiciary, which aspires that in the times ahead, people's rights will be strengthened further.

Sir Gerard Brennan emphasized that an independent and active judiciary should exist. He declared, "As the wind of political expediency now chills Parliament's willingness to impose checks on the executive, and the executive now has a large measure of control over Legislation, the courts alone retain the original function of standing between the government and the governed" (Nariman, 2018). This, perhaps, is judicial activism. With the rise of the new avatar of the Indian judiciary, human rights have found fertile fields throughout the nation.

The achievement of the Indian judiciary in expanding human rights represents the highest fulfilment of the democratic system. With its course already well set, the advancement of human rights will endure as the greatest attainment of the Golden Age of Indian history.

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