

## V. JUDICIAL ACTIVISM

Due to activist approach of judges, a new facet of Judicial Review emerged during course of time to be known as Judicial Activism that envisages changes in interpretation of constitutional and statutory provisions in consonance with the dynamics and uncertainties of human affairs and relations. The broad contours of Judicial Activism is visible in Black's Law Dictionary that defines it as a judicial philosophy which motivates judges to depart from strict adherence to precedents in favor of progressive policies which are not always consistent with the restraint expected to be exercised by appellate judges.

In the Indian context, Judicial Activism is regarded as the active interpretation of any existing provision with the view of enhancing the utility of legislation for social betterment in accordance with the Constitution. The Judicial Activism may be taken to mean the approach of the judiciary to probe into inner functioning of other organs of the government. It is, no doubt, the outcome of inactiveness on the part of other organs-the legislature and executive. The activist approach of the Supreme Court became discernible after the Emergency was revoked in 1977. It is the activist approach due to which innumerable rights crucial for the welfare of the citizens have been inferred from article 21 of the Constitution of India dealing with protection of life and personal liberty. It is notable in the following area:

(1) Bonded Labour – *Bandhua Mukti Morchav. Union of India*<sup>14</sup>, *People's Union for Democratic Rights v. Union of India*<sup>15</sup>, *Neerja Chaudhary v. State of M.P.*<sup>16</sup>, etc., are the cases decided on the issue in welfare of the bonded labourer.

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<sup>14</sup> AIR 1984 SC 802.

(2) Child Welfare – The judgements in *M.C. Mehta v. State of Tamil Nadu*<sup>17</sup>, *Lakshmi Kant Pandey v. Union of India*<sup>18</sup>, *Sheela Barse v. Union of India*<sup>19</sup>, etc., have been delivered in the welfare of child.

(3) Woman Welfare – The Supreme Court issued several directions in *Vishakav. State of Rajasthan*<sup>20</sup> for prevention of sexual harassment of working woman and also in relation to trial of rape case in *Bodhisattwa Gautamv. Subhra Chakraborty*<sup>21</sup>. In *Gaurav Jain v. Union of India*<sup>22</sup>, several directions were issued for rescue and rehabilitation of child prostitutes and children of fallen women.

(4) Care Homes – Directions were issued in *Vikram Deo Singh Tomer v. State of Bihar*<sup>23</sup> for the improvement of care homes.

(5) Human Dignity – Right to live with human dignity was recognized in *Fancis Coralie v. Administration Delhi*<sup>24</sup> and reiterated in *Bandhua Mukti Morchav. Union of India*<sup>25</sup>, *Chameli Singh v. State of UP.*<sup>26</sup>, etc.

(6) Protection of Prisoners – In *Joginder Kumar v. State of U.P.*<sup>27</sup> right against illegal arrest, in *Postsangbam Nigol v. General Officer Commanding*<sup>28</sup> right Against police torture, in *People's Union for Civil Liberties v. Union of India*<sup>29</sup> right against fake encounter, in *Kishore Singh v. State of Rajasthan*<sup>30</sup> right against inhuman treatment, in *D.K. Basu v. State of West Bengal*<sup>31</sup> right of compensation for death in police custody, etc., have been recognised for protection of prisoners.

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<sup>15</sup> AIR 1982 SC 1473

<sup>16</sup> AIR 1982 SC 1099.

<sup>17</sup> AIR 1999 SC 41.

<sup>18</sup> AIR 1984 SC 469.

<sup>19</sup> AIR 1986 SC 1773

<sup>20</sup> AIR 1997 SC 3011.

<sup>21</sup> AIR 1996 SC 922.

<sup>22</sup> AIR 1997 SC 3021.

<sup>23</sup> AIR 1988 SC 1782.

<sup>24</sup> AIR 1981 SC 746.

<sup>25</sup> AIR 1984 SC 802.

<sup>26</sup> AIR 1996 SC 1051.

<sup>27</sup> AIR 1994 SC 1349.

<sup>28</sup> AIR 1997 SC 3435.

<sup>29</sup> AIR 1997 SC 1203.

<sup>30</sup> AIR 1981 SC 625.

<sup>31</sup> AIR 1997 SC 610.

(7) Protection of Environment – Right to live in pollution free environment was recognized in *Subhash Kumar v. State of Bihar*<sup>32</sup> and directions were issued for the protection of environment in *M.C. Mehta v. Union of India*,<sup>33</sup> *Indian Council for Enviro-Legal Action v. Union of India*<sup>34</sup>, *M.C. Mehta v. Kamal Nath*<sup>35</sup>, etc.

(8) Enforcement of Public Duty – The Supreme Court has issued several directions in *Vineet Narain v. Union of India*<sup>36</sup> so as to compel the law enforcing agencies to perform their duties.

(9) Privacy – Right to privacy has been recognized as a part of the right to life and personal liberty in *People's Union for Civil Liberties v. Union of India*<sup>37</sup>, *R. Rajagopal v. State of Tamil Nadu*<sup>38</sup>, *State of Maharashtra v. Madhukar Narayan Mandikar*<sup>39</sup> and *Justice Puttaswami (retd.) v. Union of India*<sup>40</sup> etc.

It is worth mentioning here that all the aspect of privacy was discussed in the *Puttaswami Case* and it was held that privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in article 21. Elements of privacy also arise in varying context from other facets of freedom and dignity recognized and guaranteed by the Fundamental Rights contained in Part III.<sup>41</sup> Expanding the scope of privacy, it was further held that privacy is a constitutional core of human dignity.<sup>42</sup> Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private

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<sup>32</sup> AIR 1991 SC 420.

<sup>33</sup> AIR 1987 SC 1086.

<sup>34</sup> AIR 1996 SC 1446.

<sup>35</sup> AIR 2000 SC 1997.

<sup>36</sup> AIR 1998 SC 889.

<sup>37</sup> AIR 1997 SC 568.

<sup>38</sup> AIR 1995 SC 264.

<sup>39</sup> AIR 1991 SC 207.

<sup>40</sup> Supreme Court August 24, 2017; available at <https://www.livelaw.in/breaking-right-privacy-fundamental-right-sc/> (last visited on May 30, 2019)

<sup>41</sup> *Id* at para 3(C) of conclusions of CJI J.S. Khehar and JJ R.K. Agrawal, Dr. D.Y. Chandrachud and S. Abdul Nazeer.

<sup>42</sup> *Id* at para 1(E).

to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.<sup>43</sup>

It is the activist approach of the judiciary due to which fairness in governance of the country becomes possible and the rights of the citizens, particularly, of poor and marginalized section of society are protected from arbitrary actions of legislature and executive. There are many judicial pronouncements which may be considered historic in Indian legal system. Following are some instances:

(1) Judgement on Tainted Legislators – The Supreme Court in *Lily Thomas v. Union of India*<sup>44</sup> declared section 8(4) of the Representation of the People Act, 1951 *ultra-vires* the Constitution on the ground that it is contrary to the provisions of articles 102 (1)(e) and 191 (1)(e). Section 8 of the Act of 1951 deals with disqualifications on conviction for certain offences. The sub-sections (1), (2) and (3) of section 8 make a person, convicted of any offence mentioned under these sub-sections, disqualified from the date of such conviction and to be disqualified for a further period of six years since release. The expression “disqualified” has been defined in section 7 (b) according to which “disqualified” means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of State. The sub-section (4) of section 8 provides exemption to a person, who is a Member of Parliament or State Legislature on the date of conviction, from being disqualified under any of sub-sections (1), (2) and (3) of section 8 for the period of three months or till the disposal of appeal or application of revision if these are brought in respect of conviction within the period of three months. The provisions of Articles 102(1)(e) and 191(1) (e) empower Parliament to make law laying down same disqualifications for a person to be elected as, and for a person being, Member of Parliament or State Legislature, while Parliament has made different laws for a person to be elected as a member and for an elected member under Section 8(4).

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<sup>43</sup>*Id* at para 1(E).

<sup>44</sup>Supreme Court July 10, 2013 at para 20; available at <https://indiankanoon.org/doc/63158859> (last visited on May 30, 2019)

The judgment can be said a historic judgment towards elimination of criminalization of politics because a democratic country cannot be said to be governed in accordance with the principles of democracy unless and until charge -sheeted persons or persons with criminal record are elected or continued as representatives of the people as they do not reflect the will of the people in general and adversely affect the process of election and functioning of government.

In another step towards elimination of criminalisation of politics, a five-judge Constitution Bench of the Supreme Court in the *Public Interest Foundation v. Union of India*<sup>45</sup> observed that Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. The Court issued following directions also regarding contesting candidate and political parties:<sup>46</sup>(i) Each contesting candidate shall fill up the form as provided by Election Commission and the form must contain all the particulars as required therein; (ii) With regard to criminal cases pending against the candidate, it shall state in bold letters; (iii) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her and the concerned political party shall be obligated to put up that information on its website and (iv) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspaper in the locality about the antecedents of the candidate and also give wide publicity in the electronic media.

(2) Judgment on Section 377 of IPC – In *Navtej Singh Johar v. Union of India*<sup>47</sup> a five-judge Constitution Bench of the Supreme Court declared section 377 of the Indian Penal Code unconstitutional to the extent to which it criminalises the consensual penile non-vaginal intercourse between adults in private. Section 377 criminalises voluntary carnal intercourse against the order of nature with any man, woman or animal. Due to this provision, the LGBT (Lesbian, Gay, Bisexual and Transgender) community was suffering atrocity and torture and was deprived of Fundamental Rights conferred under article 14 and 21. It is worth mentioning here

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<sup>45</sup>Supreme Court September 25, 2018 para 118;available at <http://www.livelaw.in/breaking-candidates-cannot-be-disqualified-on-framing-of-charges-in-criminal-case/> (last visited on May 30, 2019)

<sup>46</sup>*Id* at para 116 (i)-(v).

<sup>47</sup>Supreme Court September 6, 2018 Dipak Misra former CJI (for himself and A.M. Khanwilkar J.) para 253 (xvii), R. F. Nariman J. para 97, D. Y. Chandrachud J., para 156 (i) and Indu Malhotra J., para 21 (i) ;available at <http://www.livelaw.in/celebration-of-sexual-agency-justice-chandrachuds-soulful-judgement-in-section-377-case/> (last visited on May 30, 2019)

that the Delhi high court in *Naz Foundation v. Union of India*<sup>48</sup> had held the same as has been held in the Navtej Singh Johar Case. These judgements are historic because criminalising the consensual sexual acts between adults in private is against the principle of criminal law.

(3) Judgement on Section 497 of IPC – In *Joseph Shine v. Union of India*<sup>49</sup> a five-judge Constitution Bench of the Supreme Court declared section 497 of the Indian Penal Code unconstitutional as being violative of article 14, 15(1) and 21 of the Constitution. Section 497 makes the sexual intercourse with wife of another man, without the consent or connivance of that man, the offence of adultery. The judgement can be said to be a historic one because section 497 is founded on the notion that the woman is property of husband and, thus, it is against the status and dignity of person.

(4) Judgement on Euthanasia – The Supreme Court in *Common Cause (A Registered Society) v. Union of India*<sup>50</sup> held the right to die with dignity as a Fundamental Right under Article 21 and allowed passive euthanasia and living will. In passive euthanasia, life support system is withdrawn in order to smoothen the dying process. Living will is a will purporting to be prepared for the patient expressing willingness to withdraw the medical treatment in order to smoothen the dying process for reducing the period of suffering if the patient is terminally ill or in a permanent vegetative state where there is no hope of recovery. This judgement provides justice to those persons who are terminally ill or in a permanent vegetative state and alive with the help of life support system, and there is no hope for revival.

(5) Judgement on Honour Killing – In *Shakti Vahini v. Union of India*<sup>51</sup>, the Supreme Court upheld the choice of consenting adults to love and marry as part of their Fundamental Right and declared that consent of family, clan or community is not necessary if adult couple

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<sup>48</sup>Delhi High Court July 2, 2009 para 132; available at <https://indiankanoon.org/doc/100472805/> (last visited on May 30, 2019)

<sup>49</sup>Supreme Court September 27, 2018 Dipak Misra former CJI, (for himself and A.M. Khanwilkar J.) para 55, F.R. Nariman J. para 28, D. Y. Chandrachud J. para 67 and Indu Malhotra J. para 18 (i); available at: [www.livelaw.in/33-year-old-judgement-on-adultery-law/](http://www.livelaw.in/33-year-old-judgement-on-adultery-law/) (last visited on May 30, 2019)

<sup>50</sup>Supreme Court March 9, 2018 Dipak Misra former CJI., (for himself and A.M. Khanwilkar J.) para 195, A.K. Sikri J., para 136, D. Y. Chandrachud J., para 143 and Ashok Bhushan J., para 95.; available at: <https://www.livelaw.in/breaking-right-die-dignity-fundamental-right-sc-allows-passive-euthanasia-living-will-issues-guidelines/> (last visited on May 30, 2019)

<sup>51</sup>Supreme Court March 27, 2018 para 41, 42 and 53 ;available at : <https://www.livelaw.in/right-choose-life-partner-fundamental-right-consent-family-community-clan-not-necessary-marriage-two-adults-se-read-judgement/> (last visited on May 30, 2019)

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decide to marry. The Court also issued a set of guidelines to safeguard young couples under threat for marrying outside their caste or religion, or inside the same clan. This judgment is also historic because in many States in India, the couples of same clan and of different caste or religion loving or marrying to each other were subjected to torture or, often, killing in the name of honour of the family. Sometimes, *khappanchayats* used to order the killing of such couples.

Furthermore, due to the activist approach of the judiciary, the concept of Public Interest Litigation, Procedural Device for Justice to Poor and Doctrine of Basic Structure emerged as a means of justice to poor and disadvantaged section of the society and as the mechanism of control of arbitrary actions of legislature and executive.