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## Human Rights in India - Fifty Years after Independence

### Keywords

Human Rights Law, Women, Comparative Law, Jurisprudence, Revolution

# HUMAN RIGHTS IN INDIA — FIFTY YEARS AFTER INDEPENDENCE

VIJAYASHRI SRIPATI

## I. INTRODUCTION

August 15, 1997 marked the fiftieth anniversary of India's independence.<sup>1</sup> A momentous day for all citizens of the subcontinent, it is of no less significance to the rest of the world. As the second most populous nation in the world and one occupying a significant geo-strategic location in Asia, the triumph of democracy and the strengthening of its roots in India augur well for international peace and security. Enduring for half a century as a vibrant, democratic and secular nation of teeming millions reflecting a rich diversity of caste, religion, language, culture, economic and social backgrounds is an achievement for India worthy of celebration.

This celebration has been at one and the same time an inspiring and introspective event. India's fiftieth anniversary provides evidence of survival, as well as an opportunity to pause and take measure of her half century of experience in promoting human rights among her own citizens. While India has come a long way since 1947 and has many impressive achievements to her credit, it would be less than honest not to take cognizance of the number of severe failings that have marked the past five decades. It is imperative that we understand the nature and cause of those failings, and put the lessons of the past to work in charting a future course. In the failure to do so, those deprived of basic rights may "blow up the structure of political democracy" that the

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1. See Kenneth J. Cooper, *Free but Bound by their Pasts — Fifty Years After Independence, India and Pakistan Face Same Ills*, WASH. POST, Aug. 14, 1997 at A1, A27; John F. Burns, *India's Five Decades of Progress and Pain*, N.Y. TIMES, Aug. 14, 1997 at A1, A10-A11; India at 50, N.Y. TIMES, Aug. 14, 1997 at A26.

On August 14, 1947, at the stroke of midnight, India emerged independent after two centuries of British colonial rule. The British had first set foot in India as traders in 1600. In that year, Queen Elizabeth I had granted a charter to the East India Company granting it a full monopoly on British trade with India. See M.V. PYLEE, *CONSTITUTIONAL GOVERNMENT OF INDIA* 47-139 (Asia Pub. House 1977) (discussing the establishment of the East India Company, its subsequent control over India, the commencement of India's struggle for freedom and the development leading to India's independence from Great Britain). Taking advantage of the prevailing disunity among the Indian rulers, the East India Company and later Her Majesty's government assumed full control over India by the second half of the eighteenth century. *Id.* The British domination continued up to the close of the second World War. In the aftermath of the war and with the disintegration of the British Empire, independence for India became imminent. *Id.* at 120-139.

founding fathers "so laboriously built up."<sup>2</sup>

John Hart Ely's remark that "constitutional law appropriately exists for those situations where the representative government cannot be trusted" evidences the crucial role of the judiciary in safeguarding human rights.<sup>3</sup> This is especially true of India where it is the Supreme Court that has been constitutionally vested with wide-ranging powers and the responsibility of protecting the citizens' human rights.<sup>4</sup> The significant, and arguably controversial, role the Court has come to play in the Indian polity can be traced back to this fact. It is sad that despite several economic successes, India is still plagued with the ubiquitous problems of poverty, illiteracy, housing, health, environmental degradation and exploitation, and other grave injustices. Judicial protection of human rights, therefore, takes on a desperate urgency. The challenges faced by the Court are daunting, and its failure to serve as a bastion of liberties could have a potentially explosive impact: threatening the most precious edifice of the Indian polity — democracy.

While the seriousness of India's current problems does not permit any slackening of effort by any branch of the government, this essay argues that the Supreme Court must continue to remain at the forefront of enforcing human rights. Article 21 is the life and liberty clause of the Indian Constitution.<sup>5</sup> This essay analyzes the jurisprudence of human rights that the Supreme Court has developed out of this seminal provision since independence. This analysis will be advanced against the backdrop of India's international obligations and international standards laid down in the International Covenant on Civil and Political Rights.<sup>6</sup>

This essay comprises four parts. Part I is devoted to a discussion of the framing of India's Constitution, an analysis of its Fundamental Rights Chapter and the Supreme Court's role in the first three decades of independence (1947-1977). Part II critically examines the principles and approaches that have guided the Court both in the expansion of Article 21 and its adoption of many procedural innovations beginning in the late seventies. What is the relationship between international law and municipal law in India? How informed is the Indian Judiciary of International Human Rights Law? What use, if any, has the Court made of international legal norms? Part III, entitled "Creative Impact of International Human Rights Norms," analyzes these issues. The concluding part highlights issues most in need of the Court's activist

2. SOLI SORABJEE, *Equality in the United States and India*, in CONSTITUTIONALISM AND RIGHTS 100 (Louis Henkin & Albert J. Rosenthal eds., Columbia University Press) (1990).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 146 (1980).

4. The Supreme Court heads the unified judicial system in India. Article 32 of the Constitution confers on every citizen the right to invoke the Court's original jurisdiction for the enforcement of his fundamental rights.

5. Article 21 confers the fundamental right to life and personal liberty.

6. *International Covenant on Civil and Political Rights*, GA Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *International Covenant*].

thrust.

## II. INDIA'S FIRST HOUR OF FREEDOM

### A. Framing The Constitution

On December 9, 1946, eight months prior to the formal transition of power from the British Government to the Indians, the Constituent Assembly<sup>7</sup> convened to draft a constitution that was acceptable to all sections of free India and suitable to its peculiar needs and situation. It was a historic occasion and marked India's first hour of freedom. To use the words of Granville Austin, it was "perhaps the greatest political venture since that originated in Philadelphia in 1787."<sup>8</sup> What emerged after thirty-six months of deliberations was not merely a political document establishing a democratic, secular state but a document embodying the blueprint of a parliamentary form of government with all sovereignty vested in "the people."<sup>9</sup> As articulated in its evocative Preamble,<sup>10</sup> the Constitution, a social document, envisaged an egalitarian, just, and humane society committed to the dignity and liberty of the individual. It therefore enshrined an array of both Fundamental Rights<sup>11</sup> and Directive Principles,<sup>12</sup> which unlike the former, are non-justiciable, but nonetheless deemed to be "fundamental in the governance of the country," and it was the "duty" of the "State to apply these principles in making laws."<sup>13</sup> Part IV embodies the socio-economic responsibility of the state towards its citizens through provisions such as: securing for

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7. Once it became clear that independence for India was imminent, the British Government created a semi-sovereign Constituent Assembly for India in the Cabinet Mission Plan of 1946. The Constituent Assembly consisted of 296 elected members and was truly a representative body. See P. MISRA, *THE MAKING OF INDIA'S REPUBLIC* 56 (1966).

8. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 308 (1966) [hereinafter AUSTIN].

9. India has a Parliamentary form of government with a bicameral Legislature: Lok Sabha - (House of people or the lower house) and Rajya Sabha (House of States or the Upper house). The Lok Sabha is the principal legislative body. The executive wing of the government is headed by the Prime Minister who is a member of the Lok Sabha. The President is merely a titular head. Each of the federal states that comprises the Indian union has its own government on a parliamentary model similar to that of the Central (federal) Government. The Indian Constitution provides for a strong Central (federal) Government.

10. We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens—JUSTICE, social economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEARBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

11. Part III of the Constitution enumerates six fundamental rights.

12. Part IV of the Constitution contains Directive Principles of State Policy [hereinafter *Directive Principles*]. It is interesting to note that many rights enshrined in the International Covenant on Economic, Social and Cultural Rights find mention as Directive Principles in Part IV of the Indian Constitution.

13. See INDIA CONST. art. 37.

all citizens; just and humane conditions of work and maternity relief;<sup>14</sup> free and compulsory education;<sup>15</sup> and the establishment of sound international relations.<sup>16</sup> The communal riots and the bloody carnage that followed partition<sup>17</sup> prompted the framers to add two drastic provisions to safeguard their nascent republic's unity and integrity. The first allowed for preventive detention without trial,<sup>18</sup> even during peacetime; the second for the suspension of certain fundamental rights during an emergency.<sup>19</sup>

### *B. Constitutional Expression Of Human Rights*

"*Swaraj mera janma sidh adhikar hai*" (Freedom is my birthright and I shall have it) was the daring declaration made by a great patriot, Lokmanya B. G. Tilak, before the British Government as far back as 1895. Tilak's and subsequent freedom fighters' demands for the guarantee of basic human rights denied to Indians during British rule found compendious expression in Part III.<sup>20</sup> The Constituent Assembly members debated the subject of fundamental rights, "the most criticized part of the constitution" with great passion for thirty-eight days.<sup>21</sup> They used the American Bill of Rights as their model in drafting the rights.<sup>22</sup> Thus, with respect to Part III, it was "the Potomac and not the Thames that fertilized the flow of Yamuna."<sup>23</sup>

The Constitution guarantees an impressive array of Fundamental Rights covering a wide range of civil, political, cultural, economic and social rights. These rights are subject to certain exceptions that do not render them illusory. Originally, the Constitution guaranteed a right to property and to obtain compensation for the property acquired by law for a public purpose except in the crucial areas of agrarian reform.<sup>24</sup> The Forty-fourth Constitutional Amendment introduced in 1978 removed property as a fundamental right. Today, the right to property

14. *Id.* at art. 42.

15. *Id.* at art. 45.

16. *Id.* at art. 51.

17. On being granted independence, India was partitioned into two sovereign states: Pakistan and India by the British Government. What ensued was a panicky exodus of Muslims fleeing to Pakistan and Hindus fleeing to India and a communal carnage in which about a million lives were lost.

18. See INDIA CONST. art. 22 cl. 4-7.

19. *Id.* at arts. 352-360. The Constitution provides for three types of emergencies: National Emergency; State Emergency and Financial Emergency.

20. See 1 THE FRAMING OF INDIA'S CONSTITUTION 3-122 (B. Shiva Rao ed., Delhi 1968) (containing various documents relevant to the discourse of human rights before independence).

21. SORABJEE, *supra* note 2, at 96-97.

22. *Id.* at 97. See generally M. Abel, *American Influences on the Making of the Indian Constitution*, 1 J. CONST. PARLIAMENTARY STUDIES 35 (1967). Many of Part III's provisions correspond to the substance of one provision or the other in the United States Bill of Rights. In fact, almost every fundamental right in the India Constitution has its counterpart in the United States Bill of Rights. *Id.*

23. *Shamsher Singh v. State of Punjab*, A.I.R. 1974 S.C. 2192, 2212.

24. See INDIA CONST. at art. 31 (Forty-fourth Amendment) Act, 1976.

enjoys the status of a mere legal right.

The right to equality guarantees both equality before law and equal protection of all laws.<sup>25</sup> Specific kinds of discrimination such as those based on religion, race, caste, sex or place of birth are constitutionally prohibited.<sup>26</sup> Further, the Constitution sanctions "special treatment" in favor of women, children, scheduled castes and tribes<sup>27</sup> and "backward classes" of citizens.<sup>28</sup> The Constitution also abolishes untouchability, and forbids its practice in any form.<sup>29</sup> These provisions were designed to eradicate the evils of casteism and untouchability that had been practiced on a relentless scale in India. Unfortunately, they have not yet been totally banished from modern and free Indian society.

Other crucial rights such as freedoms of speech and expression,<sup>30</sup> to assemble peacefully without arms,<sup>31</sup> to form associations,<sup>32</sup> to move freely and to reside and settle in any part of the country,<sup>33</sup> to acquire, hold and dispose property,<sup>34</sup> and to practice any profession, occupation, trade or business,<sup>35</sup> have all been given constitutional protection. There are explicit grounds on which "reasonable restrictions" can be placed in exercising these freedoms.<sup>36</sup>

Article 21, which enshrines the most venerable right, reads as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Accepting an American jurist, Felix Frankfurter's, sagacious advice, the framers eliminated the original "due process" clause in this article. The resistance was not to due process as a requirement of fair procedure but to the substantive interpretation that could flow from it.<sup>37</sup> The phrase "due process" was replaced with the "procedure established by law" clause — a term borrowed from the Japanese Constitution.<sup>38</sup> Articles 20 and 22 provide a host of safeguards designed to assure a fair trial to all citizens. These crucial provisions were inserted at the behest of Dr. B.R. Ambedkar<sup>39</sup> to

25. *Id.* at art. 14 [hereinafter *Equality Clause*].

26. *Id.* at art. 15 cl. (1).

27. Members belonging to Scheduled castes are the untouchables who suffered grave indignities prior to independence and who comprise the most oppressed minorities in the world. Mahatma Gandhi called them "*Harijans*" meaning children of God.

28. See INDIA CONST. at art. 15 cl. 4. For an authoritative discussion of the Equality Clause and Compensatory Discrimination in India see also MARK GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA* (India 7 Gala 1984).

29. See INDIA CONST. at art. 17.

30. *Id.* at art. 19 cl. (1) (a).

31. *Id.* at art. 19 cl. (1) (b).

32. *Id.* at art. 19 cl. (1) (c).

33. *Id.* at art. 19 cl. (1) (d) - (e).

34. *Id.* at art. 19 cl. (f).

35. *Id.* at art. 19 cl. (g).

36. *Id.* at art. 19 cl. (2) - (6).

37. See *infra* notes 60 and 63.

38. See SORABJEE, *supra* note 2, at 96-97. The framers chose the term "procedure est by law" on the ground that its language was less ambiguous than "due process clause."

39. Chairman of the Drafting Committee in the Constituent Assembly and the chief architect of India's Constitution. Born as an untouchable, he had suffered grave indignities and had struggled relentlessly for the welfare of Harijans in India. He was instru-

compensate for the absence of a "due process" clause in Article 21.<sup>40</sup> They guarantee freedom from retroactive crimes,<sup>41</sup> double jeopardy,<sup>42</sup> self-incrimination,<sup>43</sup> imprisonment without being informed of the grounds of arrest,<sup>44</sup> the right to counsel on arrest,<sup>45</sup> the right to be produced before a magistrate within twenty four hours of arrest<sup>46</sup> and the right to magisterial supervision in case of imprisonment for a period beyond twenty four hours.<sup>47</sup> The framers' serious commitment to upholding the dignity of the individual is amply reflected in the constitutional ban on the traffic of human beings,<sup>48</sup> 'begar' and other forms of forced labor,<sup>49</sup> and the employment of children below the age of fourteen years in any hazardous occupation or workplace.<sup>50</sup> These salutary provisions are grouped under the rubric — the right against exploitation.

Freedom of religious thought, belief, practice and "institutional existence" is also guaranteed.<sup>51</sup> It is interesting to note that the State has been vested with far reaching powers to regulate this freedom not merely in its secular aspects, in the interests of 'public order' and 'morality',<sup>52</sup> but also to effect social reform and compel public Hindu temples to open their doors to all classes of Hindus.<sup>53</sup> This was done with the intention of accelerating the emancipation of Indian women and abolishing the concept of untouchability.

Additional provisions were included to safeguard the rights of minorities — any distinct religious, cultural and linguistic group. These groups are free to establish and administer institutions to preserve their culture, language and script.<sup>54</sup> In cases where such institutions receive grants from the State, they are subject to the constitutional ban on the exercise of specific kinds of discrimination in their admission policies.<sup>55</sup>

The right to legal remedies is the last fundamental right. It se-

mental in writing into the Constitution, the compensatory discrimination clause in favor of untouchables or the Scheduled Castes and Tribes.

40. See *infra* note 69 and corresponding text.

41. See INDIA CONST. art. 20 cl. (1).

42. *Id.* at art. 20 cl. (2).

43. *Id.* at art. 20 cl. (3).

44. *Id.* at art. 22 cl. (1).

45. *Id.*

46. *Id.* at art. 22 cl. (2).

47. *Id.*

48. *Id.* at art. 23 cl. (1).

49. *Id.*

50. See *id.* at art. 24. See generally Lee Tucker, *Child Slaves in Modern India: The Bonded Labor Problem*, 19 HUM. RTS. Q. 572 (1997) (exposing the Indian Government's lackadaisical approach in dealing with the problem of children caught in the death trap bonded labor in India).

51. See INDIA CONST. at arts. 25-26.

52. *Id.* at art. 25 cl. (1) - (2) (a).

53. *Id.* at art. 25 cl. (2) (b).

54. *Id.* at art. 29 cl. (1).

55. *Id.* at art. 29 cl. (2).



cures to every individual, citizens and aliens alike, the right to invoke the Supreme Court's original jurisdiction for enforcing any of the fundamental rights.<sup>56</sup> This is a very significant provision in that it prevents Part III from being reduced to mere chimerical constitutional claptrap.

*C. Due Process: Elimination Of This Clause From The Draft Constitution*

Although the framers borrowed heavily from the American Bill of Rights in framing Part III, the term "due process" is conspicuously absent in the Indian Constitution. Initially, the fundamental rights sub-committee<sup>57</sup> adopted the due process clause in its classic form.<sup>58</sup> As the drafting of the constitution progressed, however, some influential members of the Committee voiced their stiff opposition to its inclusion in the Constitution.<sup>59</sup> Influenced by the U.S. Supreme Court decisions of the early part of the century, B.N. Rau, the Constitutional Advisor to the Assembly, expressed his fear that due process would become an obstacle to social welfare legislation concerning tenancy reform, price control, wage legislation and working conditions of laborers.<sup>60</sup> He warned the members that the "[C]ourts manned by an irremovable judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant."<sup>61</sup>

Ultimately, and ironically, what hastened the elimination of the due process clause, was the advice of the U.S. Supreme Court justice, Felix Frankfurter.<sup>62</sup> Drawing Rau's attention to the obstruction to social reform and the excessive judicial power that the due process clause had created in the United States, the learned judge recommended the omission of this clause in the Indian Constitution.<sup>63</sup> Returning from the United States, Rau persuaded the Committee to drop the due process clause in the Draft Constitution because of the substantive interpretations that could be placed upon it.<sup>64</sup> If the dangers inherent in the substantive interpretation of due process had contributed to its demise, with regard to the property provisions in the Constitution, the conjunction of cataclysmic events in the wake of independence can be said to

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56. *Id.* at art. 32.

57. The provisions concerning fundamental rights in the Draft Constitution were mainly the product of the fundamental rights sub-committee. This committee began its task in February 1947. It submitted the Draft Consideration for the approval of the Constituent Assembly in February 1948.

58. AUSTIN, *supra* note 8, at 84-85. The classic statement of the right to due process is that of the Fifth Amendment of the U.S. Constitution. See U.S. CONST. amend. V.

59. AUSTIN, *supra* note 8, at 85-87; 101-03.

60. *Id.* at 86-87.

61. *Id.* at 87.

62. *Id.* at 103. See SORABJEE, *supra* note 2, at 96-97.

63. *Id.* at 96-97.

64. *Id.* at 102-04.

have influenced its non-application to the irreducible claims of life and individual liberty.

The horrors of partition and Mahatma Gandhi's brutal assassination by a Hindu fanatic in early 1948 influenced many members to opt for preventive detention, a harsh and draconian measure, and "place the citizens' freedom at the disposition of a legislature for the sake of a public peace in which social and economic reforms could be achieved."<sup>65</sup> Since "due process," applied to life and individual liberty, renders preventive detention or detention without trial unconstitutional, it was decided not to extend its safeguard to life and liberty as well.<sup>66</sup> Therefore, the Draft Constitution that was placed before the Constituent Assembly contained no due process clause. Article 15 of the Draft Constitution, which corresponds to Article 21 in the Constitution, simply read: "No person shall be deprived of his life or personal liberty except *according to procedure established by law*."<sup>67</sup> The phrase, "procedure established by law," was borrowed from Article XXXI of the Japanese Constitution.<sup>68</sup>

#### *D. Return Of Due Process: Infusion Of Its "Substance" Into The Constitution*

The peculiarities of India's political and socio-economic condition discussed above, thus, compelled the framers to depart from the textual and substantive details of the U.S. Constitution. Nonetheless, they were committed to the doctrine of "due process," and therefore, they consciously wove its "substance" into the constitutional tapestry. The debates in the Constituent Assembly<sup>69</sup> and a closer reading of the fun-

65. *Id.* at 102.

66. *Id.* at 86-87, 101-04.

67. See 1 THE FRAMING OF INDIA'S CONSTITUTION, 523 (B. Shiva Rao ed., 1967).

68. *Id.*

69. As noted earlier, the Draft Constitution submitted to the Constituent Assembly contained no due process clause. Many Constituent Assembly members strongly opposed the omission of due process safeguards for life and individual liberty. They pressed for restoring some safeguards for individual freedom. Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, therefore moved an amendment introducing a new article: Article 15A (in the Draft Constitution). This article corresponds to Article 22 in the Constitution that guarantees to all citizens a fair trial in a duly established court of law. Referring to the apprehensions expressed by the Constituent Assembly members on the removal of "due process" from Article 15 of the Draft Constitution, he observed:

We are therefore, now, by introducing Article 15A, making, if I may say so, compensation for what was done then in passing Article 15. In other words, we are providing for the *substance* of the law of "due process" by the introduction of Article 15A. IX. CONSTITUENT ASSEMBLY DEBATES 1497 (emphasis supplied) [hereinafter C.A.D.].

At the end of the debate on the inclusion of Article 15A he again stated:

Ever since that Article (Article 15) was adopted, I and my friends had been trying in some way to restore the content of due procedure with its fundamentals without using the words "due process." I should have thought that the members who are interested in the liberty of the individual would be more than satisfied for being able to have the prospect before them of the provisions contained in Article 15A. *Id.* at 1556

damental rights provisions make this point clear. The fundamental freedoms clause (Article 19 clause (1)) sets out the various freedoms such as freedom of speech, assembly and so forth.<sup>70</sup> Clauses (2) to (6) of the same article provide explicit grounds on which "reasonable restrictions"<sup>71</sup> can be placed by the legislature to curb these various freedoms. It is ultimately the judiciary, however, that determines the reasonableness of these restrictions. These provisions, in effect, provide for nothing but due process and the police powers. For, after all, due process is equated with reasonableness, and the judiciary, itself, applies the test of reasonableness in determining the validity of a law restricting the liberty of the individual. The same is true of Articles 22<sup>72</sup> (right to a fair trial) and 20<sup>73</sup> that, in essence, define the contours of individual rights protected by due process and the corresponding police powers of the state. It is a pity that this crucial aspect escaped the attention of the learned judges of the Supreme Court for almost three decades.

### *E. Constitutional Supremacy And Judicial Review*

India proudly shares with the United States, allegiance to the doctrine of judicial review. The express declaration of fundamental rights coupled from the introduction of judicial review<sup>74</sup> in the Constitution marks a radical departure with the pivotal British Constitutional doctrine of parliamentary supremacy. Although India is a federation (with unitary bias) of twenty three states, the Constitution provides for a single integrated judiciary. The Supreme Court, is the highest court in the land and has original, appellate and advisory jurisdiction. The law decided by it is binding on all courts functioning within the Indian "Union" or federation.<sup>75</sup>

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70. See *supra* notes 30-35, at 65 and accompanying text, at 6.

71. Article 13 of the Draft Constitution corresponds to Article 19 clauses (2)-(6), of the Indian Constitution (see *supra* note 36 and accompanying text). Initially, the restrictions permitted on the seven freedoms in Article 13 were not justiciable. One of the members of the Constituent Assembly, had made a prescient suggestion. He said:

Sir, one speaker was asking where the soul in the lifeless article 13 was? I am putting the soul there. If you put the word "reasonable" there, the court will have to say whether a particular Act is in the interests of the public and, secondly, whether the restrictions imposed by the legislature are reasonable, proper and necessary in the circumstances of the case. The courts will have to go into the question and it will not be the legislature and the executive who could play with the fundamental rights of the people. It is the courts who will have the final say. Therefore, my submission is that we must put in these words "reasonable" or "proper" or "necessary," or whatever good word the House likes. I understand that Dr. Ambedkar is agreeable to the word "reasonable." Otherwise, Article 13 is a nullity. It is not fully justiciable now and the courts will not be able to say whether the restrictions are necessary or reasonable. VII. C.A.D., *supra* note 69, at 739 - 40.

72. See *supra* notes 44-47 and accompanying text.

73. See *supra* notes 41-43 and accompanying text.

74. INDIA CONST. at art. 13.

75. *Id.* at art. 141. The highest courts in each of the states comprising the Indian "Union" (Federation) are the "High Courts." All appeals from the High Courts lie to the Supreme Court. Under Article 226 of the Constitution, any citizen can invoke the High

The Indian Constitution was a product of the post World War II era – a seminal period in the development of human rights. Part III also reflects the inspirational impact of another great charter of liberties – the Universal Declaration of Human Rights – that was adopted by the U.N. General Assembly in 1948.<sup>76</sup> Many Fundamental Rights find mention in both the Universal Declaration and the International Covenant. Thus, Indian citizens had the good fortune to be constitutionally blessed with many of the International Covenant's rights twenty-one years before India became a signatory to it.<sup>77</sup> The table below shows the rights that are embodied in both the Indian Constitution and the International Covenant.

**RIGHTS CONTAINED IN BOTH THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

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***International Covenant on: The Indian Constitution - Name of the Right Civil and Political Rights Fundamental Rights***

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Article 8(3)	Article 23	Freedom from compulsory labor
Article 14(1)	Article 14	Right to Equality
Article 26	Article 15	Protection against Discrimination based on any ground
Article 25(c)	Article 16	Right to have access to public service
Article 19(1) & (2)	Article 19(1)(a)	Freedom of speech
Article 21	Article 19(1)(b)	The Right of Peaceful

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Court's jurisdiction for the vindication of his Fundamental Rights. No citizen, however, is barred from bypassing the High Court (at the state level) and directly invoking the Supreme Court's (original) jurisdiction for the enforcement of his Fundamental Rights. Indeed, a citizen's right to approach the Supreme Court for the enforcement of his Fundamental Rights is itself a Fundamental Right (Article 32 -Right to Legal Remedies) under the Constitution [hereinafter *Universal Declaration*].

76. *Universal Declaration of Human Rights*, G.A. Res. 217A (III) U.N. GAOR Res. 71 U.N. Doc. A/811, (1948).

77. India ratified the *International Covenant* in 1978.

Article 22(1)	Article 19(1)(c)	Assembly Freedom of Association
Article 12(1)	Article 19(1)(d) &(e)	Freedom of Movement and Freedom to choose one's own residence

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***International Covenant on: The Indian Constitution - Name of the Right Civil and Political Rights Fundamental Rights***

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Article 15 (1)	Article 20(1)	Freedom from ex-post facto legislation
Article 14(7)	Article 20(2)	Freedom from double jeopardy
Article 14(3)(g)	Article 20(3)	Freedom from Self incrimina- tion
Article 6(1) & 9(1)	Article 21	Right to life and personal liberty
Article 9(2)(3) & (4)	Article 22 & 23	Right to legal remedies
Article 18(1)	Article 25	Freedom of thought, religion and conscience
Article 27	Article 29(1)	Rights of minor- ities

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There are rights in the International Covenant such as right to a speedy trial;<sup>78</sup> right to free legal services;<sup>79</sup> freedom from imprisonment

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78. *International Covenant* at art. 14 (3)(c).

on the inability to fulfill a contractual obligation;<sup>80</sup> right to travel abroad;<sup>81</sup> right to privacy;<sup>82</sup> freedom from torture, cruel, inhuman or other degrading treatment or punishment;<sup>83</sup> and a right to compensation to the victims of unlawful arrest or detention,<sup>84</sup> which do not find express mention in the Constitution. The manner in which these rights will be available to the Indian citizens depends on the fashion in which international treaty law is given domestic legal effect in India. Suffice it to say at this point, India subscribes to the dualist view of international law — provisions of international treaty law can be given internal legal effect only through domestic legislation. The Supreme Court reiterated this view in *Jolly George Varghese v. Bank of Cochin*.<sup>85</sup>

*F. Judicial Interpretation In The Post-Independence Era:(1947-77): Restrictive Interpretation Of Article 21*

Despite the Constitution's emphasis on individual liberty, the Supreme Court initially gave only a niggardly reading to Article 21. The Court's 1950 decision in the celebrated case of *A.K. Gopalan v. State of Madras*<sup>86</sup> underscores the judiciary's colonial hangover and conservative attitude. The petitioner who was detained under the Preventive Detention Act challenged its validity on the ground that it violated his right to life.<sup>87</sup> What the Court did was to treat each of the Constitution's fundamental rights as separate and distinct from one another.<sup>88</sup> The Court reasoned that when the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that particular article, no recourse can be had to a Fundamental Right conferred by another article.<sup>89</sup> On this basis, the Court treated Article 22<sup>90</sup> as a code unto itself.<sup>91</sup> The Court reasoned that since the procedure in the impugned act did not come into conflict with the relevant provisions of Article 22, its validity could be upheld.<sup>92</sup> The Court added that the impugned act did not have to satisfy the tests of any other fundamental rights. Further, the Court interpreted "law" in Article 21 like any other state made law, rather than an abstract principle of natural justice.<sup>93</sup>

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79. *Id.* at art. 14 (3)(d).

80. *Id.* at art. 11.

81. *Id.* at art. 12.

82. *Id.* at art. 7.

83. *Id.* at art. 17.

84. *Id.* at art. 9(5).

85. A.I.R. 1980 S.C. 470, 473-74.

86. A.I.R. 1950 S.C. 27, 31-32 (Judgment of Kania, J.).

87. *Id.*

88. *Id.* at 34-38.

89. *Id.*

90. See *supra* note 18 and accompanying text.

91. A.I.R. 1950 S.C. 32.

92. *Id.*

93. *Id.*

This led the Court to hold that the impugned act — a law duly enacted by Parliament within its legislative powers — did not violate Article 21.<sup>94</sup>

By failing to invoke the procedural safeguards inherent in Article 21, the Court stunted the true meaning and scope of this venerable right. The Court also stifled the cumulative impact of Fundamental Rights by treating them piecemeal, rather than as an organic whole. It would take more than two decades for this erroneous approach to give way to a progressive interpretation.

As a first step towards building an egalitarian society, Parliament and many State Legislatures enacted land reform legislation much to the discontent of the landed gentry. Thus, in the post-independence era, disgruntled landlords were the chief litigants and it was their rights and grievances — property rights and compensation for property acquired by the state<sup>95</sup> — that became one of the dominant issues before the Court. During this period, the Court displayed an excessive zeal to protect individuals' property rights which triggered a great parliamentary — judiciary controversy.<sup>96</sup> The Court went so far as to declare that the Indian Parliament has no power to amend any fundamental right.<sup>97</sup> In keeping with its image of a protector of privileged interests, the Court also struck down the Presidential Order terminating the pensions

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94. *Id.*

95. INDIA CONST. arts. 31 and 19 cl. (f).

96. The very first Amendment to the Constitution in 1951 resulted from the controversy over the Bihar Land Reforms Act of 1950. The Patna High Court had struck down this Act as unconstitutional on the ground that it violated the equal protection guarantee in Article 14. Consequently, the Constitution (First Amendment) Act, 1951, was enacted. It created what has come to be known as the "Ninth Schedule Immunity." Certain acts concerning right to property were placed in the Ninth Schedule of the Constitution, which was immunized from judicial review on the basis of Articles 14, 19 cl. (f), and 31. In *State of West Bengal v. Bela Banerjee* A.I.R. 1954 S.C. 170, the Court ruled that compensation for property acquired by the state must be "full and fair," which meant the market value. The precipitated the Constitution (Forty-fourth Amendment) Act, 1955. This Act appended an express provision to Article 31(2), which stated: "no law shall be called in question in any court on the ground that the compensation provided by the law is not adequate." Then came *L.C. Golaknath v. State of Punjab*, 1967 S.C. 1643. In 1970, in *R.C. Cooper v. Union of India*, A.I.R. 1970 S.C. 564, the Court stoutly insisted that it will apply the "market price" rule in determining the constitutionality of the "compensation" that the State shall offer or pay for property acquired by it. What resulted was the Constitution (Twenty-fifth Amendment) Act, 1971, which replaced the word "compensation" in Article 31 with the word "amount." By removing the word "compensation," Parliament hoped its troubles were over. The Act also provided an immunity against judicial review to statutes which purported to give effect to the policy of securing principles enshrined in Articles 39(b) and (c) of Part IV (dealing with material resources and monopolies). Judicial review continued until a status quo was reached in *Kesavananda v. State of Kerela*, A.I.R. 1973 S.C. 1461. In that case, the Court declared that the right to property was not a basic feature of the Constitution and could therefore be amended by Parliament. The legislatures were given the power to determine the amount of compensation for property acquired for public purpose subject to an ultimate scrutiny by the courts (emphasis added). Ultimately, Parliament deleted the right to property from the list of fundamental rights in 1977.

97. *See L.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

and other privileges of the erstwhile princes in India.<sup>98</sup>

Confronted with a succession of resourceful judicial opinions insisting on full compensation, Parliament sought to acquire far reaching amendatory powers to reinforce its supremacy.<sup>99</sup> Thus, the crucial matter of accomplishment of land reform measures was converted into an issue of the Court's power of judicial review versus parliamentary sovereignty. This was ultimately resolved in *Kesavananda Bharathi v. State of Kerala*.<sup>100</sup> In a delicately balanced response, the Court placed an effective break on the emerging trend of parliamentary despotism. It accomplished this by enunciating an innovative doctrine of inviolability of the Constitution's "basic structure." The rationale of the Court's judgment in this historic case is simple and cogent. Since Parliament is only a creature of the Constitution, the Court declared that it can amend the Constitution, but it cannot use its amending power to destroy the Constitution's "basic structure."<sup>101</sup> Accordingly, since the Supreme Court's power of judicial review is a cardinal feature of the Constitution, Parliament cannot, even by an amendment, exclude the Court's scrutiny of laws that profess to fulfill directive principles but violate citizens' fundamental rights.<sup>102</sup> The Court reaffirmed and expanded this doctrine beyond the right to property in *Indira Gandhi v. Raj Narain*.<sup>103</sup> The Court struck down a Constitutional Amendment which made the Prime Minister's election to Parliament unassailable in a court of law on the ground that it violated the "democratic set-up" and the "rule of law" that were essential features of the Constitution's "basic structure"<sup>104</sup>

Although the Court had repudiated Parliament's claim to absolute power and lessened its scope for repression, it nonetheless acquiesced in the subversion of the Constitution during an emergency.<sup>105</sup> In *Addi-*

98. See *Madhava Rao Scindia v. Union of India*, A.I.R. 1971 S.C. 530.

99. Parliament enacted two Constitutional Amendments: Constitution (Twenty-fourth Amendment) Act, 1971, and Constitution (Twenty-fifth Amendment) Act, 1971. Both Amendments had great political significance. The former Act sought to provide the widest possible meaning to the word "amendment" in the Constitution so as to empower Parliament to add, vary, or repeal any provision of the Constitution. The latter provided an immunity from judicial review to acts which purported to give effect to securing directive principles contained in the sub-clause (art. 39(b) and (c) dealing with material resources and monopolies). Taken to their logical outer limits, such immunities rendered judicial protection of Fundamental Rights useless.

100. (1973) 4 S.C.C. 225. See generally U. BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 65-110 (N.M. Tripathi Pvt. Ltd. 1985) (analyzing and discussing the significance of the decision) [hereinafter BAXI.]

101. (1973) 4 S.C.C. 486.

102. See *id.* at 366, 454, 486.

103. (1975) Supp. S.C.C. 1.

104. See *id.* at 87-93.

105. In 1975, Mrs. Indira Gandhi, then Prime Minister, was held guilty of corrupt electoral practices by the judiciary. This created a furor among the opposition party members in Parliament who called for her immediate resignation. What ensued was a proclamation of emergency by the President of India at the behest of Mrs. Gandhi. Drastic preventive detention laws were enacted and all of Mrs. Gandhi's political opponents were detained without trial. The national press was gagged and civil liberties were drastically



*tional District Magistrate v. Shiv Kant Shukla*,<sup>106</sup> the Court had failed to stand four-square between the citizens and the chasm of unrestrained power. A Constitution Bench of the Court held that the proclamation of emergency and the Presidential Order, suspending Article 21, precluded the Court from considering the constitutional validity of any preventive detention laws.<sup>107</sup>

Deeply wedded to the traditional concept of property rights, the Court had for three long decades displayed scant regard to considerations of creation of a welfare state in India. It had consequently served as a bastion not of human, but of property rights. Further, it had forsaken its vital role of the custodian of the Constitution during emergency — India's gravest internal crisis since independence. Thus, despite some landmark decisions, the Supreme Court of the post-independence era made no enduring contributions towards strengthening constitutionalism in the subcontinent and left unfulfilled the constitutional aspirations of the vast majority of the citizens.

## II. HUMAN RIGHTS JURISPRUDENCE

### A. *The Supreme Court Takes Suffering Seriously*<sup>108</sup>

In the aftermath of emergency, the Supreme Court carved a role for itself in Indian politics quite differently from that which it had played since independence. One of the main reasons is that the concept of constitutional interpretation underwent a fundamental change in the late seventies. The Court's path-breaking decision in *Maneka Gandhi v. Union of India*<sup>109</sup> was the critical moment in this transformation. Thenceforth, the Court resuscitated judicial activism after the passivity that followed its deference to the executive during emergency.<sup>110</sup> The Court, however, did this for a purpose previously absent from its history, namely, to render constitutional liberties a living reality for the most vulnerable and powerless sections of Indian society. The Court's metamorphosis, from an executive serving institution to that of a dynamic one poised to exercise its solemn constitutional responsibility with aplomb and imaginative realism, "was partly an aspect of the post-

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curtailed. The emergency remained in force from June 1975-March 1977.

106. *Additional Dist. Magistrate v. Shiv Kant Shukla*, A.I.R. 1976 S.C. 1206, 1207.

107. *See id.* at 1241. As a result of the Constitution (Forty-fourth Amendment) Act, 1977, Article 21 can no longer be suspended during the proclamation of an emergency.

108. I have respectfully borrowed the idea for this appropriate heading from the eminent jurist Dr. Upendra Baxi's seminal article on the role of the Supreme Court in the post-emergency era. *See* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES* 33 (N. Tiruchelvan & R. Coomaraswamy, eds., 1987).

109. A.I.R. 1978 S.C. 597, 616 [hereinafter *Maneka Gandhi*].

110. *See* A.I.R. 1976 S.C. 1207.

emergency catharsis."<sup>111</sup>

## B. *Creative Expansion of Article 21*

### 1. Right To Travel Abroad

In *Maneka Gandhi*, the Court observed that fundamental rights "weave together a pattern of human rights guarantees" and that they are not mutually exclusive and distinct.<sup>112</sup> On this line of reasoning, the Court held that any act that violated article 21 must meet the additional tests of anti-arbitrariness of Article 14 and reasonableness of the fundamental freedoms clause.<sup>113</sup> In the Court's view, Article 21 covers a plethora of rights — some which are implicit and others that are expressly mentioned as fundamental rights.<sup>114</sup> In light of the constitutional ethos, mere freedom from physical restraints was not the true scope of the term "personal liberty." Rather, the term brought within its pale, a variety of rights that contributed to the blossoming of an individual's personality such as freedom to travel abroad.<sup>115</sup>

Significantly, the Court did not confine its scrutiny to the scope of an individual's personal liberty. Breaking from the past, the Court examined the nature of a procedure by which a person could be deprived of his life or personal liberty. After an elaborate survey of Anglo-American jurisprudence, the Court emphatically declared that the procedure must be infused with the principles of natural justice.<sup>116</sup> The procedure must be right, just and fair. It cannot be "arbitrary, fanciful or oppressive."<sup>117</sup>

*Maneka Gandhi* set the stage for the efflorescence of Article 21. In the years that ensued, Article 21, infused with the doctrines of anti-arbitrariness and reasonableness, became a potent weapon in the hands of a transformed judiciary that was consciously committed to redressing the grave and glaring injustices of Indian society.

### 2. Right To Privacy

The right to privacy was perhaps the first dimension of Article 21 that the Court unfolded, as early as in 1963, in *Kharak Singh v. State of Uttar Pradesh*.<sup>118</sup> The petitioner, an ex-dacoit contended that police surveillance, including their domiciliary visits to his house, violated his right to personal liberty.<sup>119</sup> Significantly, the Court examined the scope

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111. See Baxi, *supra* note 108, at 36.

112. A.I.R. 1978 S.C. 597, 620-21.

113. See *id.* at 622-24.

114. *Id.* at 622.

115. See *id.* at 619-22. The Court drew attention to its earlier judgment in *Satwant Singh v. Assistant Passport Officer*, A.I.R. 1967 S.C. 1836 (holding that Article 21 included the right to travel abroad).

116. See *id.* at 624.

117. *Id.*

118. *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295 (Judgment of Ayyangar, J.).

119. See *id.* at 1298.

and content of the words "life" and "personal liberty"<sup>120</sup> in light of individual dignity — a cherished value underscored in the Constitution.<sup>121</sup> After an analysis of the issues involved and noting that freedom from unlawful searches and seizures was absent in the Indian Constitution, the Court concluded that domiciliary visits were in violation of a common law right to privacy.<sup>122</sup> Freedom from encroachments on a citizen's private life was an "ultimate essential of ordered liberty" inherent in Article 21.<sup>123</sup> The Supreme Court has reiterated that Article 21 guarantees the right to privacy in a 1991 decision.<sup>124</sup>

The Court's historic ruling, that law under Article 21 had to be fair, just, and reasonable in its procedural essence, had a humanizing impact on the lives of all those whose liberties were curtailed. Thus, prisoners deprived of certain fundamental freedoms were now brought under the Constitution's protective mantle.<sup>125</sup>

### 3. Freedom From Torture, Cruel, Inhuman And Degrading Treatment Or Punishment

The case of *Sunil Batra v. Delhi Administration*<sup>126</sup> set the trend for the development of a humane prison jurisprudence in India. Adopting a poignant definition of life given by an American judge, the Court poured new meaning and content into this term which is present in Article 21.<sup>127</sup> "Life, even behind the iron bars," said the sensitized judiciary, "did not mean mere 'animal existence'."<sup>128</sup> This led the Court to hold that death row prisoners were entitled to all the amenities on par with ordinary prisoners, that is, food, clothing and a bed.<sup>129</sup> Infliction of torture, mental or physical, on such prisoners who were in the safe-keeping of prison authorities, was unconstitutional.<sup>130</sup>

The Court did not stop with humanizing the life style behind the iron bars. Applying *Maneka Gandhi's* rule of fair procedure to a prison setting, the Court declared inhumane prison practices, such as arbitrary imposition of solitary confinement and use of iron chains on prisoners,<sup>131</sup> infliction of physical cruelty and torture,<sup>132</sup> routine handcuff-

120. *Id.* at 1305-1306

121. *See* INDIA CONST. art. 21.

122. A.I.R. 1963 S.C. 1296, 1302.

123. *Id.*

124. *See* State of Maharashtra v. M.N. Mardikar, A.I.R. 1991 S.C. 207.

125. As a consequence of the Court's ruling in *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27, individuals whose liberties were curtailed by a duly enacted law (e.g., prisoners) were denied fundamental freedoms, such as the right to free speech and expression, property, and intellectual pursuits.

126. A.I.R. 1978 S.C. 1675, 1691.

127. *See id.* (citing Justice Field's definition of "life" in the case of *Munn v. Illinois*, 94 U.S. 113, 142 (1877)).

128. *See id.* at 1691, 1703, 1706.

129. *See* A.I.R., 1978 S.C. at 1703.

130. *Id.*

131. *See* A.I.R., 1978 S.C. at 1691 (citing Justice Field's definition of "life" in *Munn v. Illinois*, 94 U.S. 113, 142 (1877)).

ing of prisoners,<sup>133</sup> and denial of permission to prison inmates to have interviews with their attorneys and family members,<sup>134</sup> to be violative of Article 21.

The following passage strikingly portrays the cumulative impact of the principles of fair procedure and anti-arbitrariness in outlawing prison caprice and cruelty:

True, our constitution has no due process clause or the VIII amendment, but in this branch of law after . . . *Maneka Gandhi* the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive is unarguably unreasonable and arbitrary and is shot down by articles 14 and 19 and if inflicted with procedural unfairness falls foul of article 21. Part III of the constitution does not part company with the prisoner at the gates. Judicial oversight protects the prisoners' shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authorities.<sup>135</sup>

Significantly, the Court did not confine its task in these cases to fashioning an individual relief for the petitioners. Faced with the traumatic abridgment of prisoners' rights, the Court seized the opportunity to develop remedial processes to prevent similar future injustices. To make prisoners' rights viable, the Court directed the district magistrates concerned, to inspect the prisons in their jurisdictions once a week; to receive complaints from individual prisoners; to take remedial actions where they were deemed necessary; and to provide a grievance box to which all prisoners were to be given free access.<sup>136</sup> The Court did not stop with laying down such elaborate guidelines for the treatment of prisoners. It went a step ahead and vested the power of curtailing prisoners' liberties in judicial officers alone. It directed them to provide all prisoners a hearing complying with the principles of natural justice before revoking any benefit available to them.<sup>137</sup>

#### 4. Right To A Speedy Trial

Incarceration as a pretrial prisoner for a patently long period of time awaiting one's trial is tantamount to torture that takes many protean forms. In *Hussainara Khatoon v. State of Bihar*,<sup>138</sup> the Court was faced with the desperate plight of several prisoners languishing in jail for years without their trials having been commenced. As a consequence of being denied a trial, leave alone a speedy trial, some of these persons were incarcerated for periods exceeding the punishment that

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132. See A.I.R. 1980 S.C. 1579, 1584.

133. See *Sunil Batra v. Delhi Admin.*, A.I.R. 1980 S.C. 1535, 1585.

134. See *Francis Coralie Mullin v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746.

135. A.I.R. 1978 S.C. 1690.

136. See A.I.R. 1980 S.C. 1602-04; A.I.R. 1980 S.C. 1593-94.

137. See cases cited in notes 131-134.

138. *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360.

could have been awarded to them had they been tried and convicted.<sup>139</sup> Given the broad sweep and content of Article 21, it was not difficult for the Court to rationalize that no procedure, which does not ensure a speedy trial, could be regarded as reasonable, fair or just. Accordingly, the right to a speedy trial — "a reasonably expeditious trial" — is implicit in Article 21.<sup>140</sup> The Court ordered the release of all the pretrial prisoners on personal bond.<sup>141</sup>

### 5. Right To Free Legal Services

The next important step of the Court was to use the guarantees of fair procedure and equal protection to ensure equality in criminal justice. By articulating the right to free legal services, the Court strove to ensure equality as between rich and poor defendants and to eliminate the inherent inequality that exists between the prosecution and the defendant. Stating that the "Gideon's trumpet had been heard across the Atlantic," the Court held that free legal services is an "imperative processual piece of criminal justice" implicit in Article 21.<sup>142</sup> In *Khatri v. State of Bihar*,<sup>143</sup> the Court took the opportunity to make an important clarification pertaining to the new constitutional right that it had hitherto enunciated. Commenting on the excuse of financial and administrative inability that the state can put up to avoid its constitutional obligation, the Court rightly pointed out that "the law does not permit any government to deprive its citizens of constitutional rights on the plea of poverty."<sup>144</sup> The Court made it mandatory for every magistrate and sessions judge to inform the accused of his constitutional right to free legal services at the cost of the state.<sup>145</sup> Under *Hussainara Khatoon* and its progeny, every prisoner is entitled to a justiciable right to free legal services and to a speedy trial.<sup>146</sup>

The tremendous impact of these landmark decisions can be best summarized in the Court's own words:

[A]ny form of torture, or cruel, inhuman or degrading treatment would be offensive to human dignity and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure established by law. But no law which authorizes and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness. It would plainly be unconstitutional and void as being violative of Articles 14 and 21. It

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139. *Id.* at 1361.

140. *Id.* at 1365.

141. *Id.* at 1364, 1377.

142. *M.M. Hoskot v. State of Maharashtra*, A.I.R. 1978 S.C. 1548, 1554 (Judgment of Krishna Iyer, J.).

143. *Khatri v. State of Bihar*, A.I.R. 1981 S.C. 928.

144. *Id.* at 931 (citing *Rhem v. Malcom*, 377 F.Supp. 995).

145. *Id.* at 931.

146. *See, e.g., Kedar Pahadiya v. State of Bihar*, A.I.R. 1982 S.C. 1167; *Sheela Barse v. State of Maharashtra*, A.I.R. 1983 S.C. 378; *Hussainara Khatoon v. State of Bihar* (No.2), A.I.R. 1981 S.C. 736; *Sukhdas v. Union Territory*, A.I.R. 1986 S.C. 991.

would thus be seen that there is implicit in Article 21 the right to protection against torture, cruel inhuman and degrading treatment or punishment which is enunciated in Article 5 of the Universal Declaration of human rights and Article 7 of the International Covenant on Civil and Political Rights.<sup>147</sup>

#### 6. Freedom From Imprisonment For The Inability To Fulfill A Contractual Obligation

The right to free legal services was not the last civil and political right that was enunciated by the Court. Other crucial human rights were to be unfolded. In *Jolly George Varghese v. Bank of Cochin*,<sup>148</sup> the Supreme Court ruled that article 21's humane imperative for a fair procedure obligated the State not to incarcerate a judgment debtor who either could not afford to pay his debt or had money on which there were other pressing claims, so as to decree payment.<sup>149</sup> Such an interpretation was in consonance with Article 21's emphasis on human dignity.<sup>150</sup> Thus, Article 21 was infused with the flavor of Article 11 of the International Covenant that enshrines the freedom from imprisonment for the inability to fulfill a contractual obligation.

#### 7. Socioeconomic And Environmental Dimension To Right To Life In International law

Article 6 of the International Covenant and Article 3 of the Universal Declaration of Human Rights embody the right to life — the most venerable human right. Taken in its wider and proper dimension, the fundamental right to life has both positive and negative connotations. The right to life comprises the right of every human being not to be arbitrarily deprived of his life (right to life) and the right to have the adequate means of subsistence and a decent standard of life. Such a broad meaning of the right to life is inevitable even in the case of those who insist on regarding it strictly as a civil right. Without an adequate standard of living that provides access to nutritious food, health and medical care, adequate housing, the right to life would be meaningless and illusory. From this perspective, the right to a healthy and a wholesome environment appears as a natural corollary of the right to life.<sup>151</sup>

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147. A.I.R. 1981 S.C. 753.

148. A.I.R. 1980 S.C. 470.

149. *Id.* at 475.

150. *Id.*

151. Prof. Louis B. Sohn opines that principle 1 of the Stockholm Declaration supports an individual's right to an environment. See PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 191 (1992).

Furthermore, the right to a healthy environment is recognized in a number of treaties. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, is titled "Right to a Healthy Environment" and states: "Everyone shall have the right to live in a healthy environment and to have access to basic public services" and; "The States Parties shall promote the protection, preservation and improvement of the environment." Additional Protocol to the American

Today, governments are under the duty to pursue policies and administer programs which are designed to ensure access to the means of survival for all individuals. The Supreme Court deserves to be richly commended for its wider characterization of the threats to the right to life in tune with the raw realities of the Indian socioeconomic and environmental milieu.

#### 8. Right To Earn A Livelihood

An interesting issue came before the Court in the case of *Olga Tellis v. Bombay Municipal Corporation*.<sup>152</sup> A journalist challenged the Municipal Corporation's decision to evict pavement dwellers who were in the path of a modernizing freeway. The petitioner argued that since the pavement dwellers would be deprived of their livelihood if they were evicted and deported to their place of origin, their eviction was tantamount to a deprivation of their right to life and hence unconstitutional.<sup>153</sup> This argument found a receptive audience in the Court. The Court pointed out that although the state could not be compelled by way of affirmative action to provide means of subsistence to all its citizens, it could not deprive a person of the means to his livelihood.<sup>154</sup> Depriving a person of his right to livelihood, except by a law that was right, just and fair, was tantamount to depriving him of his life.<sup>155</sup> The Court halted all evictions of pavement dwellers and the demolition of huts for a period of four years following the filing of the writ petition.<sup>156</sup> The Court directed the municipal authorities to provide alternative

Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *opened for signature* Nov. 17, 1988, art. 11, O.A.S.T.S. No. 69, *reprinted in* BASIC DOCUMENTS OF HUMAN RIGHTS 521, 525 (Ian Brownlie ed., 1992) [hereinafter BASIC DOCUMENTS].

Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights states: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12(2) further states: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (b) The improvement of all aspects of environmental and industrial hygiene." International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 12 (1) and (2), 993 U.N.T.S. 3, *reprinted in* BASIC DOCUMENTS, *supra* notes 114, 118. *See also* Convention on the Rights of the Child, Nov. 20, 1989, art. 24 (2)(c), 28 I.L.M. 1448, 1466 (1989), *reprinted in* BASIC DOCUMENTS, *supra* notes 182, 191 (requiring States' Parties to provide children with nutritious food and potable drinking water viz. controlling health risks due to environmental contamination).

Moreover, the constitutions of at least 44 countries, ["in the world" is unnecessary] including the Indian Constitution, contain provisions for the protection of the environment in one form or another. *See* Alexandre Charles Kiss, *An Introductory Note to a Human Right on Environment, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 200 (Edith Brown Weiss ed., 1990).

152. A.I.R.1986 S.C. 180.

153. *Id.* at 183-184.

154. *Id.* at 193-94, 196.

155. *Id.* at 195.

156. *Id.* at 204.

sites or accommodation to the slum and pavement dwellers within a reasonable distance of their original sites.<sup>157</sup> The Court also took the opportunity to strongly urge the municipal government to implement a proposed housing scheme for the poor.<sup>158</sup>

More recently, in the case of *Banawasi Seva Ashram v. State of Uttar Pradesh*,<sup>159</sup> tribals were being ousted from their forest land by the National Thermal Power Corporation Ltd. (NTPC) for the establishment of a huge thermal power project.<sup>160</sup> Observing that "the tribals for generations had been using the jungles around for collecting the requirements for their livelihood — fruits, vegetables, fodder, etc." — the Court issued an order making such acquisition of land conditional on NTPC's arrangements to provide certain Court-approved facilities to the ousted forest dwellers.<sup>161</sup> The Court has relied on the right to livelihood, implicit in Article 21, in making interim orders requiring state agencies to rehabilitate tribals in cases involving the construction of dams and the consequent dislocation of tribals.<sup>162</sup>

### 9. Right To A Clean And A Wholesome Environment

In taking its first step towards sculpting an environmental dimension to Article 21, the Court acted on the implicit premise that environmental degradation affected the quality of life. The Court also hinted at recognizing the environment as intrinsically worthy of protection. This new and enlightened thinking is reflected in the Court's reasoning in *Rural Litigation & Entitlement Kendra, Dehradun v. State of Uttar Pradesh*,<sup>163</sup> one of the first environmental complaints that was addressed to it. The Court stated:

Preservation of the environment and to keep the ecological balance unaffected is a task not only of governments but which every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Article 51a(g) of the constitution.<sup>164</sup>

In that case, the Court issued interim orders halting the operation of limestone quarries in the Doon valley, a picturesque hill station near the Himalayan range on the ground that mining had a deleterious impact on the surrounding environment.<sup>165</sup> Although the Court did not specifically mention Article 21 in this case, it is obvious that the Court was concerned with the "non-violent" threats to "life" that emanated

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157. *Id.*

158. *Id.*

159. A.I.R. 1987 S.C. 374, 375, 378.

160. *Id.* at 374-75.

161. *Id.* at 374.

162. *See, e.g., Karajan Jalasay Y.A.S.A.S. Samiti v. State of Gujarat*, A.I.R 1987 S.C. 532; *Gramin Sewa Sanstha v. State of Uttar Pradesh*, 1986 (Supp) S.C.C. 578.

163. A.I.R. 1985 S.C. 652.

164. *Id.* at 656.

165. *Id.* at 654-56.



from a gradually deteriorating environment.

In *Subhas Kumar v. State of Uttar Pradesh*<sup>166</sup> the Court readily accepted a slow, steady and subtle method of extinguishment — severe pollution — to be violative of the right to life. The Court reasoned that life in its proper dimension could not be enjoyed unless the ecological balance and the purity of air and water were preserved.<sup>167</sup> This led the Court to come out with an express declaration that "any action that would cause environmental, ecological, air, water pollution etc., should be regarded as amounting to a violation of Article 21."<sup>168</sup> In its 1995 decision in *Virendra Gaur v. State of Haryana* the Supreme Court clearly reiterated that Article 21 includes a *Right to a clean and a wholesome environment*.<sup>169</sup>

### C. Universal Scope of Fundamental Rights

#### 1. Enforceable Against Non-State Actors

One message that comes through clearly in the above cases is that in India it is the state that is the principal violator of the citizens' human rights. However, acute inequalities and maldistribution of wealth and resources engender many exploitative relationships between individuals in civil society. Thus, the silent exercise of power by private entities over other humans also results in some of the gravest injustices and atrocities. In this regard, it is interesting to note that many of the fundamental rights provisions are universal in scope; they have not been addressed merely to the state.<sup>170</sup> In light of these facts, one is prompted to pose the question: Should non-state entities' actions in certain circumstances be subject to the Court's scrutiny when they are violative of Part III's provisions?

In *People's Union for Democratic Rights v. Union of India*,<sup>171</sup> the Court's attention was drawn to the pitiable plight of several laborers who were silently suffering the cruelty of contractors who were paying them less than the legal minimum wages.<sup>172</sup> The contractors had been employed by the Delhi city authorities in connection with the running of the Asiad Games.<sup>173</sup> The Court struck down the government's specious plea that non-observance of labor laws by the contractors did not

166. J.T. 1991 (1) SC 531; 1991 (1) S.C. 598, 605.

167. See J.T. 1991 (1) S.C. 538.

168. *Id.*

169. (No.2) A.I.R. 1982 S.C. 577.

170. In Part III of the Constitution of India, the articles dealing with untouchability (art. 17), "fundamental freedoms" (art. 19), due process (art. 21), anti-exploitation (arts. 23-24), and religious and cultural rights (arts. 25, 26, 29 and 30) are all couched in general terms; they have not been addressed merely to the State. These rights can, therefore, be claimed against anybody without establishing a connection with State action. INDIA CONST. pt. III, arts. 17, 19, 21, 23-26, 29 and 30.

171. *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473.

172. *Id.* at 1483-84.

173. *Id.* at 1484.

amount to a fundamental rights violation.<sup>174</sup> The Court cogently reasoned that many benefits conferred by the labor laws were intended to ensure the workers' basic human dignity, a cherished human value inherent in Article 21.<sup>175</sup> Hence, any violation of the labor laws, even by private contractors, was a transgression of Article 21.<sup>176</sup> Further, denial of minimum wages to the laborers amounted to "forced labor" — a violation of freedom from exploitation — a right that was "enforceable against the whole world."<sup>177</sup> The Court proceeded to make the Delhi Administration responsible for the contractors' non-observance of labor laws.<sup>178</sup>

Not long after, came *Bandhua Mukti Morcha v. Union of India*,<sup>179</sup> a case concerning the existence of bonded labor in certain stone quarries. Although those guilty of violations were lessees of the quarries, the Court held the Union of India and the government of the state of Haryana responsible for the enforcement of the labor provisions, and the rehabilitation of the workers who were released.<sup>180</sup>

## 2. Right To Education

More recently, in *Mohini Jain v. State of Karnataka*,<sup>181</sup> the Court ruled that private institutions imparting education were amenable to the discipline of Part III. Declaring that the right to education was a fundamental right, the Court observed that the state was constitutionally obliged to provide educational facilities to its citizens at all levels.<sup>182</sup> No citizen could lead a life of dignity ensured under Article 21 unless he was educated.<sup>183</sup> Therefore, private educational institutions, receiving accreditation from the state, could not charge an exorbitant tuition fee for educational courses.<sup>184</sup> Commercialization of education was both repugnant to the Indian cultural ethos and violative of the Constitution.<sup>185</sup>

The salutary consequence of these pronouncements is that, today, the Court has begun drawing "private governments into the tent of state action."<sup>186</sup> Protection of human rights can never be meaningful and comprehensive, unless the Court maintains its momentum in subjecting diverse discriminatory and exploitative practices and relations

174. *Id.*

175. *Id.* at 1485.

176. *Id.* at 1484-86.

177. *Id.* at 1485.

178. *Id.* at 1484, 1491.

179. *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

180. *Id.* at 811-12; 828-34.

181. A.I.R. 1992 S.C. 1858, 1871. See also *Ajay Hasia v. Khalid Mujib*, A.I.R. 1981 S.C. 481; *Unnikrishan v. State of Bihar* (1993) 1 S.C.C. 645.

182. *Mahini Jain v. State of Karnataka*, AIR 1992 S.C. at 1864-65.

183. *Id.* at 1863.

184. *Id.* at 1870-71.

185. *Id.* at 1865.

186. *Sukhdev v. Bhagatram*, A.I.R. 1975 S.C. 1331, 1355 (citing Arthur S. Miller, *The Constitutional Law of the "Security State*, 10 STAN. L. REV. 620, 664 (1958)).

between institutions and men and women in civil society to the discipline of Part III.

### 3. Right To Compensation For Violation Of Article 21

The process of Article 21's revitalization would seem fascinating. But, one cannot avoid believing that protecting the right to life would be futile, if the Court *merely* punished a state official or a non-state entity for its transgression. Indeed, in the absence of a constitutional right to compensation for its violation, the grand declaration of freedom to life and liberty would be reduced to a whisper, or a mere nullity.

It is fortunate that it was not long before the Court declared that ordering the payment of monetary compensation for the violation of Article 21 fell within its wide ranging powers. The Court's bold stroke, in 1983, added new vigor to Article 21 in this regard. In *Rudul Shah v. State of Bihar*,<sup>187</sup> the Court rightly conceded that the right to life would be denuded of its significant content, unless those who violated it were compelled to pay compensation. For the first time, the Court awarded compensation to the petitioner, who was tortured while in police custody.<sup>188</sup> By another bold stroke, in *M.C. Mehta v. Union of India*,<sup>189</sup> the Court ordered a privately owned company, that had permitted the emission of noxious gases, to compensate the victims of the gas leak. With the Court's 1993 decision in *Nilabati Behera v. State of Orissa*,<sup>190</sup> a constitutional right to monetary compensation, for the unlawful deprivation of an Article 21 right, seems well entrenched.<sup>191</sup> Articulating the underlying principle on which the liability of the state arose for payment of compensation, the Court stated:

It may be mentioned straight-away that award of compensation in a proceeding under art. 32 by this Court . . . is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defense in private law in an action based on tort.<sup>192</sup>

Awarding compensation to the petitioner, a poor woman, for the death of her son in police custody, the Court rightly pointed out that this constitutional remedy had to be made more readily available in the case of the poor who lacked the means to vigorously pursue their rights

187. A.I.R. 1983 S.C. 1086, 1089.

188. *Id.*

189. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965, A.I.R. 1987 S.C. 982; A.I.R. 1987 S.C. 1086. *See also* *Bandhu Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802; *Sebastian M. Hongray v. Union of India*, A.I.R. 1984 S.C. 571; *Bhim Singh v. State of Jammu and Kashmir*, A.I.R. 1986 S.C. 494.

190. A.I.R. 1993 S.C. 1960.

191. *Id.* at 1970. Such a right was distinct from, and in addition to, a right to recover damages in private law. *See id.*

192. *Id.* at 1966 (emphasis added).

in private law.<sup>193</sup>

#### 4. Discussion

A comparison of the Court's decision in the *A.K. Gopalan* case,<sup>194</sup> with its later decisions in the post-emergency era, demonstrates that although the Constitution guarantees human rights, judicial reasoning can either negate those rights or uphold them. Much credit then goes to the Supreme Court judges of the late 1970s for infusing Article 21 with vitality and enriching its content. Today, many international human rights, such as right to privacy; freedom from torture, cruel, inhuman and degrading treatment or punishment; right to a speedy trial; right to free legal services; freedom from imprisonment on the inability to fulfill a contractual obligation; right to compensation for unlawful arrest or detention; and right to education, have become part of India's constitutional heritage solely on account of perceptive judicial exegesis. In its expansive interpretation of Article 21, the Court has articulated rights that may not have been contemplated by the founding fathers. Even so, its construction is in active unison with the inherent spirit of the Constitution that underscores the dignity of the individual and the promotion of a humane society. These decisions also demonstrate that the gradual expansion of Article 21's ambit has resulted in a concomitant increase in the state's responsibility towards its citizens' total well being.

If Article 21 has become a living reality for some deprived citizens, it is largely because of the expansive manner in which the Supreme Court has interpreted the clause. The result has been a profound revolution — for social justice — ever achieved by essentially peaceful means. Indeed, it was a judge-led revolution. It is noteworthy that the judicial renaissance of the post-emergency era bears the individual insignia of a few activist judges such as P.N. Bhagwati,<sup>195</sup> Krishna Iyer, O. Chinnappa Reddy, D.A. Desai, and R.S. Pathak. Many of the landmark decisions analyzed above were handed down by these individuals.

#### *D. The Procedural Dimension*

The Supreme Court did not confine its juristic creativity to merely unraveling the varied facets of Article 21. The Court's newly articulated rights were not individual rights of eighteenth or nineteenth century vintage. Indeed, they were "meta-rights" or collective social rights that rendered the traditional Anglo-Saxon legal strategies woefully inadequate for their effective realization.<sup>196</sup> Responding to the challenges

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193. *Id.* at 1969-70.

194. *See* A.I.R. 1950 S.C. 28.

195. Justice Bhagwati, former Chief Justice of the Supreme Court of India, was the chief architect of the Social Action Litigation (or the Public Interest Litigation) movement in India.

196. *See* P.N. Bhagwati, *Social Action Litigation: The Indian Experience*, in JUDICIARY IN PLURAL SOCIETIES 21 (N. Tiruchelvan & R. Coomaraswamy eds., 1987) [hereinafter

erected by the emergence of these new rights and keenly aware of the tremendous obstacles the downtrodden face in asserting their basic human rights, it initiated bold new judicial mechanisms with imaginative realism. These procedural innovations formed, in essence, the hallmarks of a radically new category of litigation that the Court initiated and fostered, such as social action litigation or public interest litigation.<sup>197</sup>

### 1. Expansion Of Locus Standi

Facilitating popular access to courts is perhaps one of the most significant steps taken by the Supreme Court in fulfilling the constitutional aspirations of the downtrodden. Abandoning the technical and conservative procedural rules of *locus standi* developed by Anglo-Saxon jurisprudence, the Court enabled "public spirited individuals" to bring legal action on behalf of many hapless citizens whose rights had been violated and against the state to compel it to perform its "public duties." The following passage sums up the Court's approach to the issue of *locus standi* in public interest cases:

[W]here a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an action for an appropriate direction order or writ . . .<sup>198</sup>

Thus, in one stroke, the Court had extended the range of people with effective access to justice and the variety of issues that it could adjudicate upon. In rejecting public interest petitions motivated by malice and/or other personal gain, however, the Court made it clear that the public spirited litigant was expected to be acting *bona fide* and not for personal gain or any oblique consideration.<sup>199</sup> This procedural innovation served as a boon to many public spirited citizens, NGOs, journalists, social workers, environmental organizations, ecological groups, and activist lawyers who were now able to espouse challenges with a public interest flavor. Petitions concerning the horrifying prison

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Bhagwati].

197. There is a lot of literature on public interest litigation in India. See, e.g., P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561 (1985); Upenda Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDICIARY IN PLURAL SOCIETIES 32 (N. Tiruchelvan & R. Coomaraswamy eds., 1987); G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66 (1991); Soli Sorabjee, *Protection and Promotion of Fundamental Rights by Public*, 51 REV. INT'L. COMM'N OF JURISTS. 31 (1993).

198. S. P. Gupta v. President of India & Others, A.I.R. 1982 S.C. 149, 188.

199. *Id.* at 189.

scene;<sup>200</sup> torture of children and women in police custody and state-run protection homes;<sup>201</sup> existence of bonded labor and forced labor;<sup>202</sup> eviction of pavement dwellers;<sup>203</sup> protection of India's cultural heritage (erosion of Taj Mahal's exquisite marble facade by pollution);<sup>204</sup> pollution of the sacred river Ganges;<sup>205</sup> air pollution caused by a chlorine Plant;<sup>206</sup> and by motor vehicles;<sup>207</sup> a plea to stop the construction of the *Tehri Dam*;<sup>208</sup> environmental degradation caused by limestone quarrying;<sup>209</sup> and a plea to stop the disingenuous strategy of issuance of ordinances by the Bihar State government done with a view to usurp legislative power,<sup>210</sup> soon began to flood the Court. In 1993, in *Tarun Bharat Sangh, Alwar v. Union of India*,<sup>211</sup> a social action group was permitted standing to bring suit for the halting of mining operations in the Sariska Tiger Park.

## 2. Epistolary Jurisdiction

"Epistolary jurisdiction" is another momentous procedural innovation that the Court introduced. Any concerned citizen, NGO or a public spirited individual *could by writing a letter invoke the highest court's original jurisdiction* for the vindication of the Fundamental Rights of any aggrieved individual or group of oppressed people. Forsaking procedural formalities, the Court then treated such epistles as writ petitions, investigated the complaint (more often than not through Court-appointed commissions of inquiry), made provision for legal aid if necessary, heard arguments and passed interim or other orders as it deemed necessary. Cases involving torture of prisoners,<sup>212</sup> torture in police custody,<sup>213</sup> plight of women in state-run welfare homes,<sup>214</sup> plight

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200. See, e.g., *Hussainara Khatoun v. State of Bihar*, A.I.R. 1979 S.C. 1360; *Sunil Batra v. Delhi Admin.*, A.I.R. 1980 S.C. 1580; *Prem Shankar Shukla v. Delhi Admin.*, A.I.R. 1981 S.C. 1535; *Khatri v. State of Bihar*, A.I.R. 1981 S.C. 928; *Kedar Pahadiya v. State of Bihar*, A.I.R. 1982 S.C. 1167; *Sheela Barse v. State of Maharashtra*, A.I.R. 1983 S.C. 378.

201. See, e.g., *Veena Sethi v. State of Bihar*, (1982) 2 S.C.C. 583; *Sheela Barse v. State of Maharashtra*, A.I.R. 1983 S.C. 378; *Sheela Barse v. Union of India*, (1986) 3 S.C.C. 596; *Sheela Barse v. Secretary, Children's Aid Soc'y*, A.I.R. 1987 S.C. 656; *Vikram Deo Singh v. State of Bihar*, (1988) Supp. S.C.C. 734.

202. See *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473; *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

203. See *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180.

204. See *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1120.

205. See *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037; *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1115.

206. See *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965; 1086.

207. See *M.C. Mehta v. Union of India*, A.I.R. 1991 S.C. 1332.

208. See *Tehri Badh Virodhi Samiti v. State of Uttar Pradesh*, JT 1990 (4) S.C. 519.

209. See *Rural Litig. & Entitlement Kendra, Dehradun v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652.

210. See *Dr. D.C. Wadhwa v. State of Bihar*, (1987) 1 S.C.C. 378.

211. A.I.R. 1993 S.C. 293.

212. See, e.g., *Sunil Batra v. Delhi Admin.*, A.I.R. 1980 S.C. 1580; *Prem Shanker v. Delhi Admin.*, A.I.R. 1982 S.C. 1535; *Vikram Deo Singh v. State of Bihar*, 1988 Supp. S.C.C. 734, 736; *Sheela Barse v. State of Maharashtra*, A.I.R. 1983 S.C. 378.

213. See *Nilabeti Behera v. State of Orissa*, A.I.R. 1993 S.C. 1960, *supra* note 190.

of inmates in a mental institution<sup>215</sup> degradation of the environment,<sup>216</sup> existence of bonded labor<sup>217</sup> and eviction of pavement dwellers<sup>218</sup> were brought on the judicial agenda thanks to this novel procedural rule.

### 3. Socio-Legal Commissions Of Fact-finding And Enquiry

The petitioners in most of the Public Interest Litigation cases were public spirited citizens or organizations who, having limited means at their disposal, found it onerous to establish and effectively prove violation of rights by the states before the courts.<sup>219</sup> Their other vexing problems included the stout denial by state governments of their well-founded allegations and denunciation of their reliable sources of information.<sup>220</sup> It is a tribute to the Supreme Court's craftsmanship, however, that it used its wide powers imaginatively to forge innovative though unconventional ways to assist the litigants in the expensive task of gathering evidence. The Court has evolved the practice of appointing commissioners for the purpose of gathering facts and data regarding the violations of citizens' fundamental rights.<sup>221</sup> The commissioners' reports are then circulated among the parties concerned, who may dispute the facts stated therein by filing affidavits. The Court then considers the commissioner's report and affidavits that may have been filed and proceeds to adjudicate upon the matter.<sup>222</sup> These commissioners are a diverse group of individuals ranging from social activists, teachers, research scholars, and journalists to government bureaucrats, technical experts and judicial officers.<sup>223</sup> It is obvious that in public interest litigation cases, the Court "assumes a more positive attitude in determining the facts."<sup>224</sup> In a case which concerned bonded labor in stone quarries, the Court appointed two Supreme Court attorneys to ascertain the true state of affairs and submit a detailed report on the basis of which it issued far-reaching orders for the release and rehabilitation of the

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214. See *Upendra Baxi v. State of U.P.*, A.I.R. 1987 S.C. 191.

215. See *Vikram Deo Singh v. State of Bihar*, 1988 Supp. S.C.C. 734, 736.

216. See *Rural Litigation & Entitlement Kendra v State of Uttar Pradesh*, A.I.R. 1985 S.C. 652.

217. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

218. See *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180.

219. See *Bhagwati*, *supra* note 196, at 25-26.

220. *Id.*

221. See, e.g., *Ram Kumar v. State of Bihar*, A.I.R. 1984 S.C. 537; *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652, 653; A.I.R. 1985 S.C. 1259; A.I.R. 1987 2426; *Olga Tellis v. Bombay Municipal Corporation* A.I.R. 1986 S.C. 180; *Kutti Padma Rao v. State of A.P.* (1986) (Supp.) S.C.C. 574; *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965; A.I.R. 1987 S.C. 2426; A.I.R. 1988 S.C. 2187; *Vikram Deo Singh Tomar v. State of Bihar* (1988) (Supp.) S.C.C. 734, 736; *Dr. Shiv Rao Shanta Rao Wangla v. Union of India*, (1988) 1 S.C.C. 452.

222. See *Bhagwati*, *supra* note 196, at 28.

223. See *Bhagwati*, *supra* note 196, at 27.

224. See *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. 839-48.

bonded laborers.<sup>225</sup> In *Tarun Bhagat Sangh Alwar v. State of Uttar Pradesh*, the Court appointed a judge-led commission to assess the consequences mining in the "Sariska Tiger park" had on the environment, wildlife and forests, and to make appropriate recommendations as to remedial measures.<sup>226</sup>

#### 4. Innovative Remedies

Some of the Public Interest Litigation cases involved flagrant human rights violations that rendered immensely inadequate traditional remedies, such as the issuance of prerogative writs by the Courts. What was required was an "affirmative action" that ensured "distributive justice."<sup>227</sup> Once again, the Court did not hesitate to forge unorthodox remedies. Where the peculiarities of the case prompted urgent action, the Court gave immediate and significant interim relief with a long deferral of final decision as to factual issues and legal liability. For instance, in a case involving the blinding of several pretrial prisoners by the police, the Court ordered the state of Bihar to provide medical and rehabilitative services to the blind prisoners. The Court gave directions for such relief, even before the culpability of the police officials was determined.<sup>228</sup> The case of *Hussainara Khatoon v. State of Bihar*<sup>229</sup> concerned the plight of a large number of young pre-trial prisoners languishing in jail without their trials having been commenced. In the months following the filing of the writ petition, the Court issued interim orders directing the immediate release of pre-trial prisoners on personal bond<sup>230</sup> and provision of free legal aid to all the accused.<sup>231</sup> The Court held that a speedy trial was a constitutional right;<sup>232</sup> and it imposed an affirmative duty on magistrates to inform pre-trial prisoners of their right to bail and legal aid.<sup>233</sup> The case, however, remained pending before the Court for a period of eight years without a final judgment.

The Court has also evolved the practice of appointing ombudsmen for the purpose of ensuring and monitoring the effective implementation of its far reaching orders. In *People's Union for Democratic Rights*

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225. *Id.*

226. A.I.R. 1993 S.C. 293.

227. Bhagwati, *supra* note 196, at 28-29.

228. See *Khatari v. State of Bihar*, A.I.R. 1981 S.C. 930-35. See also *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180 (involving the halting of the eviction of pavement dwellers for four years after the filing of the petition); *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965, 982 (involving the closure of a private industry responsible for a gas leak and the establishment of a victim rehabilitation scheme by the Court prior to its determination of the issue as to whether a private actor could be held liable for the violation of fundamental rights).

229. See *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360. See generally U. Baxi, *The Supreme Court Under Trial: Undertrials and the Supreme Court*, 35 S.C.J. 1980 (analyzing the Court's bold remedies in this case).

230. See A.I.R. 1979 S.C. 1364, 1369.

231. *Id.* at 1369.

232. *Id.* at 1376.

233. *Id.* at 1377.



*v. Union of India*,<sup>234</sup> the Court appointed an ombudsman, comprising three individuals, for the purpose of monitoring the implementation of labor laws by the contractors and the Delhi administration.<sup>235</sup>

##### 5. Detailed Administration Or "Creeping Jurisdiction"<sup>236</sup>

In India, where implementation of laws is tardy, government functionaries are corrupt, and the concept of 'public accountability' of administrators is conspicuous by its absence, many human rights violations owe their origin to the exercise of state powers either by commission (repression) or omission (lawless disregard of statutory or constitutionally imposed duties). The Court's desire, to make the enforcement of public duties and dispensation of "distributive justice" effective, has resulted in its involvement even in the realm of administrative implementation. For instance, in a case involving the abhorrent conditions in a mental institution, the Court went to the extent of determining the amount to be allocated for provision of meals, directing the removal of the limit placed by the hospital authorities in respect to the cost of drugs which may be prescribed for patients.<sup>237</sup> The underlying rationale for this immersion of the Court into administrative minutiae has been its underlying conviction that justice in a country like India often requires the taking of affirmative steps by the state.<sup>238</sup>

Despite its significant successes in devising creative means of advancing human rights in the subcontinent, the apex Court has attracted some criticism from those wedded to a more conservative interpretation of the Constitution and mechanical interpretation of the rule of law. For instance, the Court's procedure of appointing commissioners for the purpose of assisting public interest litigants in the gathering of evidence has drawn some criticism. One attorney has opined, "a judge who appoints commissioners would be inclined to appoint those whom or about whom he knows personally . . . Such commissioners are likely to be at least as biased as the judges who have been enthusiastic about Public Interest Litigation."<sup>239</sup> Judges have also been accused of displaying a bias in the selection of cases and "choosing their litigants."<sup>240</sup>

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234. A.I.R. 1982 S.C. 1473.

235. See also *Sheela Barse v. State of Maharashtra*, A.I.R. 1983 S.C. 378 (involving the appointment of a female judicial officer to oversee the implementation of the Court's directives with regards to the treatment of prisoners); *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (involving the appointment within the Ministry of Labor of a joint secretary to monitor the effective implementation of the release and rehabilitation of released bonded laborers).

236. Dr. Upendra Baxi coined the term: creeping jurisdiction.

237. See *Rakesh Chand Narain v. State of Bihar* (1986) (Supp.) S.C.C. 576. See also *Khatri v. State of Bihar*, A.I.R. 1978 S.C. 928 (involving the Supreme Court's detailed instruction to the State of Bihar regarding proper prison administration, including maintenance of pre-trial and convict population records).

238. See *Bhagwati*, *supra* note 196, at 27-28.

239. AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE 26 (Tripathi Publications, Bombay 1985).

240. *Id.* at 17.

The nature of the Court's directives to the executive and its unhesitating forays in the realm of implementation of its orders has led to accusations that the "court is factually (not merely virtually) taking over the administrative function" and violating the doctrine of separation of powers.<sup>241</sup> The comment that the executive "cannot decide to start settling legal cases just because the judiciary has not been able to clear the piled up cases at every level,"<sup>242</sup> reflects the conviction among some members of the bar that the judiciary should consign itself to its assigned domain. In the words of a former Attorney Solicitor-general:

The judiciary is assigned a certain role in our (India's) constitutional scheme of things. The apex court is for conflict resolution and it is duty bound to interpret the Constitution; whereas policy making is assigned to the legislature and the executive . . . . The judiciary is not appointed as the monitor of the working of democracy.<sup>243</sup>

Another voiced apprehension is that the Court may be involuntarily embroiled in political disputes brought on the judicial agenda under the guise of public interest litigation.<sup>244</sup> Further, the enormous backlog of cases in India has given rise to the "floodgates argument" — the threat that Public Interest Litigation poses to the timely disposal of traditional law suits filed in the Supreme Court and High Courts.<sup>245</sup>

These matters are legitimate concerns and ought to be taken very seriously indeed. The problems raised by Public Interest Litigation are not insuperable. Therefore, any call for its banishment from the legal landscape is akin to throwing the baby out with the bath water. As Justice Kuldeep Singh, an activist judge who recently retired from the Supreme Court, rightly believes, the judiciary's encouragement to Public Interest Litigation "is doing more good than harm," especially in the areas of human rights, environment and corruption.<sup>246</sup> While there have been instances of misuse of Public Interest Litigation in the past,<sup>247</sup> the Court has repeatedly insisted that the public interest applicant must be a "public spirited person," "acting bona fide" and not for personal gain and has strongly condemned the use of Public Interest Litigation as a means of settling personal scores.<sup>248</sup> Further, in its zeal to safeguard citizens' liberties, the Court has not acted in a "confrontational mood or with a view to tilting at executive authority or seeking to usurp it."<sup>249</sup> The Court's recommendation for the creation of new bodies, such as Environmental Courts consisting of a professional judge

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241. *Id.*

242. *Judicial Activism . . . The Good and the Not So Good*, THE HINDU, March 2, 1997, available in 1997 WL 7218402 [hereinafter *Judicial Activism*].

243. *Id.*

244. *Id.*

245. See *Fertilizer Corp. Kamgar Union v. Union of India* (1981) 1 S.C.C. 568.

246. See *Judicial Activism*, *supra* note 242, at 11.

247. See *Chetriya Pardushan Mukti Sangharsh Samiti v. State of U.P.*, (1990) 1 S.C.C. 449.

248. See *Subhas Kumar v. State of Bihar*, (1992) 1 S.C.C. 598, 605.

249. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. 802.

and two environmental scientists,<sup>250</sup> reveals both a mature reflection and a realistic assessment by the judges of what they can accomplish in their quest for dispensing social justice to the common man. Judicial activism in India is, thus, certainly not a case of overzealous or unbridled activism. The Court's approach and reasoning in public interest cases is best reflected in Justice Pathak's observation: "we live in an age when this Court has demonstrated while interpreting Article 21 of the Constitution that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the Fundamental Right of every Indian citizen."<sup>251</sup>

What is called for is an open minded response to the healthy criticism that the Court has evoked in its approach to Public Interest Litigation. Mr. Soli Sorabjee's, former Attorney-general, suggestions of "strengthening" post-judgment monitoring and the prudent use of the Court's contempt power to secure compliance with its orders and directions in future, merit serious consideration in this regard.<sup>252</sup>

In the last two decades, the poor, starved and hapless millions have received the Court's protection for securing to themselves the enjoyment of basic human rights. This is no small gain. True, Public Interest Litigation has some remediable drawbacks but "in a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken."<sup>253</sup>

### III. CREATIVE IMPACT OF INTERNATIONAL HUMAN RIGHTS NORMS

Jack Greenberg, an American jurist, made a prescient observation fifteen years ago: "it may be time for United States Courts to begin looking to international criteria as sources of domestic law on human rights issues"<sup>254</sup> makes sense even for the Indian judiciary. Indeed, in a number of common law countries, domestic courts refer to international treaties ratified by their countries as a source of guidance in constitutional and statutory interpretation. Further, "the vast array of international human rights norms now available for use make it imperative that we not turn completely inward in judicial attitude in ways that deny the rich traditions of the rule of law beyond our borders."<sup>255</sup> This part analyzes the manner in which the normative content of international human rights law has infused Indian Constitutional standards. This necessitates a brief discussion of the relationship between international law and municipal law in India.

250. See *M.C. Mehta v. Union of India*, (1986) 2 S.C.C. 176.

251. *Vikram Deo Singh Tomar v. State of Bihar*, 1988 Supp. S.C.C. 734,736

252. Soli Sorabjee, *Protection of Fundamental Rights by Public Interest Litigation in India*, 51 INT'L COMM'N OF JURISTS REV. 37 (1993).

253. See *Fertilizer Corp. Kamgar Union v. Union of India* (1981) 1 S.C.C. 568.

254. Jack Greenberg, *The Widening Circles of Freedom*, 8 HUMAN RTS. 10, 45 (Fall 1979).

255. Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3, 35-36 (1983) [hereinafter Christenson].

### A. *Relationship Between Municipal Law And International Law In India*

Indian Courts are potentially open to a liberal absorption of customary international law. During British rule in India, the courts applied common law doctrines in many fields. There has been no change in this policy even after independence since Article 372(1) of the Constitution provides for "the continued operation of the law in force immediately preceding its commencement." Therefore, by the analogy to the English common law, the municipal courts in India may apply well recognized principles of customary international law on the ground that they form the law of the land. As regards international conventional or treaty law, India subscribes to the dualist position. That is to say, international treaty law has no binding effect in India unless it has been implemented by legislation. The Supreme Court reiterated this position in *Jolly George Varghese v. Bank of Cochin*.<sup>256</sup>

Further, Part IV obligates the state, including the Supreme Court, to apply the Directive Principles in the making of laws. Since the Supreme Court makes binding law under the Constitution,<sup>257</sup> the duty to employ the directive principles for the interpretation of the Constitution and of statutes is imperative. Article 51 in Part IV provides that the "State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another." In light of this analysis, it can be argued that the Court must strive to interpret the constitutional provisions in a manner that is in accordance with India's international commitments and treaty obligations. Indeed, that was the Court's approach in construing the provisions of the Indian Code of Civil Procedure and Article 21 in *Jolly George Varghese v. Bank of Cochin*.<sup>258</sup>

### B. *"Indirect Incorporation" Of International Human Rights Norms*

As noted above, the courts in India may give effect to rules of customary international law on the ground that they form part of the law of the land. Therefore, a norm of customary international law, such as freedom from torture,<sup>259</sup> is arguably binding on the Indian courts. In none of the cases concerning prisoners' rights, however, has the Supreme Court focused on the binding effect of customary international law. Instead, the Court relied solely on the Constitution to afford the petitioners relief, thereby securing a remedy based on domestic law. A fundamental reason for this approach stems from the Court's unwillingness to accept that the Indian constitutional values fall below international standards. As is apparent from its methodology, the Court ex-

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256. A.I.R. 1980 S.C. 470.

257. See INDIA CONST. art. 141.

258. A.I.R. 1980 S.C. 472-73

259. See Richard Lillich, *The U.S. Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 73, n.132 (1990). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n.15 (2d Cir. 1980).

explicitly pointed out that there is a constitutional basis for holding that torture violated the petitioners' fundamental rights and was inconsistent with the inherent spirit of the Constitution.

The fact that the Court did not use principles of customary international law or other international human rights norms, however, to establish an independent rule of decision in its cases does not mean that it was insulated from their wholesome impact. Indeed, the Court's frequent references, in its decisions to norms laid down in treaties and declarations, reflects its awareness of India's international obligations and its underlying approach to take international human rights law seriously.<sup>260</sup> In *Prem Shankar Shukla v. Delhi Administration*, before embarking on a survey of the issues involved, the Court observed: "The Court must not forget the core principle found in Article 5 of the Universal Declaration of Human Rights . . . and . . . Article 10 of the International Covenant on Civil and Political Rights."<sup>261</sup>

In formulating elaborate guidelines for the treatment of prisoners, the Court has drawn upon Articles 8 and 9 of the United Nations General Assembly declaration on the protection of all persons from torture, cruel, inhuman, degrading treatment or punishment.<sup>262</sup> In another case involving children's rights, the Court pointed out that since India was a signatory to the *International Covenant* it was obligatory on the part of the Indian government to implement its provisions.<sup>263</sup> More recently, while reiterating that the award of monetary compensation for the unlawful deprivation of Article 21 amounted to its enforcement, the Court referred to the *International Covenant*.<sup>264</sup> It is clear that, although the Court has decided the cases addressed to it on the basis of Indian constitutional law, it has been equally desirous of being guided by international human rights norms and standards in determining the content and reach of the fundamental rights.

Some may perceive this "indirect incorporation" of international human rights law to be a timid and a cautious attitude on the part of the Indian Supreme Court. A perusal of the practice of courts elsewhere in the world, however, will show that such an approach is not unusual. Domestic courts all over the world will be, more often than not, reluctant to base their decisions on customary international human rights law or laws developed outside domestic law making processes when their own constitutions are thought to be sufficient.<sup>265</sup> The con-

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260. See, e.g., *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

261. A.I.R. 1980 S.C. 1535, 1541.

262. See A.I.R. 1978 S.C. 1602.

263. See *Sheela Barse v. Secretary, Children's Aid Society*, A.I.R. 1987 S.C. 656. The Court cited to Article 24 of the International Covenant and to the 1959 U.N. Declaration of the Rights of the Child. *Id.* at 658.

264. See *Nilabati Behera v. State of Orissa*, A.I.R. 1993 S.C. 1960. The Court referred to Article 9(5) of the International Covenant which enshrines the right to compensation for unlawful arrest or detention. *Id.* at 1970.

265. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). For an interesting discussion on the use of international human rights norms in U.S. courts see *The Doctrine of Incorporation: New Vistas for the enforcement of International Human*

cepts of "state sovereignty" and a preference for the law of the forum are also barriers to the use of principles developed outside the pale of domestic law making processes. In fact, this problem has been recognized in the drafting of the international lawmaking instruments. A high degree of deference for state sovereignty and domestic jurisdiction is manifest in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>266</sup> This indirect incorporation of international human rights norms is thus a sound and a realistic approach.<sup>267</sup> It enriches evolving constitutional precepts and thereby ensures that internationally recognized rights do not remain a mere chimera for individuals all over the globe.

### C. Influence Of International Environmental Norms

Interestingly, the Court has also cited to international environmental norms in supporting its conclusions. In *M.C. Mehta v. Union of India*, before embarking on a survey of the issues involved, the Court dwelt at length with the famous proclamation adopted at the UN Stockholm Conference on Human Environment in 1972 and the leading role played by the Indian delegation headed by the then Prime Minister, late Mrs. Indira Gandhi at that event.<sup>268</sup> It drew attention to the recommendation that required States to take all possible steps to prevent pollution of the seas.<sup>269</sup> In *Law Society of India v. Fertilizers and Chemicals, Travancore Ltd.*, while reiterating that the right to a wholesome environment is implicit in Article 21, the Court referred to the 1984 UN Resolution embodying a fundamental right to an environment adequate for health and well-being.<sup>270</sup> This clearly indicates that the

*Rights?* 5 HUM. RTS. Q. 68-86 (1983); Robert J. Martineau, Jr., *Interpreting the Constitution: The Use of International Human Rights Norms* 5 HUM. RTS. Q. 87-107 (1983).

266. A. Luini Del Russo, *International Law of Human Rights: A Pragmatic Appraisal*, 9 WM. & MARY L. REV. 749 (1968). Del Russo opines: "The effort to reach a compromise [in passing the Covenants] has whittled away the effectiveness of the original proposal to a point of illusory consistency. The issue of Human Rights has remained a purely political question to be settled by sovereign States only . . ." *Id.*

The preamble to the International Covenant on Economic, Social and Cultural Rights, adopted Dec. 19, 1966, G.A. Res. 2200, 2 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976), gives great deference to state sovereignty: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

267. "Indirect incorporation" of international legal norms by domestic courts has won widespread scholarly support. See generally Christenson, *supra* note 255; Richard B. Lillich, *The U.S. Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53 (1990); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990).

268. (1987) 4 S.C.C. 467-69.

269. *Id.* at 468-69

270. 1994 A.I.R. 308 (Ker.) 370.

Court is receptive to international environmental norms and has used them as an interpretative tool in elaborating the constitutional provisions. In essence, the Court has used human rights and environmental norms in a "definitional manner." Further, by empowering individuals and environmental groups to safeguard the environment and to be free from the consequences of environmental harm or damage, the Supreme Court has served as an effective instrument for the enforcement of environmental justice.<sup>271</sup> In this connection, Principle 10 of the Rio Declaration, which recommends provision of effective access to judicial and administrative proceedings (including redress and remedy by member states for the protection of the environment), takes on special significance.

In sum, the Supreme Court's decisions involving fundamental rights are important landmarks in the domestic enforcement of international human rights law. They represent the Court's enlightened interpretation of the Constitution in consonance with principles of international human rights and environmental law. A colloquium, held in Harare in 1989, concluded that if texts of the most relevant international and regional human rights instruments are made accessible to judges and lawyers,

the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarize themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties. In this way, the noble words of international instruments will be translated into legal reality for the benefit of the people we serve, but also . . . of people in every land.<sup>272</sup> "Let noble thoughts come to us from all sides" states an ancient Vedic prayer. One hopes that in keeping with the spirit of this noble invocation and the Harare Declaration, the Indian judiciary will continue to enrich its jurisprudence with international learning.

#### IV. WHAT OF THE FUTURE?

In this author's analysis of the Supreme Court's role since independence, she has defended and applauded the Court's expansive interpretation of Article 21, its creative procedural innovations, and its indirect method of weaving international human rights norms into the constitutional tapestry. She must hasten to add, however, that this does not mean she applauds every decision rendered by the Court

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271. See, e.g., *Rural Litig. Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652; *M.C. Mehta v. Union of India*, (1987) 4 S.C.C. 463 (Tanneries case); *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965 (Air pollution); *Shri Sachidanand Pandey v. State of West Bengal*, A.I.R. 1987 S.C. 1109; *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037 (Pollution of River Ganges); *M.C. Mehta v. Union of India*, A.I.R. 1991 S.C. 1332 (Motor vehicles pollution).

272. Harare Declaration of Human Rights, reprinted in 2 DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A SECOND JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 9, 12 (1989).

in the post-emergency era or is oblivious to the fact that judges can go wrong in advancing human rights. Nonetheless, one must wonder what the landscape of human rights would be like today were it not for the Court's sensitivity to the harsh realities of Indian society and its juristic activism. The preceding analysis clearly illustrates the unique contributions that the judicial process can make to the task of fulfilling the constitutional aspirations of the poor and the downtrodden. It is fair to conclude that in its role as a "social auditor,"<sup>273</sup> the Court has taken "suffering seriously" and has made a significant contribution to the meaningful protection of human rights in India. A lot has been accomplished, but there is still much to be done. Indeed, at this moment during the celebration of the fiftieth anniversary of India's independence, one cannot avoid wondering if this new commitment of the judiciary to the poor and downtrodden — displayed after three decades of negation — will be kept? Will it continue and flourish? The landscape of human rights in India would be one of unrelieved gloom if the Court were to forsake its new activist role for a traditional one, merely presiding over adversarial proceedings, and concluding with an order to the parties. India, a pluralist society, can ill afford such a reactive and restrained judiciary. The concept of judicial activism and the need for a judiciary to serve as a bulwark of individuals' rights from legislative and executive encroachment is visibly highlighted on the constitutional landscape of the world today.<sup>274</sup> That judges make law and decide policy issues in the process of interpreting and applying the law is not a new discovery of our times. Rather, the focus is on what and for whom they should intervene and how far they should go. In this concluding part, I shall highlight a few issues where the new forward surge of constitutional concern is particularly required in future.

#### A. *Strengthening Constitutionalism*

The two fundamental "correlative elements of Constitutionalism" writes Charles Mc.Lewan are "the legal limits of arbitrary power and a complete political responsibility of government to the governed."<sup>275</sup> It is indeed unfortunate that the Indian political system has been rapidly deteriorating into a brazen display of naked political power, without accountability to the real sovereigns of the land — the people. The history of the amendment process provides ample testimony to the abuse of constitutional processes by Parliament for partisan political ends. In *Kesavananda Bharathi v. State of Kerala*<sup>276</sup> what was really at stake

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273. *Fertilizer Corp. Kamgar Union v. Union of India*, A.I.R. 1981 S.C. 344, 354. (Judgment of Krishna Iyer, J.).

274. See *THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES* 179-182 (Neelan Tiruchelvam & Radhika Coomaraswamy eds., 1987) (giving the conclusion of the workshop on the theme: "The Role of the Judiciary in Plural Societies" held in India and organized by the International Center for Ethnic Studies, Sri Lanka).

275. J.N. Pandey, *CONSTITUTIONAL LAW OF INDIA* 52 (1990).

276. A.I.R. 1973 S.C. 1461. See also (1973) 4 S.C.C. 225, 336, 454, 486. See generally BAXI, *supra* note 100, at 65-110.



was Parliament's claim to unlimited power to make not merely changes in the constitution but of the constitution.<sup>277</sup> No party in power could abuse its majority in Parliament to convert "a Republican India into a hereditary monarchy, a secular India into a theocratic state, a federal India into an unitary state, an India with citizens into a [sic] India consisting only of subjects."<sup>278</sup> This was, in essence, what the Supreme Court judges accomplished by articulating the doctrine of "basic structure." All Indians ought to be grateful to them for ensuring that tyranny and despotism can no longer masquerade as Constitutionalism. In the words of Dr. Baxi, this case has a "structural message" for the people of India:

[F]or the atisudras, (untouchables) the social and economic proletariat, the reaffirmation of the unchangeable basic structure not merely marks the limits of the power of the state but also the maintenance of civil and political *space* within which they can continue to articulate their struggle against the dominating groups.<sup>279</sup>

The recent eruption of a series of scandals has exposed the large-scale corruption, venality of public officials, and the unholy trinity of politicians, businessmen and bureaucrats in India.<sup>280</sup> Once again the limelight is thrust squarely on the judiciary to usher in accountability of the institutions of governance, even if in a limited sense. The Supreme Court's fearless directions in the Jain Diaries or the *Hawala* case, ordering the Central Bureau of Investigation<sup>281</sup> "to investigate every accusation made against each and every person irrespective of his status" and not to close the case against anybody without first satisfying the Court, is indeed welcome.<sup>282</sup> It is only a display of this sort of

277. See BAXI, *supra* note 100, at 65-69.

278. *Id.* at 66.

279. Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 J. INDIAN L. INST. 1, 6 (1993).

280. See Zafar Agha, *Hawala: Congress - Explosive Fallout*, INDIA TODAY, Feb. 15, 1996, at 22; Bharat Desai, *Hawala: Jain Family: The Bold and the Brazen*, INDIA TODAY, Feb. 15, 1996, at 40; N.K. Singh, *Hawala: BJP: Tarded with the Same Brush*, INDIA TODAY, Feb. 15, 1996, at 28; Charu Lata Joshi, *Hawala: Interrogations - Jain's Confessions*, INDIA TODAY, Feb. 15, 1996, at 30; Charu Lata Joshi, *Hawala Charge Sheets: Inexplicable Lapses*, INDIA TODAY, Feb. 15, 1996, at 34; Manoj Mitta, *Supreme Court - Setting the Agenda*, INDIA TODAY, Feb. 15, 1996, at 62; Charu Lata Joshi, *CBI: Going Soft on the PM*, INDIA TODAY, Feb. 29, 1996, at 22; *JMM Payoffs*, INDIA TODAY, Mar. 15, 1996, at 26; Charu Lata Joshi, *Hawala Case*, INDIA TODAY, Mar. 15, 1996, at 30; Manoj Mitta & Raj Kumar Jha, *Judiciary: Mr. Justice J.S. Verma*, INDIA TODAY, Mar. 15, 1996, at 98; Zafar Agha, *Under Assault*, INDIA TODAY, July 31, 1996, at 24; Charu Lata Joshi, *Legal Offensive*, INDIA TODAY, July 31, 1996, at 28; Navneet Sharma & Shefali Rekhi, *Sukh Ram: The Stench of Corruption*, INDIA TODAY, Sept. 15, 1996, at 28; Charu Lata Joshi, *Judiciary: Steely Resolve*, INDIA TODAY, Oct. 31, 1996, at 20; Charu Lata Joshi, *JMM Payoffs Case: Tortuous Progress*, INDIA TODAY, Nov. 15, 1996, at 36; Amarnath K. Menon & G.C. Shekhar, *J. Jayalalitha: Booty Queen*, INDIA TODAY, Dec. 31, 1996, at 20; Harinder Baweja, *Jain Hawala Case: Stuck in Legalese*, INDIA TODAY, Apr. 15, 1997, at 44.

281. The Central Bureau of Investigation is the nation's premier investigative agency.

282. Manoj Mitta & Raj Kumar Jha, *Judiciary - Mr. Justice J.S. Verma*, INDIA TODAY, Mar. 15, 1996, at 112. In March 1997, Mr. J.S. Verma was elevated to the post of the Chief Justice of the Supreme Court of India.

judicial assertiveness that can restore a modicum of the two crucial "correlative elements of Constitutionalism" to the Indian polity that is now facing a new internal and insidious peril – corruption.

It is, however, insufficient if the Court confines its role merely to that of a watchdog to check the arbitrariness of the executive and the legislature. If the roots of democracy are to be cemented in India, it is essential that the constitutional processes be involved in issues of poverty, political repression, social and environmental justice and the protection of the most vulnerable sections of society such as the ethnic groups, Scheduled Castes and Tribes, women, children, criminal and terrorists suspects, prisoners and other unpopular minorities.

### *B. Women's Rights*

Women often are the most vulnerable and exploited group in any society. This is equally true of India where the constitutional guarantees have not had much impact on their lives. In India members of different religious communities are governed by their personal religious laws in matters pertaining to marriage, divorce, inheritance etc. These laws are in many respects discriminatory and violative of women's human rights.<sup>283</sup> For instance, polygamy, an abhorrent practice prevalent among the Muslim population has survived constitutional challenge on the grounds that it involved discrimination against women on the basis of religion as well as gender.<sup>284</sup> In the absence of an Uniform Civil Code women have no escape from the oppressive clutches of their personal laws and their emancipation remains a far cry. While the Court has boldly asserted that a "custom"<sup>285</sup> "must yield to a fundamental right"<sup>286</sup> it is a pity that it has not subjected oppressive personal religious laws to the rigor of Article 21 and the Equality Clauses of Part III. True, the Constitution guarantees religious freedom. But, it also underscores the dignity of the individual. Therefore, any practice which denigrates women ought not to escape the constitutional gauntlet masked as a "personal religious law." In a recent decision, the Supreme Court has called upon the government to introduce an Uniform Civil Code to pave the way for women's liberation and strengthen national unity.<sup>287</sup> Significantly, the Court also noted with approval the prohibition of polygamy in the United States on the ground of public morals and expressly criticized its practice in India.<sup>288</sup> This new change of atti-

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283. See generally Anika Rahman, *Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law*, 28 COLUM. J. TRANSNAT'L L. 473 (1990) (discussing the Indian Supreme Court's valiant attempt to secularize Muslim personal law in India); Farah Baria, *Gender: Marital Laws*, INDIA TODAY, June 30, 1997, at 60.

284. See e.g., *State of Bombay v. Narasau Appu*, A.I.R. 1952 Bombay 85; *Sambu Reccy v. G. Jayamma*, A.I.R. 1972 A.P. 136; *Sonu Bai v. Bala* A.I.R. 1983 Bombay 156.

285. The Supreme Court's power of judicial review is not confined to statutes and laws. It also extends to Custom or Usage. See INDIA CONST. art. 13 cl. (2).

286. See *Rama Rao v. State of Andhra Pradesh*, A.I.R. 1961 S.C. 564, 570.

287. See *Sarla Mudgal, President, Kalyani & Ors v. Union of India and Ors*, J.T. 1995 (4) 331.

288. *Id.* at 345-346.

tude is welcome as an important beginning for judicial activism *vis-à-vis* women's rights. One hopes that in the years to come, the Court will construe Article 21 as mandating gender justice and fairness within the family.

### *C. Protection Of Prisoners And Mentally Ill Persons*

In *Veena Sethi v. State of Bihar*,<sup>289</sup> the Court was faced with the horrifying situation where persons who were detained in state-run homes on account of their alleged insanity continued to be incarcerated for years even after they had been certified as having regained their sanity. Yet another case, *Tomar v. State of Bihar*<sup>290</sup> exposed the sub-human conditions in which individuals in a "care home" were confined. The district magistrate's report revealed that the "Care Home" was a "crowded hovel, in which a large number of human beings had been thrown together, compelled to subsist in animal survival conditions which blatantly denied their basic humanity."<sup>291</sup> These cases typify the brutal and inhumane conditions that homeless and mentally ill persons are forced to exist in Indian society. The situation with respect to conditions in Indian penal institutions is no better.<sup>292</sup> Penal institutions and State run welfare homes for the poor and the mentally ill are plagued with the same problems: serious overcrowding; unsanitary and understaffed physical facilities; insufficient medical and psychiatric services; and deplorable material conditions that have made rehabilitation of the inmates well nigh impossible. The Supreme Court has in its judgments hauled up the government for this horrible state of affairs, provided elaborate guidelines for the treatment of such individuals, and, in certain instances, has virtually taken over the administration of these institutions. For instance, the Agra Protective Home for women has been virtually run by the judiciary for well over ten years.<sup>293</sup> The degrading brutal conditions exposed and challenged in these cases are undoubtedly the product of legislative and bureaucratic apathy, callousness and of course budgetary constraints. Part III exists as much for the propertied class as for those confined to prisons and welfare homes. Therefore, if judicial intervention should be exercised for the

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289. *Veena Sethi v. State of Bihar*, (1982) 2 S.C.C. 583.

290. See *Vikram Deo Singh Tomar v. State of Bihar*, (1988) Supp. S.C.C. 734.

291. *Id.* at 734, 736.

292. See U.S. DEPT OF STATE, *Country Reports on Human Rights Practices for 1996*, S. Rep. No. 382-5, at 1435 (1997).

The report regarding India states: Prison conditions are poor. Prisons are grossly overcrowded, often housing over three times their designed capacity. The largest class of prisoners typically sleeps on bare floors, has inadequate sanitary facilities, and receives inadequate food and medical care. Overcrowding in jails is severe. According to a statement in Parliament in 1994 by the Minister of State for Home Affairs, New Delhi's Tihar Jail, considered one of the best-run in the country, housed 8,577 prisoners - facilities designed to hold 2,487. According to the Minister, 7,505 detainees awaited the completion of their trials, while 672 others had been on trial 3 years or longer. Press reports, statements in court cases, and statements by government officials indicate that conditions remained essentially unchanged in 1996. *Id.* at 1440.

293. See *Upendra Baxi v. State of U.P.*, A.I.R. 1986 S.C. 191.

protection of any group in India, certainly it should be exercised for the protection of this utterly vulnerable lot. As Winston Churchill reminded us many years ago: "the mood and temper of the public in regard to the treatment of crime and criminals is one of the most unflinching tests of civilization of any country."<sup>294</sup>

A sad and deplorable feature of the Indian polity is that Parliament and the executive have on several occasions effectively abdicated their constitutionally defined responsibilities. These defaults, when they occur, are a breakdown not only of the substantive scheme of the Constitution, a failure to protect human rights. In these circumstances, the Court has had no choice but to step in to fill the void. This has led to its inescapable involvement in the formulation and implementation of broad social policy often impinging on controversial matters. To give just two examples: although the Constitution declared as violative of the Fundamental Rights, the practice of bonded labor, and commanded Parliament to make a law declaring this an offense, it was only in 1976 that a Bonded Labor Prohibition Act was enacted. The tragic consequence of this brazen abdication of responsibility by the august body of elected representatives was that freedom from exploitation, a Fundamental Right remained a chimera for about a quarter of a century.

For five decades each succeeding government has callously ignored Article 38-A in Part IV that mandates the state to provide free legal services to the poor. It was left to the judiciary to declare free legal services to be a justiciable right and direct the executive to fulfill its mandate in this regard. Defending the Court's role in this regard, Mr. Ahmadi, who recently retired as the Chief Justice of the Supreme Court observed:

When such (aggrieved) citizens raise grave constitutional issues and exercise their fundamental rights in invoking its jurisdiction, the Supreme Court is left with little choice but to act in deference to its constitutionally prescribed obligations. This is the reason why the Court has had to expand its jurisdiction, by at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner.<sup>295</sup>

Prolonged systemic injustice in a democracy can only survive for so long. Grave consequences would ensue if the Court were to turn a blind eye to the government agencies' 'lawlessness' or to the abdication of their constitutional responsibilities. The state would then be left free to transgress the law and what would result is subversion of the rule of law. Thus "it is essential that rule of law must wean the people away from the lawless street and win them for the Court of law."<sup>296</sup> Any failure to do so would threaten the survival of our constitutional system no less than the subversion by a skillful, ruthless, neighboring foreign enemy. This is a very important reason why the Supreme Court must re-

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294. P. LAL, *BOOK OF QUOTATIONS* 12 (S. Chand & Co. 1989).

295. *See Judicial Activism*, *supra* note 242, at 11 (emphasis added).

296. *Fertilizer Corp. Kamgar Union (Regd.) v. Union of India*, (1981) 1 S.C.C. 568.

main in the vanguard in enforcing human rights.

Judicial activism has other beneficial effects. In one sense, the Court acts as a "teacher of the community." The Court's crucial directives to the government and appointment of individuals as commissions of enquiry enhance the political visibility of human rights violations, serve to ignite effective legislative action, raise public consciousness and create opportunities for individuals and institutions<sup>297</sup> to make meaningful contributions for the realization of constitutional values. What Eugene Rostow has written in the context of the United States Supreme Court holds good for its Indian counterpart as well:

The process of forming opinion in the United States is a continuous one with many participants — Congress, the President, the press, political parties, scholars, pressure groups and so on. The discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made. The Supreme Court is amongst other things an educational body and the justices are inevitably teachers in a vital national seminar.<sup>298</sup>

This perception of the function of the Court in human rights cases is one that appeals to me and which I find persuasive.

In articulating new rights and placing the mantle of constitutional protection over a variety of claims, judges in India, have unhesitatingly donned the robes of high priests, academicians, environmentalists and social reformers. This serves as a reminder of the danger that they may silence a just claim espoused by an unpopular group on the basis that their collective wisdom finds it unworthy of constitutional protection. For instance, homosexual men in India have demanded the repeal of a few discriminatory provisions of the Indian Penal Code that criminalizes certain types of sexual activity. It is imperative that in the coming years, "constitutional interpretation by the judges must view the definition of human rights with an expansive wisdom to interpret the text purposively so as to preserve the right of all human beings to mutual respect and concern."<sup>299</sup>

My emphasis has been on the importance of robust participation by the Court in the task of translating the Constitution's promise into meaningful action. I do not mean by my emphasis to suggest that the Supreme Court is the sole agency to safeguard and advance human

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297. In *Sheela Barse v. Union of India*, A.I.R. (1986) 3 S.C.C. 596, 632, the Court directed the College of Social Work, University of Bombay to submit a report on the conditions of women prisoners in Bombay.

In another case, the Court appointed the President of a University as a commissioner with the task of submitting a report on the working and living conditions of migrant workers in textiles (powerloom) production. See *SOUTH GUJARAT UNIVERSITY, A REPORT ON WORKING AND LIVING CONDITIONS OF TEXTILE WORKERS: A SURVEY* (1985).

298. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

299. B.P. JEEWAN & RAJEEV DHAVAN, *The Jurisprudence of Human Rights, in HUMAN RIGHTS AND JUDICIAL REVIEW* 205 (D.M. Beatty ed., Kulwer Academic Publishers 1994).

rights in a democratic society like India. While it is not the sole institution, it is nonetheless a crucial agency, sometimes perhaps — in the light of a corrupt and an errant executive, an irresponsible Parliament — a virtually indispensable one for the protection of human rights in India. The Indian Constitution explicitly lacks much of what is identified with modern Indian Constitutionalism; it is the Supreme Court's contribution that has established the impressive array of Fundamental Rights as we know them today. I can, therefore, think of no good reason why the Supreme Court should forsake its activism and revert to a restrained and passive role in the future.

Our founding fathers were men of great vision and integrity. In fighting for liberation from colonial rule and drafting our national charter — imbued with a socialistic spirit — they have both left us (their descendants) a valuable heritage and expressed their basic faith in our ability to solve through democratic processes the most complex problems. They had envisaged the Judiciary as a bastion of rights and of justice, and, therefore, decided to rely on the Supreme Court to define and enforce the guarantees of Part III. They were, in effect, acknowledging the peculiar competence of that branch of government to perform such crucial tasks. Such expectations, is after all, the heart of our constitutional blueprint of justiciable Fundamental Rights. It is, therefore, the judiciary's responsibility to ensure that their faith was not unfounded. Indeed, on the occasion of the Fiftieth Anniversary of India's independence, there is no more vital task to which we (citizens and the judiciary) can dedicate ourselves. Our task is arduous but certainly not insurmountable. A crucial ingredient in the success or failure of a national task of this magnitude is the dream that inspires hard and sustained work and the vision that impels the enduring belief in the future greatness of India. The eminent historian, E.P. Thompson's poignant words will perhaps inspire us in our collective endeavor and give us some idea of the momentous destiny that India is called upon to fulfill. He writes:

India is not an important but perhaps the most important country for the future of the world. All the convergent influences of the world run through this society: Hindu, Muslim, Christian, Secular, Stalinist, Liberal, Maoist, Democratic-Socialist, and Gandhian. There is not a thought that is being thought in the East or the West which is not active in some Indian mind. If that subcontinent is rolled up into authoritarianism, if that varied intelligence and creativity should be submerged into conformist darkness, it would be one of the greatest defeats of the human record, sealing the fate of a penumbra of other Asiatic nations.<sup>300</sup>

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300. P. Lal, *supra* note 294, at 129.