CHAPTER IV
JUDICIAL ACTIVISM IN INDIA DURING THE POST-EMERGENCY ERA

According to Justice David Ipp of South Africa, the modern common law world has seen at least three forms of judicial activism. “The first is activism in reforming procedural rules. The second is activism in political and social reforms and the third is activism in human rights.”

India which became a member of the Commonwealth on 10th May, 1949 did not remain immune to the judicial activism taking place in other Commonwealth nations. The Indian legal system too, was gripped with judicial activism during the post-emergency period.

According to Prof. S.P. Sathe, “The post–emergency period of 1977–98 is (in fact) known as the period of judicial activism because it was during this period that the Court’s jurisprudence blossomed with doctrinal creativity as well as processual innovations.”

Prof. Sathe’s observation implies that two forms of judicial activism were observed in India during the post–emergency period. The first form related to doctrinal activism while the second form was procedural activism. Doctrinal activism included reforms other than procedural reforms.

During the post–emergency period, it was found that three forms of judicial activism were observed in India. The first form of judicial activism was the evolution of human rights jurisprudence. The second form of judicial activism were

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the procedural innovations through Public Interest Litigations. The third form was doctrinal activism through the concept of rule of law.

The first form of judicial activism through human rights jurisprudence is discussed in Chapter IV. The discussion in Chapter IV is confined to the evolution of human rights jurisprudence through a dynamic interpretation of Article 21, Article 14, Article 19 and the directive principles, the defining of positive and negative rights from Article 21, the right to education as a human right, women’s human rights of gender equality and gender justice and the constitutionality of the right to die with dignity.

The second form of judicial activism through Public Interest Litigation is discussed in Chapter V. The third form of judicial activism through rule of law is discussed in Chapter VI.

**Judicial Activism and Human Rights Jurisprudence**

A remarkable feature of judicial activism in India during the post-emergency period was the evolution of human rights jurisprudence. Human rights jurisprudence became the Court’s rule for preserving the constitutional values. The higher judiciary of India expressed its commitment to protect and promote human rights for two obvious reasons. Firstly, the Indian nation had been a signatory of several International Covenants. The ratification of International Covenants signifies that India intends to be a frontrunner in the worldwide human rights movement. Secondly, the Indian constitutional policy mandates the Indian state to promote international peace and security, to foster respect for international treaty
obligations and also to apply these principles in making law. This is by virtue of Article 51 of the Constitution of India, which forms a part of the Directive Principles. The Directive Principles are fundamental to the governance of the country since they aim to create an egalitarian Indian society. “However the key feature is that the Directive Principles are ‘non–justiciable’ but are yet supposed to be the basis of executive and legislative actions.”\(^3\) Through human rights jurisprudence, the Indian Supreme Court has applied these non–justiciable principles to achieve an egalitarian Indian society.

Why human rights? An urgent need to have a code of human rights as a part of the law of land was felt by nations just after the horrors of World War II. Soon a code of human rights got the first global recognition through the Universal Declaration of Human Rights, 1948. Since then, human rights which was a widely disregarded concept till now became a universally espoused cause. The Indian Supreme Court has played an activist role in advocating the cause of human rights and placing them beyond state encroachments as well as individual encroachments. Speaking about the importance of human rights in *Nagaraj v. Union of India,*\(^4\) the Indian Supreme Court had said:

> “Individuals possess basic human rights independently of any constitution by reason of basic fact that they are the human race. These rights are important, as they possess intrinsic values. Its purpose is to withdraw certain subjects from the area of political controversy in order to place them beyond the reach of the majorities

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4 AIR 2007 SC 71
and officials and to establish them as legal principles to be applied by the Courts.”

India is a signatory of the Universal Declaration of Human Rights, 1948. The Universal Declaration adopted just before the Indian Constitution came into force on January 26th, 1950 served as a model for the latter’s human rights guarantees. Most of the civil and political rights mentioned in the Declaration are guaranteed as fundamental rights in the Indian Constitution. The social, economic and cultural rights finds place in the Directive Principles of State Policy. Fundamental Rights are inviolable but Directive Principles are violable. Protection and promotion of human rights gained momentum after India ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on March 27, 1979. In the absence of any domestic legislation the Court’s judgements blossomed with human rights jurisprudence.

“Judges should be great story tellers of their age.” The morale of their story is to uphold the constitution and the constitution’s commitment to its people, to the nation and to the world as a whole. The Indian Constitution categories some rights as fundamental but leaves the vast majority of socio-economic rights to the whims of the State. The three-generation human rights theory has been endorsed by the Indian Courts. “The Indian judges have said that you simply cannot have civil and

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5 Ibid
7 Note: The Optional Protocol to International Covenant on the Civil and Political Rights of 1966 and the Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989 have not been ratified by India
8 Albert Louise Sachs, “Judges should be great story tellers of their age,” The Hindu, 5 Feb. 2011, p. 9
political rights unless they are informed by socio-economic rights. So the second generation rights have not come through the front door but the windows have been left open." It is submitted that not only the second-generation rights but also several unenumerated first generation rights and the third generation right to unpolluted environment flew in through the windows. These first generation rights and third generation rights are not specifically enumerated under the Indian Constitution. But through judicial activism, they arrived as an integral part to life and personal liberty. It was with this juridical sense that the Court adopted, nurtured and developed the concept of human rights jurisprudence in India.

Evolving Human Rights Jurisprudence through Article 21, Article 14, Article 19 and Directive Principles of State Policy

During the post–emergency the Supreme Court developed its human rights jurisprudence through a harmonious construction of Article 21, 14 and 19 and the directive principles of state policy. “The fundamental rights and directive principles had their roots deep in the struggle for independence. And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India.” A law depriving a person of his human rights has not only to stand the test of Article 21 but it must also stand the test of Article 19 and Article 14 of the Constitution. For the judiciary, Article 21 which provides the right to life and personal liberty had been the fundamental source for defining different human rights within the framework of the Indian Constitution. The open textured expressions of ‘life’ and ‘personal liberty’ in Article 21 provide ample scope for

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9 Ibid
judicial creativity. Justice Krishna Iyer and Justice P.N. Bhagwati had used Article 21 as a canvas for drawing different human rights unenumerated under the Indian Constitution. “Article 21 has verily been treated as the cornucopia from which all such newly created rights flow”.11 Hence through Article 21 arrived negative rights as well as positive rights. The negative rights were basically centered on the protection of civil–political rights such as right to travel abroad and right to privacy. Negative rights also included guarantees against abusive practices by state agencies such as arbitrary arrest, detention torture and extra–judicial killings. These negative human rights which are the outcome of judicial activism during the post emergency period are in consonance with the human rights mentioned in the International Covenant on Civil and Political Rights, 1966. On the other hand positive rights are group rights, which necessarily have socio–economic dimensions as well. Positive rights are guarantees for an active participation by the state agencies to provide facilities for better qualities of life such as shelter, food, health, medical assistance, unpolluted environment, education and also compensation to rape victims and to those killed in police custody and fake encounters. These positive human rights are in consonance with the human rights mentioned in the International Covenant on Economic, Social and Cultural Rights, 1966. During the post–emergency era, the Indian courts have tried to collapse the distinction between ‘negative rights’ and ‘positive rights’ by applying the theories of ‘inter-relationship of rights’ and ‘harmonizing of rights and duties’. The ‘interrelationship of rights’ theory provided that ‘the rights must mix to constitute that grand flow of unimpeded and impartial justice – social, economic and political. “Isolation of various aspects of human

freedom for purposes of their protection is neither realistic nor beneficial but would defeat the objects of such protection."  

The harmonizing of rights and duties theory provided that "the provisions of Part III and IV are supplementary and complementary to each other and not exclusionary of each other. That the fundamentals rights are but a means to achieve the goals prescribed in Part IV."  

According to H.M. Seervai, "there is no necessary conflict between fundamental rights and public welfare; on the contrary, legally enforceable fundamental rights were conferred by our Constitution on persons, citizens and groups of persons as the most effective way of securing public welfare."  

The voyage of human rights jurisprudence in India began with *Gopalan* when the Supreme Court for the first time was asked to define the words ‘personal liberty’ in Article 21. In *Gopalan*, the majority judges defined ‘personal liberty’ as a negative right which could be curtailed if there was a law for the same. The Court could not inquire into the fairness of the procedure established by such law. This was due to the difference in the meanings of the words ‘procedure established by law’ in Article 21 and ‘due process clause’ guaranteed under the 5th and the 14th Amendment of the US Constitution. Justice Fazal Ali, the lone minority judge gave a dissenting view that the principles of natural justice was a part of the general law of the land and the same should accordingly be read into Article 21.  

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15 A.K. Gopalan v. Union of India, AIR 1950 SC 27  
minority opinion of Justice Fazal Ali had taken a much more liberal view of Article 21. It took nearly three decades for his views to be realized in Maneka.”  

*Maneka Gandhi v. Union of India* was a landmark judgment of the post-emergency period as the Supreme Court showed a great transformation in its attitude towards the protection of personal liberty. The protection of personal liberty had suffered traumatic experiences during the emergency period of 1975 to 1977 when personal liberty had reached its nadir. This is evident from the Supreme Court’s pronouncement in *A.D.M. Jabalpur v. Shivkant Shukla*. In *Shivkant Shukla*, the Supreme Court by a majority of 4 to 1 (Justice Khanna dissenting) held that the Presidential Order dated June 27, 1975 deprived a person the *locus standi* to move a writ of habeas corpus or any other writ to challenge the legality of a detention order on any ground whatsoever that it was a not in compliance with the Act or was illegal or was vitiated by malafides or based on extraneous considerations. Later on, Justice Khanna’s dissenting opinion became a law through the 44th (Constitution) Amendment, 1978. The 44th Amendment, 1978 provided that the enforcement of the right to life and personal liberty cannot be suspended through a Presidential Order.

At Justice Khanna’s memorial lecture held on February 25, 2009, Chief Justice M.N. Venkatachalaiah commented that the 1976 majority decision be “confined to the dustbin of history.” In a recent judgement of 2011, a division
bench of Justices Aftab Alam and Ashok Kumar Ganguly took the view that the
majority decision of a five–member Constitution Bench upholding the suspension of
fundamental rights during emergency in Shivkant Shukla was erroneous.\(^\text{22}\) The
Supreme Court has admitted that it had violated the fundamental rights of citizens
during the 1975 Emergency.\(^\text{23}\)

In *Maneka*, the Apex Court held that the right of liberty cannot be easily
transgressed. The governmental restraints on ‘personal liberty’ should be
collectively tested on the touchstones of Art 14, 19 and 21 of the Constitution. Art
14, 19 and 21 collectively prescribes the procedural guarantees of fairness, non–arbitrariness and reasonableness. “The court developed a theory of ‘inter–relationship of rights’ to hold that governmental action which curtailed either of these rights should meet the designated threshold for restraints on all of them.”\(^\text{24}\)
The Court thus incorporated the guarantee of ‘procedural due process’ which was
till now an American concept into the language of Article 21. In this regard, Justice
Krishna Iyer had said:

> “True, our Constitution has no ‘due process’ clause or the
> VIII Amendment of the American Constitution but after Cooper and
> Maneka Gandhi’s cases the consequence is the same.”\(^\text{25}\)

\(^{22}\) “SC owns error in rights verdict,” *The Telegraph*, 31 Jan. 2011, p. 3
\(^{23}\) Ibid
\(^{24}\) Address by Hon’ble Mr. K.G. Bala Krishnan, Former Chief Justice of India, “Judicial
Activism under the Indian Constitution”, Dublin, Ireland: Trinity College,
\(^{25}\) Sunil Batra vs Delhi Administration, AIR 1978 SC 1675, para 53, p. 1690
During the post–emergency period, the Supreme Court has not only resurrected Article 21 from oblivion but has even put it on the highest pedestal.\textsuperscript{26} By giving an expansive and purposive interpretation to Article 21 the Court has created a bundle of rights to improve the quality of life of the people.\textsuperscript{27} Rights included both positive and negative rights. The clientele included not only the deprived and the disadvantaged but also prisoners, under trials, victims of rape and fake encounters. These new rights were not expressly enumerated in Part III but had flown from Article 21. In this regard, Justice Bhagwati had observed:

“It is true that Article 21 is worded in negative terms but it is now well settled that Article 21 has both negative and affirmative dimensions. Positive rights are very well conferred under Article 21 of the Constitution.”\textsuperscript{28}

According to the theory of jurisprudence:

“A right is distinguished as positive or negative according to the nature of the correlative duty. In case of a positive right, the person subject to duty is bound to do something here as in case of negative right, the person subject to duty is restrained from doing something.”\textsuperscript{29}

Both negative and positive rights are the outcome of judicial activism during the post–emergency era to achieve the preambular objectives of securing justice – social, economic and political.

\textsuperscript{26} M.P. Jain, \textit{Indian Constitutional Law}, 5\textsuperscript{th} ed., (New Delhi : Wadhwa and Company Nagpur, Reprint 2008), (see preface)
\textsuperscript{27} Ibid
\textsuperscript{28} In \textit{Maneka Gandhi v. Union of India}, AIR 1978 SC 597, para 196, p. 683
For constraints of time and paucity of space, the discussion shall be confined to the right to education, women’s human rights and the right to die with dignity as an outcome of judicial activism during the post-emergency period.

**Judicial Activism and the Right to Education in India as a Human Right**

In India, education is considered as a tool which makes a man a complete human being. It is considered to be the bedrock of all happiness, fame and pleasure. A man without education is considered to be a man without knowledge. “The harsh reality of the society is that an uneducated person in the contemporary world can’t survive, and even if it happens, then he will be subjected to mistreatment and neglect.”

Children are the future of any nation. “The founding fathers of the Indian Constitution were wise enough to realize that India of their vision would not be a reality if the children of the nation are not developed, nurtured and educated.”

For grooming the children in their formative years to be an educated man with vision and mission, the constitution framers have included several provisions in the Indian Constitution. These provisions have found a place in Part IV as the Directive Principles of State Policy. Article 45 requires the State to make provision within 10 years for free and compulsory education for all children until they complete the age of 14 years. This directive principle has currently acquired the status of a fundamental right by the insertion of a new Article 21-A through the Constitution

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(86th Amendment) Act, 2002. Article 21–A which makes the right to education a fundamental right provides that “The State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine”. To prevent the children from exploitation due to economic necessity Article 39 (e) directs the State to protect the health and tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or necessity. To provide a congenial atmosphere for the all round development of the children and youth Article 39 (f) directs the State to give opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 41 directs the State to ensure the people within the limits of its economic capacity and development the right to education. For promoting the educational and economic interest of the weaker sections of the society, Article 46 further enjoins the State to promote the educational and economic interest of the weaker sections of the people and in particular of the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and of all forms of exploitation.

Drafted around the same time as the Indian Constitution Article 26 of the Universal Declaration of Human Rights, 1948 says that everyone has the right to education. Education shall be free, atleast in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally
accessible to all on the basis of merit. Similar provisions are provided in Article 13 of the International Covenant on Economic, Social and Cultural Rights, 1966.

Articles 28 and 29 of the Convention on the Rights of the Child, 1989 make vast provisions for the education of the child. It casts duty upon the State Parties to recognize the right of the child to education. Article 28 (1) provides the State Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity make primary education compulsory and available free to all, encourage the development of different forms of secondary education, make higher education accessible to all. Article 28 (2) also requires that the State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention. Article 29 (1) requires the State Parties agree that the education of the child shall be directed to the development of the child’s personality, talents and mental and physical abilities to their fullest potential. The Indian Parliament had ratified the Convention on the Rights of the Child, 1989 in the year 1992.

On the basis of the above principles laid down in the Constitution and the International Instruments and Conventions the Supreme Court developed its human rights jurisprudence during the post-emergency. Since the directive principles providing for education are unenforceable in a court of law, the Supreme Court through its creativity equated the status of the directive principles to that of

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32 Article 28 (1) (a) of the Convention on the Rights of the Child, 1989
33 Article 28 (1) (b) of the Convention on the Rights of the Child, 1989
34 Article 28 (1) (c) of the Convention on the Rights of the Child, 1989
fundamental rights through a harmonious construction between the two. In

*Kesavananda Bharati v. State of Kerala*, the Supreme Court has said:

“Fundamental rights and directive principles aim at the same
goal of bringing about a social revolution and establishment of a
Welfare State and they can be interpreted and applied together. They
are supplementary and complementary to each other. It can well be
said that directive principles prescribed the goal to be attained and
the fundamental rights lay down the means by which that goal is to
be achieved.” 35

The principle of harmonious construction between fundamental rights and
directive principles was again applied in *Unni Krishnan v. State of Andhra Pradesh*
wherein the Supreme Court reiterated:

“The fundamental rights and directive principles are
supplementary and complementary to each other and the provisions
in Part III should be interpreted having regard to the Preamble and
Directive Principles of the State Policy.” 36

It was through the principle of harmonious construction that the Supreme
Court enhanced Article 45 of the Directive Principle of State Policy providing for
free and compulsory education for all children until the complete the age of fourteen
years to the status of a fundamental right under a new Article 21–A of the
Constitution.

**Right to Education is included within the Right to live with Human
Dignity** Post *Maneka* 37, the Supreme Court gave a new dimension to Article 21 by
defining rights which aimed at complete and comprehensive development of human
persona and human dignity. The Supreme Court held that the right to life is not

35 AIR 1973 SC 1461
36 (1993) 1 SC 645
37 AIR 1978 SC 594
merely confined to physical existence but includes within its ambit the right to live with human dignity and all other facilities that goes along it. Elaborating this view in *Francis Coralie Mullin v. Administrator Union Territory of Delhi*, Justice Bhagwati observed:

“The right to ‘live’ is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also includes “the right to live with human dignity” and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms freely moving about and mixing and comingling with fellow human being.”  

In a recent judgment the Supreme Court has held that providing free and compulsory education to all children in the age group of 6 to 14 years is to ensure life with dignity which is a facet of the right to life’ under Article 21 of the Constitution. The Right to Education not only ensures a life with dignity but it is also a crucial means for realizing other human rights such as the right to food, health, work and livelihood. “It is the primary tool by which economically and socially marginalized individuals and communities can move up in the ladder socially, economically, culturally and even politically.”

“India has the largest child population in the world. It also has the largest number of child labourers in the world today with 12.7 million economically active children of 5–14 years according to 2001 census.”

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38 AIR 1978 SC 597  
39 “Free Education is a part of the right to life: Court,” *The Hindu*, 18 Feb., 2011  
41 Ibid at p. 5
mandate in Article 24 provides that the children should not be subjected to exploitation and the various legislative enactments prohibit employment of child labour yet child labour is a big problem and has remained unsolved even after 60 years of independence. “As is evident even after 60 years, universal elementary education remains a distant dream.”

“The directive principle relating to right to education in Article 45 has now become a fundamental right under Article 21–A after a long struggle of the child right activists, educationists and social activists espousing the right to education through Public Interest Litigations.” M.C. Mehta v. State of Tamil Nadu was an instance where a Public Interest Litigation was filed espousing the cause of children exploited through employment in hazardous industries. Delivering a landmark judgment the Supreme Court has held that children below the age of 14 years cannot be employed in hazardous industries and laid down exhaustive guidelines to protect the humanitarian rights of millions of children, working illegally in public and private sections. In one its guidelines the Court favoured the discontinuance of such employment and the ensuring of primary education to the child labour until they complete the age of 14 years. The Court also directed the Inspectors appointed under Section 17 of the Act to comply with its guidelines in fulfilling the constitutional mandate under Article 45 of the Constitution.

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44 AIR 1997 SC 699 : (1996) 6 SCC 756
As observed by Prof. Sathe, *M.C. Mehta v. State of Tamil Nadu* was an instance where a Public Interest Litigation was filed to highlight the condition of child labourers working in the match factories in Sivakasi in Tamil Nadu, but the Court thought it fit to travel beyond the confines of Sivakasi and to deal with the issue in wider spectrum and broader perspective taking it as a national problem.\(^{45}\)

The Court seems to be guided by the sociological jurisprudence and through its judgment preferred a social transformation in the society. The Court refused to confine its role to a passive observer merely awaiting the efforts of the other two organs of the government to bring about social transformation visualized in the directive principles of the state policy. Instead, it advocated an active role on its part to bring social transformation visualized in the directive principles of state policy. In this regard Justice Hansaria said:

“\[It is the duty of all the organs of the State [according to Article 37] to apply these principles. Judiciary being also one of the three principal organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern.\]”\(^{46}\)

As rightly observed by Prof. Sathe while the intentions of the Court expressing genuine concern about human exploitation in the form of child labour, the judgment also points out the limitations of judicial activism in solving such


\(^{46}\) AIR 1997 SC 699
The Court’s judgment in eradicating child labour has been criticized on the following points:-

(1) Firstly, the Court has applied the principle of harmonious construction between Article 24 and Article 41, which do not seem to supplement and complement each other. Article 24 which is a guaranteed fundamental right prohibits employment of children below 14 years of age in factories and hazardous employment. On the other hand, Article 41 is a directive principle which speaks about the right to work but with a provision “within the limits of the economic capacity and development of the State”. “The right to work can become a reality only through appropriate economic policies of the State.” 48 The framing of such economic policies are however subject to the economic condition of the States. Linking abolition of child labour to the employment of adult population has raised doubts about solving child labour problem. If abolition of child labour is linked to employment of the adult population and the State as directed by the Court cannot provide the right to work, it also means that the State cannot abolish child labour to the employment of adult population has only aggravated the child labour problem.

(2) Secondly, the judgment makes both the employer as well as the State liable to rehabilitate the child labour. The judgment which makes the offending employer pay Rs. 20,000/- as compensation for rehabilitating the child labour

47 S.P. Sathe, Judicial Activism in India : Transgressing Borders and Enforcing Limits, 2nd ed., op. cit., p. 243
48 Ibid at p. 24
is welcomed. But the same judgment which makes the State liable either to
deposit Rs. 5000/- for the child labour or to provide a job to an adult member
in lieu of the deposit has posed practical problems where some pertinent
questions are raised in this regard. How will the State find the funds to pay
Rs. 5000/- to every child labour? How will the State provide work for an
adult member of the labour child’s family? As observed by Prof. Sathe, the
Court is directly undertaking the work of prioritizing the allocation of
resources.\textsuperscript{49} By indulging in policy making, the Court has transgressed its
limits and has directly jumped into the domain of the legislature.

(3) Thirdly, the judgment prohibits child labour only in hazardous employment.

It does not prohibit the employment of children in non–hazardous jobs the
only conditions being the working hours of the child being limited to not
more than 4 to 6 hours a day and the education of the child labour for atleast
2 hours each day. Article 24 of the Constitution prohibits employment of
children below 14 years of age in factories and hazardous employment. The
term ‘factory’ as defined in the Factories Act, 1948 includes both hazardous
as well as non– hazardous employment involved in manufacturing process
either with or without the aid of power.

If the very purpose of abolishing child labour is to educate a child then the
judgment confines educating a child labour in hazardous employment. The
judgment omits the education of a child labour in non–hazardous employment.

\textsuperscript{49} S.P. Sathe, \textit{Judicial Activism in India : Transgressing Borders and Enforcing Limits},
2\textsuperscript{nd} ed., op. cit., pp. 243 – 244.
Right to Education and Capitation Fee - In India, right to education became a fundamental right as a consequence of exhorbitant capitation fees charged in higher educational institutions.

In *Mohini Jain v. State of Karnataka* 50, Mohini Jain challenged the exhorbitant fees charged from non–Karnataka students who intended to pursue medical courses in Karnataka. The Karnataka Government issued a notification known as The Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984. The notification charged the Karnataka students Rs. 25,000/- per annum whilst non–Karnataka students were charged an exhorbitant fee of Rs. 60,000/- per annum for pursuing medical courses in Karnataka. Mohini Jain challenged the notification as arbitrary, unfair, unjust and violation of Article 14 as the notification charged exhorbitant fees from non–Karnataka students whereas Karnataka students were not charged such exhorbitant fees. Mohini Jain, a non–Karnataka student was denied admission as she was unable to pay the exhorbitant fees of Rs. 60,000/-.

The Division Bench comprising Justice Kuldeep Singh and R.N. Sahai held that the right to education at all level is concomitant to the fundamental right enshrined under Article 21. The right to education flows directly from the right to life. Capitation fee frustrates the right to education. It makes the availability of education beyond the reach of the poor. The right to education is a fundamental right under Article 21 of the Constitution which cannot be denied to a citizen by charging higher fee known as the capitation fee.

50 (1992) 3 SCC 666
According to Prof. Sathe, the Supreme Court’s decision in Mohini Jain was a case of judicial populism as one of its judge Justice Kuldeep Singh went to the extent of saying that it was the duty of the Indian State to provide opportunities for education by opening as many institutions as might be required for satisfying the needs of all those who aspired to acquire education.  

Prof. Sathe believes that this would have created an impossible situation. No doubt Mohini Jain’s case was a populist judgment but it was the first decision where the Court made the right to education as an integral part to the enjoyment of the right to life. The Court realizing the impracticability of such a proposition tried to narrow the judicial dictum in Unni Krishnan wherein it said that the right to live included the right to primary education.

A year later, the Supreme Court examined the correctness of the Court’s decision in Mohini Jain’s case in Unni Krishnan v. State of Andhra Pradesh. In Unni Krishnan, the Supreme Court by 3 to 2 majority partly agreed with Mohini Jain’s decision and held that the right to education is a fundamental right under Article 21 as it directly flows from Article 21. But the Court confined its ruling only to a particular age group of children. It held that the right to free education is available only to children from 6 years to 14 years. The right to education after 14 years is an obligation of the State but subject to its economic capacity. The State can discharge its obligations under Article 41, 45 and 46 either by establishing its own institutions or by aiding, recognizing or granting affiliation to private institutions.

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52 Ibid
53 (1993) 1 SCC 645
institutions. The Court accepted the necessity of private educational institutions in the present day context.

As regards capitation fee, the Court held that Mohini’s case was not right in holding that charging of any amount must be described as capitation fee. The Court evolved a scheme for both ‘free seats’ and ‘payment seats’. 50 percent of seats in all professional colleges were reserved as payment seats to be filled by candidates prepared to pay a higher fee.

According to Prof. Sathe Unni Krishnan was another instance where the Court verged on populism. 54 Article 45 of the directive principles of state policy enjoins the State to provide within a period of ten years free and compulsory primary education for all children below the age of fourteen years. Converting a non–enforceable directive principle into a non–enforceable fundamental right will depend upon the economic policies that the State pursues taking into consideration the large number of illiteracy rate in India.

According to Prof. V.N. Shukla, the Supreme Court through its decision in Unni Krishnan and Mohini Jain hope that the conversion of the State’s obligation under Article 45 into a fundamental right would help achieve the goal of education for all at a faster speed. 55 According to M.P. Jain, in Mohini Jain the Court took an extremely expansive view of the State obligation to provide education to everyone at all levels. From a practical point of view, such an approach was hardly viable,

54 S.P. Sathe, Judicial Activism in India :Transgressing Borders and Enforcing Limits, 2nd ed., op. cit., p. 119
feasible and tenable in the present–day economic situation of the country, for no State has the financial ability to meet the public demand for professional colleges. A more realistic view has been propounded now by the Court in *Unni Krishnan*.\(^5^6\) Mohini Jain’s case and Unni Krishnan’s case has also been discussed in Chapter VII under the sub heading of ‘Educational opportunities’.

Whatever be the opinion of the different jurists, the Court’s decision in Unni Krishnan has been legitimized by the Parliament. Consequently the Parliament has passed the Constitution 86\(^{th}\) Amendment Act in 2000 which included the right to education as a fundamental right through incorporation of a new Article 21–A. The right to education has also been included as a fundamental duty by the incorporation of a new Article (k) in Article 51–A. The judicial decision in Unni Krishnan has been complemented as well as supplemented by political action. The parliamentary legislation leading to right to education is an integral part of the right to live with dignity. By enacting the Right of Children to Free and Compulsory Education Act or Right to Education (RTE) Act India has become one of the 135 countries to make education a fundamental right of every child when the Act came into force on April 01, 2010.

**Availability of Higher Education** \(^5^7\) The Supreme Court through its decision in Unni Krishnan had restricted the right to education to children in the age group of six to fourteen years. But through subsequent decisions it expanded the

\(^{57}\) This topic has already been discussed by Jai S. Singh in his article “Expanding Horizons of Human Right to Education: Perspective on Indian and International Vision,” *JILI* 52, 2010, pp. 34 – 59
horizons of the right to education to secondary level. Such activism was in consonance with Article 26 of the Universal Declaration of Human Rights, 1948 which says that technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Similar provisions for secondary education are contained in Article 13 (2) (b) of the International Covenant on Economic, Social and Cultural Rights, 1966.

State of Maharastra v. Manubhai Pragji Vashi 58 was one such instance where the Supreme Court held that paucity of funds cannot be a plea for availability of legal education. The right to legal education is inherent in the right to free legal aid, a positive right flowing from Article 21. In State of Maharashtra v. Manubhai Pragji Vashi 59, the Supreme Court stressed the importance of legal education and held that paucity of funds cannot be a ground for granting grant-in-aid to recognized private law colleges. The Court held that not extending the grant-in-aid by the State to non-government law colleges and at the same time extending such benefit to non-government colleges with facilities viz., arts, science, commerce, engineering and medicine (other professional non-government colleges) was patently discriminatory and violative of Article 14 of the Constitution. The Court, therefore, directed the State of Maharashtra to afford the grant-in-aid to recognized law colleges on the same criteria as such grants are available to other faculties.

The Court included the right to legal education as a part of legal aid in Article 21 through its harmonious construction with Article 39-A. In view of

58 AIR 1996 SC 1
59 Ibid
Article 39–A the Court indicated that in order to enable the State to afford free legal aid and guarantee speedy trial a vast number of persons trained in law are essential. In this regards the Court observed:

“Legal aid is required in many forms and at various stages for obtaining guidance, for resolving disputes in courts, tribunals or other authorities... The need for continuing and well–organized education is absolutely essential reckoning the new trends in the world order, to meet the ever growing challenges. The legal education should be able to meet the ever growing demands of the society and should be thoroughly equipped to cater to the complexities of the different situations. Specialization in different branches of the law is necessary. The requirement is of such great dimension, that sizeable or vast number of dedicated persons should be properly trained in different branches of law every year by providing or rendering competent and proper legal education. This is possible only if adequate number of law colleges with proper infrastructure including expert law teachers and staff are established to deal with the situation in an appropriate manner.”

Thus, the Court extended the right to education to the level of higher education.

**Right to Education and Minority Institutions** - The Right to Education, 2009 has been criticized for infringing the rights of the private and religious minority schools to administer and supervise their schools. Even before the Act the Supreme Court gave judgments which were glaring examples of judicial interventions in institutions managed by private groups and religious minority groups.

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60 Ibid at para 16,17,18
In *Unni Krishnan*, the Court fixed the scheme relating to the grant of admission and the fee structure in private educational institutions. The regulation of educational policy was extended to minority institutions in *St. Stephen College v. University of Delhi* 62 wherein the Court had fixed the reservation of seats up to 50 percent for minority institutions. To that extent the Court overruled its decision in *Unni Krishnan case* and in *St. Stephen’s case* and in *T.M. Pai Foundation v. State of Karnataka*. 63 But the Court refused to give full autonomy and monitored the administration in minority educational institutions in the name of maintaining the excellence of education and the efficiency of administration in such institutions. The directions for improving the terms and conditions of service of the teachers and employees in the minority institutions were welcomed. But the Supreme Court’s directions on what should be the fee structure and the quota of seats in such institutions was protested. The minority educational institutions alleged that the Supreme Court had crossed the lakshman–rekha (limits of separation of powers) by interfering in the policy matters of the minority educational institutions.

The issues raised in *T.M. Pai’s case* were again referred to a seven judge Bench in *Islamic Academy of Education v. State of Karnataka* 64 which further raised controversies. The majority judges consisting of Khare C.J. and Kapadia J. directed setting up two committees in each state, one committee to approve the fee structure charged by the minority institution and the second committee to scrutiny the tests conducted by such institutions. The Bench also fixed the State quota for

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62 (1992) 1 SCC 558  
63 AIR 2003 SC 355  
64 AIR 2003 SC 3724
admissions in respect of unaided professional institution which ran counter to T.M. Pai’s ruling and was therefore liable to be challenged. The committee was at liberty to approve the fee structure and also revise the fee structure.

The five judge Bench decision in *Islamic Academy* directing the setting up of permanent committee for regulating admission and fixing fee structure in unaided minority and non–minority institutions was again challenged in *P.A. Inamdar v. State of Maharashtra*. 65 A seven judge Bench of the Supreme Court held that the Constitution Bench in *T.M.A.Pai’s case* has not accepted the reservation policy. The private unaided professional institutions (minority or non–minority) cannot be forced to accept the reservation policy of the State. The scheme evolved in Islamic Academy to the extent that it allows States to fix quota for seat sharing between the management and the States on the basis of local needs of each State in the unaided private educational institution runs counter to T.M.A Pai’s ruling and is, therefore, liable to be overruled.

During the post–emergency, the Supreme Court ensured that the right to education does not remain a mere paper tiger. Judicial activism ensured that the other two organs played an equally active role in implementing the right to education. The State and its functionaries are under an equal obligation to implement the right to education for right to education nourishes and cultivates dignity in man.66

65 AIR 2005 SC 3236
Judicial Activism and Women’s Human Rights

During the post–emergency era the Indian Supreme Court played a proactive role in realizing the Indian women’s human rights by emphasizing the concept of gender equality, gender equity and gender empowerment. “Gender equality means that women and men have equal conditions for realizing their full human rights and for contributing to, and benefitting from, economic, social, cultural and political development. Gender equity is the process of being fair to men and women. To ensure fairness, measures must often be put in place to compensate for the historical and social disadvantages that prevent women and men from operating on a level playing field. Empowerment including gender empowerment is about people—both women and men—taking control over their lives setting their own agendas, gaining skills, building self–confidence, solving problems and developing self–reliance. No one can empower herself or himself to make choices or to speak out.” 67

In the context of international human rights, the legal concept of gender equality is enshrined in the 1948 Universal Declaration of Human Rights as well as in the 1979 United Nations Convention on the Elimination of all forms of Discrimination Against Women.

The Convention which has been ratified by 100 countries states clearly and unequivocally that “discrimination against women violates the principles of equality of rights and respect for human dignity.” The governments of the world reaffirmed

67 Based on definitions provided by UNESCO’s Gender Mainstreaming Implementation Framework
their commitment in 1995 to “the equal rights and inherent human dignity of all women and men” in the Beijing Declaration and Platform for Action.

“Language of gender equality and women’s empowerment becomes more widespread partly because the series of world conferences gives a louder voice to women from developing countries.” ⁶⁸

Under international law a state that ratifies an international instrument becomes legally bound to implement its provisions. Accordingly India having ratified the International Covenant on Civil and Political Rights, 1966 and International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 is bound to enforce the relevant provisions and ensure gender equity under national laws.” ⁶⁹

**Gender Equality and Uniform Civil Code** - The Indian Constitution expressly stands for a gender just code which is reflected in Article 44 of the Constitution. Article 44 of the Constitution envisages a uniform civil code for all citizens and lays down that “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” ⁷⁰ It means that there should be one uniform personal law for all citizens in India. However, women in India under Hindu, Muslim and Christian personal laws continue to suffer discrimination and inequalities in their personal matters of marriage, divorce, inheritance and

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⁶⁸ Keays Patricia, “Approaches to Gender and Development,” (New York: Consultation for UNDP Gender Focal Points, February 1998)


succession. Thus, Indian women who make up nearly half of India continue to clamour for a gender just code to enjoy equality and justice irrespective of the community to which they belong. The objective to achieve a gender–just code is perceived as a need not only to reform the personal laws of various communities in India but also as a need to comply with the provisions of the Indian Constitution and the International Conventions to which India is a party.

It is unfortunate that even after more than six decades from the framing of the Constitution, the ideal of uniform civil code under Article 44 is yet to be achieved by the Indian Government. Though the Indian government adopts a policy of interference towards the implementation of a uniform civil code, positive efforts have been made by the Indian Supreme Court which are reflected in its various pronouncements from time to time. These Supreme Court pronouncements acted as a precedent:

1. For achieving a gender just code through the implementation of Article 44
2. For achieving gender equality through a harmonious construction of the fundamental rights of Articles 14 and 25.

Such observation has already been made by Flavia Agnes, according to her uniform civil code is required not only to ensure (a) uniformity of laws between communities, but also (b) uniformity of laws within communities ensuring equality between the rights of men and women.

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It is to be noted that the founding fathers of the Constitution had incorporated Article 44 for the purpose of securing national integration rather than for achieving gender equality. Initially the demand for uniform civil code was made by the All India Women’s Conference in the context of women’s upliftment and equal rights. But the debate on uniform civil code was dominated by concerns for national integration and secularism.\textsuperscript{73} The issue of gender justice did not figure prominently in the debate on uniform civil code.\textsuperscript{74} Later during the Constituent Assembly Debates the focus shifted from gender equality to national integration.\textsuperscript{75} But the Supreme Court’s pronouncements on uniform civil code focus more on the issue of gender equality rather than on national integration. In this regard it is proposed to discuss the Supreme Court’s judgments on Shah Bano case, Sarala Mudgal case, Ahmedabad Women’s Action Group case and Lily Thomas case.

In \textit{Mohammad Ahmed Khan v. Shah Bano Begum}\textsuperscript{76} popularly known as the \textit{Shah Bano Case}, the Supreme Court acknowledged that “it was a matter of regret that Article 44 of our Constitution had remained a dead letter.” The Court held that a Muslim woman would be entitled to maintenance under Sec 125 of Cr. P C if the amount received by her as ‘dower’ under personal law is not sufficient for her sustenance. The Court’s decision negates the effect of Sec 127 of Cr. P C, which

\textsuperscript{74} Ibid
\textsuperscript{76} AIR 1995 SC 1531: (1995) 3 SCC 635
provides that if a woman has received an amount under personal law, she would not be entitled to maintenance under Sec 125 of Cr. P C, 1973 after divorce.

Though this decision was highly criticized by Muslim fundamentalists yet it was applauded by activists as a liberal interpretation of law as required by gender justice.\footnote{Jyoti Rattan, “Uniform Civil Code in India: A binding obligation under International and Domestic Law”, JILI, Vol. 46, No. 4, Oct- Dec 2004, pp. 577- 587, p. 581.} The \textit{Shah Bano} ruling by the Supreme Court created political controversy.\footnote{Flavia Agnes, \textit{Family Law- Family Laws and Constitutional Claims}, (New Delhi: Oxford University Press, Volume 1, 2011), p. 157} The Muslim fundamentalists considered the Court’s judgment as a direct interference in their personal law. The Supreme Court’s reliance on Article 44 in upholding the right of maintenance of a Muslim divorcee under Sec 125 of Cr. P C soon boomeranged resulting in a separate maintenance for Muslim female divorcee.\footnote{V.N. Shukla, \textit{Constitution of India}, 10\textsuperscript{th} ed., (Lucknow: Eastern Book Company Reprint Edition 2007), p. 10} \textit{Shah Bano} case was a perfect example of Muslim appeasement by the ruling Congress Party at the Centre. The Central government fearing that annoyance of Muslims would cause detriment to the party in the forthcoming election to a state legislature enacted a new law – The Muslim Women’s (Protection of Rights on Divorce) Act, 1986 to exclude the Muslim divorcees from the purview of Sec 125 of Cr. P C.\footnote{S.P. Sathe, \textit{Judicial Activism in India: Transgressing Borders and Enforcing Limits}, 2\textsuperscript{nd} ed., (New Delhi: Oxford University Press, 2002), p. 192} The activists have rightly denounced that it “was doubtless a retrograde step.”\footnote{Jyoti Rattan, “Uniform Civil Code in India: A binding obligation under International and Domestic Law”, JILI, Vol. 46, No. 4, Oct- Dec 2004, pp. 577- 587, p. 581} Stressing the need for a uniform civil code Justice Chinnappa Reddy observed:
“The time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. Now it is time for the legislature to take initiative in this direction.”  

The *Shah Bano* ruling points how the Court’s step forward towards a uniform civil code was pulled back by the legislature in the name of vote – bank politics.

In yet another liberal interpretation of Article 44 in *Sarala Mudgal v. Union of India*, the Supreme Court saw the implementation of Article 44 as imperative for both protection of the oppressed and promotion of national unity and integrity. The Court did not seem to be concerned about gender equality. In *Sarala Mudgal* four petitions were filed one of which was a PIL concerning polygamy of Hindu men after conversion to Islam. While the issue before the Court was that of bigamy of Hindu men and the validity of their marriage contracted prior to conversion, it primarily addressed the issue of UCC in the context of national integration and minority identity. In *Sarala Mudgal*, Justice Kuldeep Singh was agitated over the fact that people change their religion in order to enter into polygamous marriage. Justice Kuldeep Singh while delivering the judgment directed the government to file an affidavit indicating the steps taken and efforts made by the Government towards securing a uniform civil code for the citizens of India.

“The controversy between the right to religion under Article 25 and the provision regarding uniform civil code under Article 44 surfaced in the early days of...

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82 AIR 1985 SC 945, p. 950
83 (1995) 3 SCC 635
the working of the Constitution.”  

During the pre–emergency days, the Court had said that personal laws of Hindus, Muslims and Christians are excluded from the definition of ‘law’ for the purpose of Article 13 and as such they are excluded from judicial review by the Supreme Court and the high courts. However, during the post–emergency era, the judiciary has worked as a harmonious interpreter to preserve the justiciable right to freedom of religion as well as promote the unjusticiable duty to secure a uniform civil code.

The judgment in Sarala Mudgal has aroused the hope that the evil of gender oppression in the Indian society will soon be removed. But the Court’s judgment was objected as it talked of the two nation theory and exhorted the minorities to accept a uniform civil code just as the majority had accepted in Hindu law.

In a much publicized judgment delivered by Justice Kuldeep Singh and Justice R.M. Sahai, the Court commented:

“Since Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not through the Constitution enjoin the establishment of a common civil code for the whole of India… Those who preferred to remain in India after the partition fully knew that the Indian leaders did not believe in two – nation or three – nation theory and that in the Indian Republic there was to be only one nation, the Indian Nation and no community could claim to remain a separate entity on the basis of religion. In this view of the matter, no community can oppose the introduction of a common civil code for all citizens in the territory of India.”

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86 In *Bhan Ran v. Baijnath*, AIR 1962 SC 1476
87 *Sarala Mudgal v. Union of India*, (1995) 3 SCC 635, at paras 34 and 35
As observed by Flavia Agnes, the obvious reference to partition and to the choice to remain in India clearly indicates that the judgment targets the Muslim minority community.\textsuperscript{88} According to Prof. Sathe reference to the two nation theory was uncalled for because those who ask for a separate law do not necessarily think in terms of a different nation.\textsuperscript{89}

Fortunately in its subsequent decisions the Court had clarified that its decisions in \textit{Sarala Mudgal} was only an \textit{obiter dicta} and not legally binding on the Government. In \textit{Ahmedabad Women's Action Group (AWAG) v. Union of India},\textsuperscript{90} the Supreme Court gave a reserved judgment and held that the matter of removal of gender discrimination in personal laws “involves issues of state policies with which the Court will not ordinarily have any concern.” \textsuperscript{91}

Pursuing on the same line the Apex Court in \textit{Lily Thomas etc. v. Union of India and others} held:

“The desirability of a uniform civil code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.”\textsuperscript{92}

The Court further added that while it was desirable to have a uniform civil code, the time was yet not ripe and the issue should be entrusted to the Law


\textsuperscript{89} S.P. Sathe, \textit{Judicial Activism in India: Transgressing Borders and Enforcing Limits}, 2\textsuperscript{nd} ed., (New Delhi: Oxford University Press, 2002), p. 192

\textsuperscript{90} AIR 1997 SC 3614

\textsuperscript{91} Ibid at p. 3617

\textsuperscript{92} AIR 2000 SC 1650 , p. 1668
Commission which may examine the same in consultation with the Minorities Commission. The Court also clarified that the observations made by Justice Kuldeep Singh in *Sarala Mudgal* on the desirability of enacting the uniform civil code were incidentally made.

The judicial pronouncements seem to encourage the implementation of the constitutional philosophy of uniform civil code under Article 44. These judicial pronouncements will not be successful until and unless an effort is made by the legislature to promote the philosophy of Article 44. The objective of uniform civil code can be achieved only if the three organs of the State endeavour to take the initiative to put this philosophy into action. A uniform civil code is vital for the protection of the oppressed, promotion of national unity and solidarity for safeguarding the human rights of women in India irrespective of the religious community they belong and moreover, to bring the national laws in conformity with the legally binding provisions of international law in the form of various international human rights instruments already ratified by India. In this regard Shimon Shetreat suggests four guidelines – firstly initiative by legislature, secondly parallel application of civil and religious law, thirdly gradual application of uniform civil code, fourthly mediation – intercommunity and individual which could serve as a blue print for a scholarly discourse in the implementation of a uniform civil code in India. According to Flavia Agnes, in the process of progress and development

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95 Jyoti Rattan, op. cit., p. 587
96 Shimon Shethreet, “Academic blueprint for the implementation of a uniform civil code for India”, *Utah Law Review*, No. 1, pp. 97 – 120, p. 97
from a feudal to a capitalistic society, there has not been any significant change in the rights of women within the family – particularly women’s rights upon marriage. This is the significant factor which needs to examined while formulating the demand for a uniform civil code in India.\textsuperscript{97}

**Gender Equality in Public Employment** - The constitutional power of judicial review has been crucial in securing ‘gender justice’ and ‘gender equality’ in a traditional gender–based Indian society. An activist judiciary through its landmark rulings contributed to expanding the realm of women’s rights by striking down laws, rules and regulations which violate them and by upholding the constitutional validity of protective provisions.\textsuperscript{98} Issues concerning discrimination against women in the domain of public employment were challenged in the Court during the post–emergency era. The Court tested such discrimination as to whether they violated the constitutional mandates of equality enshrined in Articles 14, 15 and 16 of the Constitution of India.

*C.B. Muthamma v. Union of India*\textsuperscript{99} was the first instance to raise the issue of gender discrimination during the post–emergency era. C.B. Muthamma, a senior member of the Indian Foreign Services challenged Rule 18 (4) and Rule 8 (2) of the Indian Foreign Services (Recruitment Seniority and Promotion) Rules, 1961 as violative of her right to equality under Articles 14, 15 and 16 of the Constitution. Rule 18 (4) debarred married women the right to be appointed to that service. Rule

\textsuperscript{97} Flavia Agnes, *State, Gender and the Rhetoric of Law Reform*, (Bombay: Research Centre for women’s Studies, SNDT, Women’s University, 1995), p. 5 (see Introduction)


\textsuperscript{99} AIR 1979 SC 1868
8 (2) required the woman appointed to the service to obtain written permission from the government before her marriage. These rules were however, not applicable to the men. The Supreme Court upheld the contentions and declared both the impugned Regulations as discriminatory against women. The Court struck down the impugned Regulations as they were a blatant disregard of Articles 14, 15, and 16 of the Constitution. Acknowledging the person of gender discrimination in the domain of public employment, Justice Krishna Iyer commented:

“Discrimination against woman, in traumatic transparency, is found in this rule … In these days of nuclear families, intercontinental marriages and unconventional behavior one fails to understand the naked bias against the gender of the species.” ¹⁰⁰

A few years later, the issue of gender discrimination in the domain of public employment again came up before a three judge Bench of the Supreme Court in Air India v. Nargeesh Meerza. ¹⁰¹ Nargeesh Meerza, however, was an instance where the Court adopted a mechanical approach to eliminate gender discrimination in public employment. Nargeesh Meerza, an airhostess challenged the service conditions of Air India Regulations 46 and 47 for airhostesses as violating her right to equality under Article 14 of the Constitution. The impugned ‘Regulations’ were challenged as gender biased on three grounds. Firstly, it required the airhostess to retire upon attaining the age of 35 years or on marriage within four years of service or on first pregnancy whichever occurred earlier. Secondly, the Regulations gave the Managing Director wide discretion to extend the age of retirement by one year at a time upto the age of 45 years if an air hostess was found medically fit. These rules

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¹⁰⁰ Ibid at para 5, p. 1870
¹⁰¹ AIR 1981 SC 1829
were applicable only to the female stewards and not to the male stewards. The Airlines forwarded the ‘population control’ and the ‘difference in the nature of service’ argument to defend its Regulations. The Court accepted the arguments in case of retirement at the age of 35 years and the marriage bar within four years of service. The Court did not feel like asking why the same Regulations were not applicable to the male stewards. 102 The Court was, however, kind enough to invalidate the termination of service of an air hostess on the first pregnancy and the wide discretion given to the Managing Director in case of extension of service. The population control argument did not hold good here. Justice Fazl Ali while declaring the provision of termination of service on the first pregnancy as violative of Article 14 observed:

“It seems to us that the termination of service of an air hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood – the most sacrosanct and cherished institution.” 103

With these judgments, some headway was made towards achieving gender equality in the employment of women in public domain. 104 Despite that discrimination against women continued both in private as well as public domain of employment. “Having failed to obtain favourable judicial response to gender discrimination under Article 14 the lawyers preferred to attack gender discrimination under Article 21 of the Constitution.” 105 Neera Mathur v. Life

103 Air India v. Nargeesh Meerza., AIR 1981 SC 1829, para 80, p. 1831
Insurance Corporation  was an instance where the Court addressed the issue of
gender discrimination not on the basis of Article 14 but on the basis of Article 21.
In Neera Mathur, the Supreme Court relied on Article 21 to address the issue of the
right to privacy and dignity of working women. Neera Mathur challenged the
practice of the Life Insurance Corporation requiring its women applicants to provide
information about their menstrual cycles and pregnancies in their application forms
as extremely personal, awkward and also offensive. The Supreme Court held that
such questions infringe the right to privacy which was a part of the right to life
guaranteed under Article 21 of the Constitution.

Towards the late 1990’s the gender issues that came up before the Court
started shifting from non–discrimination to a conducive working environment at
workplaces. The coming into force in 1996 of the Convention on the Elimination of
All Forms of Discrimination against Women (CEDAW) has gained an impetus to
the realization of full equality and true dignity of women in society.  

The ratification of CEDAW in 1993 has placed an additional bonus upon Supreme Court
to eliminate all forms of discrimination against women. The Court used CEDAW
to reformulate the concept of ‘gender equality’ in a gender biased Indian society.

Vishakha v. State of Rajasthan was an instance of a much more liberal view of
gender equality formulated on the lines of CEDAW. In Vishakha, Chief Justice
R.S. Verma observed that sexual harassment of a working woman at the workplace

\footnotesize{106} AIR 1992 SC 392

\footnotesize{107} Cyrus Das and K. Chandra, Judges And Judicial Accountability, 2nd Indian Reprint,

\footnotesize{108} Flavia Agnes, op. cit., p. 136

\footnotesize{109} S.P. Sathe, op. cit., p. 135

\footnotesize{110} AIR 1997 SC 3011: (1997) 6 SCC 241}
was not only contrary to gender equality guaranteed by Article 14 but it also offended a woman’s right to be gainfully employed guaranteed by Article 19 (1) (g) of the Constitution and the right to privacy guaranteed under Article 21 of the Constitution. In absence of a suitable legislation, the Supreme Court laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work. The Supreme Court has incorporated the provisions of CEDAW in the Constitution through a dynamic interpretation of Article 14, 19 (1) (g) and 21 of the Constitution. Thus, through the concept of gender equality the Court has not only ensured the working women protection from sexual harassment but also the right to work with dignity which is a universally recognized basic human right. The Vishakha judgment is significant at a symbolic level for its validation of the problem of sexual harassment and recognition of the fact that it is an experience many women are almost routinely subjected to in the workplace.  

Apparel Export Promotion Council v. A.K. Chopra is the first case in which the Supreme Court applied the law laid down in the case of Vishakha’s case. In Apparel Export Promotion Council the Supreme Court upheld the dismissal from service of the Chairman of the Company who was found guilty of sexual harassment of a female secretary at the place of work on the ground that it violated her fundamental right guaranteed by Article 21 of the Constitution.

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112 AIR 1999 SC 625
The Court accepted the definition of sexual harassment as laid down in *Vishakha’s* case. However, the Court held that in a case involving charge of ‘sexual harassment’ or attempt to ‘sexually molest’ the courts are required to examine broader probabilities of the case and not swayed by insignificant discrepancies of narrow technicalities or dictionary meaning of the expression “molestation” or “physical assault”. The Court further held that the ‘victim’s testimony’ must be evaluated against the backdrop of the entire case, thus adopting a test of reasonableness that seems to be based on the victim’s perspective. 113 The Court said that each attempt of sexual harassment of female at the place of work results in violation of the fundamental right to gender equality in Article 14 and the right to life and liberty in Article 21 of the Constitution. As such the courts are under a constitutional obligation to protect and preserve those fundamental rights.114

The *Apparel Export Promotion Council* decision highlights how sexual harassment is contingent on woman’s sexual status and knowledge.115 The decision makes the dominance of feminist jurisprudence. “This dominance of feminist jurisprudence has raised many questions about the deployment of law and judicial activism as mode of feminist praxis.”116

The case of *Savita Samvedi* was unique as it raised the issue of gender discrimination against women as a daughter at workplaces. Discrimination against

113 Ratna Kapur, op. cit., p. 40
the daughter at the workplace cropped up as an issue in *Savita Samvedi v. Union of India*\(^\text{117}\) Savita Samvedi challenged the Railway Board circular that disentitled a married daughter from claiming regularization of the government accommodation of her retiring father both being employees of the Railways as violative of Articles 14 and 15 of the Constitution. “The Supreme Court struck down the Railway Board’s circular holding that it was a clear case of gender bias.”\(^\text{118}\) The Railway Board circular allowed regularization of government accommodation only in case of unmarried daughter or married daughter who did not have any brother.

**Gender Justice and Adultery** - Although the Court’s liberal approach to the issue of gender discrimination in case of employment proved beneficial for women. But the Court’s protectionist attitude towards women relating to the penal provisions of adultery cannot always be considered as women oriented. This is evident from an examination of some Apex Court’s judgments which though appear protective but were in fact anti–women and reflect archaic Victorian values.\(^\text{119}\) The Supreme Court invoked the constitutional mandate of Article 15 (3) to defend its protective attitude towards the penal provisions relating to adultery. The challenge to these provisions have come from the adulterer as being discriminatory against men and also from the adulterer’s wife for not being able to prosecute her husband as being discriminatory against women as the following cases illustrate. The Court adopted a paternalistic approach towards women in their involvement to the offence of adultery.

\(^{117}\) (1996) 2 SCC 380


\(^{119}\) Ibid at p. 138
Yusuf Abdul Aziz v. State of Bombay was the first instance when the penal provision of Sec 497 of IPC was challenged as violative of Articles 14 and 15 of the Constitution. Section 497 of IPC punishes only men in the offence of adultery and exempts women from punishment. Yusuf Abdul contended that Sec 497 of IPC violates the right to equality on the ground of sex since it punishes only the men though women may be equally guilty. The Court relied upon the mandate of Article 15 (3) to uphold this provision. The position was made explicit when the Court said:

“It was argued that clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a license to commit and abet crimes. We are unable to read any such restriction into the clause nor are we able to agree that a provision which prohibits punishment is tantamount to commit the offence of which punishment has been prohibited.”

The Court, thus, refused to accept the contention that Article 15 (1) can be misused by women. The Court viewed women as a passive partner and not as an abettor in the offence of adultery.

In Sowmitri Vishnu v. Union of India the validity of Sec 497 of IPC was once again challenged before a three judge Bench of the Supreme Court. Sowmitri Vishnu contended that Sec 497 of IPC recognizes only the right of the husband of the adulteress as an aggrieved party but does not confer similar rights upon the wife of the adulterer. “It was contended that such a provision was flagrant instance of

\[^{120}\text{AIR 1954 SC 321}\]
\[^{121}\text{Ibid, at para 5, p. 322}\]
\[^{122}\text{AIR 1985 SC 1618}\]
gender discrimination and ‘male chauvinism.’”

But once again the Supreme Court declined to strike down the provision and held that it does not violate Article 14 or 15 of the Constitution. Instead, the Court validated Sec 497 of IPC on the ground that it was a protective discrimination under the constitutional mandate of Article 15 (3). Subsequently in another similar instance in *Revathi v. Union of India* 124 the Supreme Court held that Sec 198 (2) of the Criminal Procedure Code (Cr. P C) which gives the husband of an adulteress the right to prosecute the adulterer but does not award similar rights to the wife of the adulterer is not discriminatory. Thus, the Court validated the provisions as enjoying a constitutional mandate under Article 15 (3) of the Constitution.

The Constitution of India forbids discrimination on the grounds of sex but permits protective discrimination on the grounds of gender. Such protective discrimination may not always be women–oriented. Whenever the Court finds so it must strike it down as being against equality. “There cannot be reasonable classification on the grounds of gender as classification on the basis of gender is per se unreasonable.”

**Right to die with Dignity – Suicides, Assisted Suicides and Euthanasia**

Through judicial activism, most of the unspecified human rights became an integral part of Article 21. These unspecified human rights included positive rights such as the right to food, shelter, health and unpolluted air, water etc specified in the

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124 AIR 1988 SC 835
International Covenant on Economic, Social and Cultural Rights, 1966. Article 21 also includes negative rights such as right against torture, cruel, inhuman or degrading treatment or punishment etc specified in The International Covenant on Civil and Political Rights, 1966. Since Article 21 includes both positive and negative rights, a pertinent question then arose as to whether the fundamental right to live with human dignity includes the positive right to die with dignity. Whether suicides, assisted suicides and mercy killings are constitutionally valid under Article 21 of the Constitution.

In India, the contention as to whether the ‘right to live’ includes within its ambit the ‘right to die’ came up for consideration for the first time in the year 1987. The contention was raised before the Bombay High Court in *State of Maharashtra v. Maruty Sripati Dayal* 126 wherein the Bombay High Court held that: “Everyone should have the freedom to dispose of his life as and when he desires.” The High Court thus decriminalized Sec 309 of IPC when it held that the right to life guaranteed by Article 21 includes the right to die. Consequently, the High Court struck down Sec 309 of IPC which punishes a person for attempt to commit suicides as unconstitutional.

In India, an attempt to commit suicide is an offence under Sec 309 of IPC which reads: “Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.” The Indian Law Commission in its 42nd Report recommended the repeal of this offence on the

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126 1987 Cr LJ 549 at para 18, p. 754
ground that it was harsh and unjustifiable to punish a person who had already found life so unbearable. A person attempts to commit suicide under the influence of several factors or disenchantment with life.

The recommendation was accepted by the Government and a Bill was passed by the Rajya Sabha in 1978 and was pending in the Lok Sabha when it was dissolved in 1979 as a result of which the Bill lapsed.

The Bombay High Court’s view regarding the right to die was, however, overruled by the Andhra Pradesh High Court in *C Jagadeeswar v. State of Andhra Pradesh*. In *C. Jagadeswar* the Andhra Pradesh high Court held that the right to die is not a fundamental right within the meaning of Article 21 and hence 309 of IPC is not unconstitutional.

The Bombay High Court’s view in *Maruti Sripati Dayal* was, however, upheld by a Division Bench of the Supreme Court in *P. Rathinam v. Union of India*. In *P. Rathinam*, a Division Bench of the Supreme Court comprising Justice M. Sahai and Justice Hansaria held that a person has a right to die and held Sec 309 of IPC as unconstitutional. The Supreme Court held that a person cannot be forced to enjoy life to his detriment, disadvantage or disliking and declared Sec 309 of IPC as a cruel and irrational provision. “Punishing a person for failing to commit suicide

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127 (1983) Cr L J 549
128 (1994) 3 SCC 394
129 Ibid, at para 33, p. 1675
may result in doubly punishing a person who has suffered agony and would be undergoing ignominy because of his failure to commit suicide.”

The Court, however, refused to decriminalize Sec 306 of IPC which makes abetting (or assisting) suicide an offence. The Court rejected the plea that euthanasia or mercy killing should be permitted. This was because in euthanasia a third person is either actively or passively involved to aid or to abet the killing of another person.

The concept of suicide or *icchamrityu* was considered to be permissible in some circumstances in India. The great sages of India practiced getting rid of one’s body through drowning, precipitating etc. To get rid of one’s body a man was also allowed to take *mahaprasthana* (great departure) on a journey which ends in death when he is incurably diseased or meets with a great misfortune.

The judicial decisions in *Maruti Sripati Dubal and P. Rathinam* finds support in Martha Nussbaum’s theory of Capabilities Approach. Martha Nussbaum’s capabilities approach emerged out of her involvement with a quality of life project undertaken on behalf of World Institute of Development Economics Research (WIDER) of the United Nations University. Martha Nussbaum’s version of life is “being able to live to the end of a human life of normal length, not dying prematurely, or before one’s life is so reduced as to be not worth living”.

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130 Ibid, at para 111, p. 1630
131 Ibid, at para 103, p. 1607
Thus Martha Nussbaum shows concern for the quality of life as being worth living. A person may not consider his life to be worth living if the enjoyment of his life is to his detriment, disadvantage or disliking.

Stanley Yeo, Professor of Law, National University of Singapore in his article ‘Dying with Dignity’\textsuperscript{134} proposes to decriminalize physician assisted suicide by the Court declaring Sec 306 of IPC and 309 of IPC as unconstitutional. Through his article he makes an appeal for legalizing physician assisted suicides in India. Physician assisted suicide constitutes a physician providing assistance to his or her patient with the necessary means or information to enable the patient suffering from a terminal disease to end his or her life. The underlying premise for advocating the decriminalization of physician assisted suicide is that in case of physician assisted suicide the patient suo moto takes the decision of ending his or her life. In case of physician assisted suicide, the patient performs the double act of requesting assistance to commit suicide and following up with committing suicide sets it apart from voluntary active euthanasia where only the second act of the patient is present.\textsuperscript{135} In this regard, Netherlands is the first country where physician assisted suicide and voluntary active euthanasia by physicians has been legalized since 1984. In Netherlands, medical guidelines call for assisted suicide to be preferred over euthanasia because it makes the patient’ determination and willingness to take responsibility clearer.

\textsuperscript{135} Ibid at p. 322
For legalizing physician assisted suicides in India, the decriminalization of Sec 306 of IPC and Sec 309 of IPC is advocated. Sec 306 of IPC makes the abettor of suicide criminally liable for abetting suicide whereas Sec 309 of IPC makes the person attempting to commit suicide criminally liable for such attempt. If physician assisted suicides are legalized then both the physician as an abettor and the medical patient as the offender would not be criminally liable.

However, in *Gian Kaur v. State of Punjab*¹³⁶ the Supreme Court has rejected the argument for decriminalizing both Sections 306 of IPC and 309 of IPC by observing:

“The arguments which are advanced to support the plea for not punishing a person who attempts to commit suicide do not avail for the benefit of another person assisting in the commission of suicide or in its attempt. The abettor is viewed differently, inasmuch as he abets the extinguishment of life of another person, and punishment of abetment is considered necessary to prevent the abuse of the absence of such a penal provision.”¹³⁷

The Court held unanimously that Sec 309 of IPC and consequently Sec 306 of IPC did not violate Articles 14 and 21 of the Constitution of India.

On the basis of human rights jurisprudence Article 21 includes both positive rights and negative rights. Accordingly Article 21 should include both the positive right to live with dignity as well as the negative right to die with dignity. The Indian Courts have not recognized the right to die with dignity within the ambit of Article 21 though it has legalized passive euthanasia in a PIL filed by Pinky Virani

¹³⁶ AIR 1996 SC 1257
¹³⁷ Ibid at para 37 – 38
advocating euthanasia for nurse, Aruna Shanbaug. The right to die including the right to choose the time and manner of one’s death, physician assisted suicide, active euthanasia, mercy killings continues to be an issue debated all over the world. According to Pinky Virani the trouble with all anti – euthanasia arguments are that while being mostly valid they leave very sick and dying people with no choice but to remain in a state of perennial suffering. It is unlikely that any anti–euthanasiast would ever want to be in that patient’s place.\textsuperscript{138} According to Govind Mishra, “Proponents of euthanasia often argue that we have a moral right, and should have a legal right, to a dignified death.”\textsuperscript{139}

Since the Supreme Court recently legalized passive euthanasia and that the Law Commission in its 196\textsuperscript{th} report has recommend the Government of India to allow the terminally ill to end their lives, there may an indication that India may soon move one day from permitting passive euthanasia to legalizing even physician assisted active euthanasia.

**Concluding Observations**

Truly, the Supreme Court has played the role of a saviour in the protection as well as the promotion of human rights in India. The Court’s jurisprudence has ensured that the nation’s promises to respect the human rights on an international level do not remain on the papers. Where the Constitution was found unclear about mentioning certain human rights, the Court through its dynamic interpretation
mentioned the unenumerated human rights within the framework of Article 21 of the Constitution. Where the legislature was lagging in dealing with the core issues of human rights the Court laid down guidelines to deal with those core issues until the Parliament made a law in respect with it. In this regard the Court’s judgments and guidelines were humane, progressive and persuasive. Regarding euthanasia the Supreme Court’s verdict struck a fine balance between legality and morality. The Supreme Court also laid down a strict framework for dealing with euthanasia that has not received the attention it deserves from the legislature.