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Article 21 as a Living Constitution Doctrine: From Minimalism to Transformative Justice

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ABSTRACT

Article 21 of the Constitution of India has undergone a remarkable change in its scope, being regarded as the most dynamic and flexible article of Indian constitutional law. It was initially interpreted in a narrow and procedural sense in the landmark case of A.K. Gopalan v. State of Madras, where the right to life and personal liberty under Article 21 was confined merely to the requirement of a procedure prescribed by law, without much judicial scrutiny into the justice of such procedures. The following phase of development emerged in the well-known case of Maneka Gandhi v. Union of India, where it was stated by the Supreme Court that every procedure that amounts to depriving an individual of life and personal liberty shall invariably be “just, fair, and reasonable.” This paper explores the development of the doctrine of substantive due process under the Indian Constitution. Article 21 has widened through time and includes rights such as livelihood, health, education, environment, privacy, and access to justice, and it provides for consistency between the Fundamental Rights and the Directive Principles of State Policy. Article 21 expands on the basis of human dignity. In Justice K.S. Puttaswamy v. Union of India, the Court held that privacy is essential to individual freedom. The paper reviews the role of the judiciary in the process of transformative constitutionalism through purposive interpretation. In the era of technological development, Article 21 has undergone further change in the light of new challenges such as technological surveillance and data protection, addressed through the principles of legality, necessity, and proportionality. Although some reservations about judicial activism persist, Article 21 continues to widen owing to the revolutionary nature of the Constitution.

Keywords: *Living Constitution Doctrine, Transformative Constitutionalism, Human Dignity, Due Process of Law, Judicial Activism*

I. INTRODUCTION: REIMAGINING THE RIGHT TO LIFE

Article 21 of the Indian Constitution, which has undergone tremendous development, has become an example of one of the most significant evolutionary processes in the contemporary legal system. Formulated at first in narrow procedural terms, Article 21 turned into a dynamic,

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expanding provision that became known under the name of the “living Constitution”. “No person shall be deprived of his life or personal liberty except according to procedure established by law”¹ was originally narrowly interpreted by the Court. However, with the passing years, the Supreme Court of India has widened the scope of application of the provision and made it possible for people to enjoy various rights necessary for human life. Such a shift from minimalist interpretations to transformative justice doctrines means that judges have changed their approach to constitutional interpretation.² Thus, the Supreme Court now believes that the Constitution is a dynamic document that should evolve in response to changes that occur in society and reflect technological progress and new ideas of justice.³

Article 21, as the “living Constitution doctrine”, is an indicator of the flexible nature of the provision. It shows that the meaning of the terms “life” and “personal liberty” need not be tied to the framers’ intentions and must be seen in the context of modern times. Article 21 has become a basis for the development of various rights related to environmental protection, privacy, human dignity, education, and good health.⁴ Thus, Article 21 has been transformed from a right not to have one’s personal freedom violated into the State’s responsibility for providing people with opportunities for leading a dignified life. It is also worth considering the evolution of Article 21 against the backdrop of the overall constitutional ideology. The framers of the Constitution deliberately refrained from employing the phrase “due process of law”, which had been understood as a strict judicial check on legislation. At the same time, the framers of the Indian Constitution wanted their constitution to be capable of further modification through judicial interpretation.⁵ The potential hidden in Article 21 has been gradually realized since the emergency regime in India, when the judiciary started playing a crucial role in securing human rights.

The development of Article 21 itself signifies an ongoing convergence between civil and political rights and socio-economic rights. It has been noted by the judiciary that the right to life would not be meaningful without basic requirements like clean surroundings, medical treatment, and educational opportunities.⁶ Thus, the Court has deliberately obliterated the dichotomy between enforceable Fundamental Rights and non-enforceable Directive Principles

¹ INDIA CONST. art. 21.

² *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, 35–36 (India).

³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, ¶¶ 56–58 (India).

⁴ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, ¶ 8 (India); *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598, ¶ 7 (India); *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, ¶ 297 (India).

⁵ *Olga Tellis v. Bombay Municipal Corp.*, (1985) 3 SCC 545, ¶ 32 (India).

⁶ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37, ¶ 9 (India); *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666, ¶ 7 (India).

of State Policy.⁷ This has added a great deal to the richness of Indian constitutional jurisprudence, allowing it to deal better with problems of inequality, poverty, and social discrimination.

II. THE MINIMALIST PHASE: *A.K. GOPALAN* AND PROCEDURAL FORMALISM

Article 21 underwent an interpretation phase of judicial minimalism and adherence to procedural formalism. In *A.K. Gopalan v. State of Madras*, the interpretation by the Supreme Court was narrow, and it ruled that “procedure established by law” referred to any procedure authorized by a law made by a competent legislature. There would be no judicial review of legislative interference with personal liberty on the ground of reasonableness, because the Constitution had deliberately not adopted the American doctrine of “due process of law”.

In the *A.K. Gopalan* case, there was a compartmentalized approach in which each right was considered separate and autonomous from the other rights. The Court declined to interpret Articles 14, 19, and 21 together. Such an approach reduced the scope of the provisions and restricted their use for protecting citizens. This phase can be described as constitutional minimalism, where judicial restraint was the hallmark. There was little regard for substantive justice, and individual rights were secondary. As such, it is apparent that many laws could be enacted that potentially infringed individual liberties.⁸ This narrow construction, however, attracted criticism on the grounds that it did not adequately safeguard basic freedoms. It was observed that the right to life and liberty guaranteed by the Constitution could only mean something if it included reasonableness and substantive justice. It had become clear that an extended construction of fundamental rights was necessary, especially considering the new socio-economic conditions and the importance of protecting human rights.

Moreover, the practical consequences of the *Gopalan* case became highly questionable in view of its permissive nature. It could easily enable the State to enact unreasonable laws simply because such legislation was not legally impermissible. For instance, preventive detention laws made it possible for a person’s freedom to be restricted without a proper evaluation of the reasonableness of the procedure. Such rigidity in adopting this approach was further exacerbated by overlooking the fact that fundamental rights are interlinked.⁹

By separating the right to life guaranteed under Article 21 from the guarantees of equality and liberty found in Articles 14 and 19 respectively, the Supreme Court neglected to consider the

⁷ *Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, ¶ 166 (India).

⁸ *A.K. Gopalan*, AIR 1950 SC at 36 (India).

⁹ *Id.*

overall scheme of the Constitution, which sought equality, liberty, and justice.¹⁰ Eventually, the courts realized that such an approach was detrimental to the constitutional scheme and the protection offered therein. The path was thus paved for the adoption of a new doctrine by the Indian judiciary.

III. THE TRANSFORMATIVE TURN: *MANEKA GANDHI* AND SUBSTANTIVE DUE PROCESS

The turning point in the development of Article 21 was brought about by the case of *Maneka Gandhi v. Union of India*.¹¹ Here, the Supreme Court adopted a completely different interpretation of the right to personal liberty guaranteed under Article 21. The Court ruled that not only should the procedure adopted in a matter be established by law, but that such a procedure must be just, fair, and reasonable.

This case represented a significant departure from the mechanical view of law adopted in *Gopalan*, and showed that Articles 14, 19, and 21 were complementary in nature and had to be read together.¹² In other words, any legislation depriving a person of his or her life or personal liberty had to satisfy the tests of reasonableness and non-arbitrariness. The *Maneka Gandhi* case became the foundation on which the development of Article 21 took place, and it became a repository of various rights necessary for the dignified existence of a human being. It is now evident that personal liberty is of the widest amplitude and that it guarantees several rights that go to constitute a person's personality.

Substantive due process increased the importance of the judiciary in guaranteeing fundamental rights. It gave the judges the authority not only to judge whether a law is legal or illegal, but whether it is reasonable or unreasonable. This marked the start of a period known as judicial activism, in which courts play an active part in protecting individual freedoms and establishing social justice. In *Maneka Gandhi v. Union of India*,¹³ it was also stated by the Court that the concept of arbitrariness is incompatible with equality, thus drawing a close link between Articles 21 and 14. This linkage in the doctrine made it possible to require that all actions taken by the State not only conform to a prescribed procedure but at the same time be non-arbitrary and rational. Here, procedural protections have been made into substantive protections by elevating laws from mere validity to justification. Lastly, there has been a change in the philosophical outlook on the Constitution, that is, from a plain text approach to a purposive, value-laden

¹⁰ *Id.*

¹¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

¹² INDIA CONST. arts. 14, 19, 21.

¹³ *Maneka Gandhi*, (1978) 1 SCC 248 (India).

approach, in order to fulfil the basic objective of providing security of life and liberty to individuals in this country.

IV. EXPANSION OF ARTICLE 21: THE EMERGENCE OF UNENUMERATED RIGHTS

After the *Maneka Gandhi* case, the Supreme Court adopted an expansive approach toward Article 21 and started identifying various unenumerated rights as being part of the right to life and personal liberty. This era saw Article 21 transformed into a fountainhead of human rights. *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*¹⁴ ruled that the right to life guaranteed by Article 21 includes the right to lead a meaningful, complete, and dignified life with adequate food, clothing, and shelter, which is necessary for human dignity.

Further, in *Olga Tellis v. Bombay Municipal Corporation*,¹⁵ the Supreme Court accepted that the right to livelihood constitutes a component of the right to life as enshrined in Article 21. Evicting pavement dwellers without any alternative provision for livelihood constitutes a violation of the said fundamental right. The right to health was identified as a basic human right in cases like *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,¹⁶ according to which there exists a constitutional obligation upon the State to provide proper medical facilities for its citizens. Similarly, the right to education first emerged as a part of Article 21 in *Mohini Jain v. State of Karnataka*,¹⁷ but received express constitutional recognition through Article 21A.¹⁸

The right to live in an environment free from pollution has also been incorporated into Article 21. In the case of *Subhash Kumar v. State of Bihar*,¹⁹ the Supreme Court stated that the right to life includes the right to the enjoyment of pollution-free water and air. The interpretation shows the interconnection made by the Court between environmental protection and the concept of human rights. Expansion at this stage has proved the judicial intention to transform Article 21 into an instrument of social justice. By including unenumerated rights within Article 21, the Court has made sure that the Constitution is able to keep itself updated with time.

In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* and *Olga Tellis v. Bombay Municipal Corporation*, the Court set up a normative basis of life under Article 21 as being something more than animal existence.²⁰ Life according to Article 21 included dignity, security,

¹⁴ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, ¶ 8 (India).

¹⁵ *Olga Tellis v. Bombay Municipal Corp.*, (1985) 3 SCC 545, ¶ 32 (India).

¹⁶ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37, ¶ 9 (India).

¹⁷ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666, ¶ 7 (India).

¹⁸ INDIA CONST. art. 21A.

¹⁹ *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598, ¶ 7 (India).

²⁰ *Francis Coralie Mullin*, (1981) 1 SCC at ¶ 8 (India); *Olga Tellis*, (1985) 3 SCC at ¶ 32 (India).

and opportunity. The principle provided by the Court paved the way for further expansion of the right and the inclusion of the right to shelter in the case of *Chameli Singh v. State of Uttar Pradesh*.²¹ Furthermore, the Court went ahead to incorporate procedural safeguards along with humane treatment in the criminal justice process through Article 21. The right to a speedy trial, as recognized in *Hussainara Khatoon v. State of Bihar*,²² was held to be an essential aspect of personal liberty, stressing the point that delayed justice is nothing but a violation of fundamental rights. Likewise, in *Sunil Batra v. Delhi Administration*,²³ emphasis was laid on prisoners' rights, and it was held that imprisonment could not deprive people of their fundamental rights, save to the extent permissible under law. This development marked another step towards the constitutionalising of welfare philosophy, where rights falling under the category of Directive Principles were gradually interpreted into fundamental rights by way of interpretation.

Further, it must be noted that this stage has emphasized the fact that the judiciary is very keen to take cognizance of the real-life concerns of socially disadvantaged classes. Through the incorporation of issues of poverty, homelessness, illiteracy, and environmental destruction under Article 21, the Court has succeeded in making the Constitution a tool of social reform. In this way, Article 21 has evolved as a means of guaranteeing justice rather than just being a protectionist clause.

V. ARTICLE 21 AND HUMAN DIGNITY: THE CORE CONSTITUTIONAL VALUE

The right to dignity has emerged as the central interpretative principle in the evolution of Article 21 of the Constitution of India. It is important to note that dignity became an essential element that allowed the scope of application of Article 21 to be expanded. Thus, in the *Puttaswamy* case, the Supreme Court ruled that privacy was a basic element of the right to life enshrined in the Constitution, and thus partook of the nature of the right to privacy and to life with dignity, implying personal freedom of choice and autonomous existence.

Dignity was also invoked in cases where the issues of reproductive rights, the end of life, and sexual orientation were raised by the petitioners. In the *Common Cause* case, the Supreme Court recognized the right to die with dignity by allowing a living will and passive euthanasia.²⁴ Similarly, in *Navtej Singh Johar v. Union of India*,²⁵ the Court ruled that the right to dignity implies the right to freedom of choice regarding one's sexual identity and preferences.

²¹ *Chameli Singh v. State of Uttar Pradesh*, (1996) 2 SCC 549, ¶ 8 (India).

²² *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 81, ¶ 5 (India).

²³ *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494, ¶ 52 (India).

²⁴ *Common Cause v. Union of India*, (2018) 5 SCC 1, ¶¶ 199–201 (India).

²⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 253 (India).

The focus on dignity has also provided greater legal protection to the marginalized sections such as prisoners, women, children, and members of the LGBTQ+ community. The Indian Supreme Court has recognized the fact that the Constitution needs to be a vehicle for social change and a vehicle to uphold the dignity of every person. Where *Justice K.S. Puttaswamy v. Union of India* is concerned, the Supreme Court has stressed the importance of dignity as the fundamental core of constitutional morality and ruled that the right to privacy was crucial to ensure that the dignity of the individual was preserved.²⁶ The fact of the matter is that, in this specific case, the idea of dignity is clearly not some sort of metaphysical abstraction.

The idea of dignity has also found application in reproductive rights. The Court upheld the right of a woman to exercise her reproductive freedom as a component of Article 21 in *Suchita Srivastava v. Chandigarh Administration*.²⁷ The Court stressed that reproductive freedom bears a close relationship to dignity, bodily autonomy, and privacy. The case laid a further foundation for the adoption of a rights-oriented approach to the issues concerning women's health and empowerment. Likewise, in *Navtej Singh Johar v. Union of India*, the Court declared that constitutional morality should supersede social morality and, thus, that members of the LGBTQ+ community have an equal claim to dignity. The judgment was another blow to centuries-long discrimination against gay persons.²⁸

Further, the idea of dignity has been extended by the Court to include the concept of gender identity. In *National Legal Services Authority v. Union of India*,²⁹ the Court accepted the right of transgender persons to determine their own gender. It was observed by the Court that self-identification of gender identity was necessary for the protection of personal liberty and dignity, and that the failure to accept it would constitute a violation of Article 21.

The concept of dignity has been significant in matters relating to criminal procedure and custody rights. In *D.K. Basu v. State of West Bengal*,³⁰ guidelines have been formulated by the Court for the prevention of custodial torture. It has been observed that even if an individual has been arrested, his dignity needs to be respected. In another case, *Sunil Batra v. Delhi Administration*,³¹ it was held that prisoners have fundamental rights under Article 21 and that cruel treatment would violate this provision. Finally, the concept of dignity has been recognized in cases involving the right to die. In *Common Cause v. Union of India*, it was held by the Court

²⁶ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, ¶ 297 (India).

²⁷ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1, ¶ 22 (India).

²⁸ *Navtej Singh Johar*, (2018) 10 SCC at ¶ 253 (India).

²⁹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, ¶ 69 (India).

³⁰ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416, ¶ 36 (India).

³¹ *Sunil Batra*, (1978) 4 SCC at ¶ 52 (India).

that dying with dignity forms a part of the right to life.³² Dignity has also been an important factor in dealing with matters of social exclusion and discrimination.

The courts have realized that structural imbalances affect the capacity of people to lead dignified lives. In its interpretation of Articles 14, 15 and 21 together, the Supreme Court aimed at formulating a new constitutional framework that would protect marginalized groups.³³ This shows that the legal doctrine relating to Article 21 recognizes dignity not as an abstract notion but as a right that is enforceable. Dignity works as a guiding principle that determines the interpretation of the other rights provided for in the Constitution.

VI. PROCEDURAL FAIRNESS TO SUBSTANTIVE JUSTICE: THE DOCTRINAL SHIFT

The evolution of Article 21 from mere procedural justice to substantive justice is a significant doctrinal development in the field of Indian constitutional law. There has been a paradigm shift from procedural concerns to substantive considerations, as the Court insists on substantive elements of reasonableness, fairness, and justice. This can be seen from the manner in which the Court evaluates preventive detention legislation, criminal justice procedure, and other administrative activities.

In making sure that there are certain requirements in terms of procedures being “just, fair, and reasonable”, the Court has ensured that there can be no arbitrary curtailment of liberty by the State.³⁴ There has also been a great advantage for the judiciary because of the doctrine of substantive due process, which permits the Court to invalidate those laws that are arbitrary or disproportionate. This has also led to the emergence of the doctrine of proportionality, which has become a central pillar of Article 21 jurisprudence. The movement from procedural justice to substantive justice has been achieved through a number of landmark judgments in the area of administrative and criminal law in relation to the principle of fairness. For instance, the first step towards achieving substantive justice was laid in the case of *Maneka Gandhi v. Union of India*, wherein the Court ruled that any procedure resulting in deprivation of the individual’s liberty had to meet the test of reasonableness under Articles 14 and 19. Further, the Supreme Court in its judgment in *Sunil Batra v. Delhi Administration*³⁵ extended the scope of Article 21 and provided protection to the prisoners against inhumane conditions in prison.

³² *Common Cause*, (2018) 5 SCC at ¶ 199 (India).

³³ INDIA CONST. arts. 14, 15, 21.

³⁴ *Maneka Gandhi*, (1978) 1 SCC at ¶ 56 (India).

³⁵ *Sunil Batra*, (1978) 4 SCC at ¶ 52 (India).

Moreover, in criminal law, the Court in its decisions has maintained that fairness should pervade every stage of the legal proceedings. As stated in *Hussainara Khatoon v. State of Bihar*,³⁶ the right to a speedy trial made procedural guarantees substantive rights, thus making it clear that a violation of the right to a speedy trial amounts to a denial of the right to personal liberty. In a similar vein, in *D.K. Basu v. State of West Bengal*,³⁷ the Court laid down detailed guidelines regarding custodial abuse.

Proportionality has become one such test in determining whether restrictions on fundamental rights are justified. The doctrine mandates that for any state action, there should be a legitimate aim, proper means, and the least infringement of the individual's fundamental rights. In *Modern Dental College v. State of Madhya Pradesh*,³⁸ it was expressly acknowledged by the Court that a restriction on individual rights must be proportionate to the importance of the object that the restriction seeks to achieve.

Moreover, the adoption of substantive due process by the courts has made it easier to hold state action arbitrary, regardless of whether there is a procedural error. In *Justice K.S. Puttaswamy v. Union of India*, the Court once again stated that privacy can only be invaded by the State through methods which are necessary and proportional to the achievement of a specific purpose. Hence, the change in approach from procedural fairness to substantive justice is an indication that there has been a development in the constitutional law of India. This is due to the fact that state actions will now be considered to be legitimate not just based on their legality, but also according to their conformity with the principles of reasonableness and dignity.

VII. ARTICLE 21 AND TRANSFORMATIVE CONSTITUTIONALISM

The history of Article 21 can be traced back to the idea of transformative constitutionalism, which perceives the constitution as a means for transformation and substantive equality. Transformative constitutionalism has found support through the interpretation of Article 21 by the judiciary in a progressive sense.

For transformative constitutionalism to take place, the courts must do more than merely ensure formal equality. Here again, Article 21 has proved to be a very useful provision, as it has helped in protecting the rights of marginalized sections of society.

³⁶ *Hussainara Khatoon*, (1980) 1 SCC at ¶ 5 (India).

³⁷ *D.K. Basu*, (1997) 1 SCC at ¶ 36 (India).

³⁸ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353, ¶ 60 (India).

Article 21 has enabled the Court to recognize the socio-economic rights that the people enjoy and to ensure that their existence is not merely formal but meaningful. This has been made possible because the Court has placed positive obligations on the State.

Similarly, this doctrine has also been shaped by the Directive Principles of State Policy, which offer guidance in realizing justice in society. While the Directive Principles are not enforceable in any court of law, these principles have served as a guideline in interpreting Article 21 in such a way that it promotes welfare and justice.

Transformative constitutionalism has become one of the main ideas of Article 21, under which the constitution needs to be active in dismantling inequalities and creating a socially just order. Transformative judicial activism has seen the adoption of this philosophy in the sense that socio-economic rights have been read into fundamental rights. In the case of *Bandhua Mukti Morcha v. Union of India*,³⁹ the Supreme Court dealt with the matter of bonded labourers and stated that the right to life in Article 21 included protection against exploitation. Through this decision, the Court gave effect to Directive Principles of the Constitution such as those in Articles 39 and 41 through Article 21.⁴⁰

Likewise, in the case of *Unni Krishnan v. State of Andhra Pradesh*,⁴¹ the Court read the right to education as a fundamental right arising from Article 21 on the basis of Article 45 of the Directive Principles. This kind of interpretation has, finally, resulted in the incorporation of Article 21A into the Constitution. It is, therefore, clear that the transformative possibilities of judicial interpretation have been institutionalized through this method. Environmental law is also an area where transformation of the constitutional provision through judicial interpretation of Article 21 is clearly visible. In the case of *M.C. Mehta v. Union of India*,⁴² the Court developed the doctrine of absolute liability. The Court has made it clear that environmental conservation is linked with the right to life.

Furthermore, the judiciary has employed Article 21 in dealing with concerns related to food security and poverty. In *People's Union for Civil Liberties v. Union of India*,⁴³ the Supreme Court has converted various welfare programmes into legal entitlements and recognized that the right to food comes within the ambit of the right to life. This shows the extent to which Article 21 has been used as a means of giving effect to socio-economic rights.

³⁹ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, ¶ 10 (India).

⁴⁰ INDIA CONST. arts. 39, 41.

⁴¹ *Unni Krishnan*, (1993) 1 SCC at ¶ 166 (India).

⁴² *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, ¶ 31 (India).

⁴³ *People's Union for Civil Liberties v. Union of India*, (2001) 5 SCC 733, ¶ 20 (India).

An important feature of the transformative power of Article 21 is its capacity to further inclusive citizenship. By bringing marginal communities such as bonded labourers, slum dwellers, and other economically weaker sections of society within the ambit of their rights under the Constitution, the Supreme Court has attempted to construct an inclusive constitutional order. It is because the Constitution cannot be seen as a mere piece of paper, but as a tool of social transformation meant to realize justice in all its dimensions.

VIII. CRITIQUES AND CHALLENGES: JUDICIAL ACTIVISM VS SEPARATION OF POWERS

Although the development of Article 21 has been hailed, it has faced a great deal of criticism for its alleged judicial activism. It is said that there has been an excess of judicial activism in creating new rights and placing obligations on the State which were never intended. It is feared that this will violate the principle of separation of powers and interfere with the legislative domain by deciding policy matters. Socio-economic rights have particularly been criticized for raising issues of judicial competence. Yet those who support judicial activism maintain that the role of the judiciary is not only confined to judicial proceedings but includes the protection of fundamental rights and justice whenever other organs of the State have failed to discharge their responsibility. The problem before the courts is how to reconcile judicial activism with judicial restraint. This dichotomy of activism and moderation has frequently been considered in the context of constitutional adjudication. While deciding *Divisional Manager, Aravali Golf Club v. Chander Hass*,⁴⁴ the Supreme Court stressed the importance of judicial restraint and cautioned against any form of judicial overreach. Although recognizing that judicial review is indeed an integral element of the Constitution, the Court stressed the need to exercise judicial restraint while invoking this power, to prevent judicial encroachment into administrative and legislative spheres.

However, when there exists a threat to the fundamental rights of people due to the indifference of the State, the Court has found justification to intervene. In the case of *Vishaka v. State of Rajasthan*,⁴⁵ the Court provided guidelines to address sexual harassment at the workplace, relying on Articles 14, 19, and 21, since there was no statute that addressed such cases. Such a ruling has been characterized as an instance of “judicial legislation”; however, this was necessary until legislation was passed by Parliament. The discussion also includes the possibility of the enforcement of socio-economic rights, where directions handed out by the

⁴⁴ *Divisional Manager, Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683, ¶ 19 (India).

⁴⁵ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶¶ 16–17 (India).

courts might imply resource allocation and policymaking. The critics claim that such a practice would overwhelm the institutional capabilities of the courts, which do not possess the necessary skills or legitimacy to formulate welfare schemes. Nevertheless, supporters maintain that the function of the courts is not to rule but to see to it that the process of ruling conforms to the constitutional dictates. In the end, judicial activism through Article 21 would be legitimate only if it follows the path of constitutional morality and rational deliberation, while recognizing the limitations of the institution.

IX. ARTICLE 21 IN THE DIGITAL AGE: PRIVACY, SURVEILLANCE, AND TECHNOLOGY

With regard to its applicability, Article 21 has gained even more significance due to the development of technology in the modern age and its implications for constitutional debate. In this regard, it should be noted that the right to privacy, as recognized by the landmark *Puttaswamy* judgment, can form the basis for further discussion.

Modern digitalization brings many threats to individual freedom, namely mass surveillance, data breaches, and automated decision making. As such, in the interpretation of the article, a balance should be struck between the rights of the person and those of the State.

In this respect, it is essential to take into account the role of factors like legality, necessity, and proportionality in the control of surveillance performed by the State. Furthermore, the digital era raises the question of the future development of Article 21 in the context of its role as a living Constitution doctrine. In the landmark case of *Justice K.S. Puttaswamy v. Union of India*, the Court provided a sound constitutional architecture on privacy, ruling that a violation of privacy should conform to the three-fold criteria of legality, necessity, and proportionality.⁴⁶ The Court, by ruling in favour of the informational component of the right to privacy, made it clear that, in this age of information and technology, personal information constitutes an extension of personal autonomy and dignity. In other words, the Court stressed the need for the legality of measures of surveillance, the legitimacy of the purposes sought to be achieved through them, and the adoption of the least invasive measures.

Moreover, legal frameworks such as the Information Technology Act, 2000 have a vital function to play in the regulation of digital domains.⁴⁷ For example, Section 43A provides that a body corporate will be held liable for failing to secure personal information, whereas Section 69 confers authority on the Government to intercept, monitor, and decrypt communications where

⁴⁶ *Justice K.S. Puttaswamy*, (2017) 10 SCC at ¶ 297 (India).

⁴⁷ Information Technology Act, No. 21 of 2000, Acts of Parliament, 2000 (India).

necessary.⁴⁸ Such powers of interception, monitoring, and decryption of communications have been subjected to judicial review to test the constitutional validity of the measure under Article 21. Nevertheless, the guidelines issued under the Information Technology (Amendment) Act, 2008 remain central to that assessment.

Moreover, the passage of the Digital Personal Data Protection Act, 2023 represents another important piece of legislation towards ensuring informational privacy.⁴⁹ This law attempts to govern the processing of digital personal data, placing obligations on the data fiduciaries as well as providing various rights to the people, including the right to access, correct, and erase personal data. While this Act represents an attempt to apply the *Puttaswamy* principles in practice, certain debates persist concerning the exemptions provided to the State and also about the regulatory mechanism. Another aspect worth consideration is the problem of surveillance, which was addressed by the courts in decisions such as *People's Union for Civil Liberties v. Union of India*,⁵⁰ establishing safeguards against arbitrary interception of communication. This is of special importance in view of new surveillance technologies, like artificial intelligence and big data.

Thus, Article 21 in the digital age operates at the intersection of technology, governance, and rights. It necessitates a fine balance between individual liberties and the State's interests, which could include matters like national security and the maintenance of law and order. The constant development of the case law in this sphere is indicative of the dynamic nature of Article 21 as a constitutional provision that is adaptable to the changing times.

X. CONCLUSION: ARTICLE 21 AS THE HEART OF TRANSFORMATIVE JUSTICE

The transformation of Article 21 from being a mere procedural right to becoming the source of transformative rights is a manifestation of the power of transformation contained in the Indian Constitution. The way in which Article 21 has been interpreted by the judiciary to provide transformative rights is a great example of how a constitution can evolve to provide justice. Article 21 is now the centre of the entire fundamental rights jurisprudence of the country, which is characterized by concepts of dignity, equality, and justice. It has also illustrated the need for a flexible Constitution to deal with emerging realities.

The role of Article 21 in the future would be determined by how relevant and important it becomes for justice to be done. While there is a need for innovation, there is also the need to

⁴⁸ Information Technology Act, No. 21 of 2000, §§ 43A, 69, Acts of Parliament, 2000 (India).

⁴⁹ Digital Personal Data Protection Act, No. 22 of 2023, Acts of Parliament, 2023 (India).

⁵⁰ *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, ¶ 35 (India).

proceed cautiously and to ensure that rights are not granted beyond what the Constitution allows. In this respect, Article 21 continues to operate as a constitutional beacon, enabling an interpretation of the rights of individuals based on the demands of society and contemporary global standards of human rights.

Through its broad interpretation, the Constitution is enabled to take account of new concerns arising in society, including disruption through technology and environmental issues, along with increasing social inequalities. Through such jurisprudence of Article 21, the fundamental promise of the Indian Constitution regarding justice is reinforced as being social, economic, and political. In conclusion, Article 21 is the key to realizing the promise of life and liberty enshrined in the Constitution.
