



DIVERGENCE OF JUDICIARY AND DYNAMICS OF LAW

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Abstract

Judiciary is one of the organs of the State, which interpret the law followed by the enactment and implementation of law. The idea of particular 'law' or 'right' emphasized in any law especially in the constitutional law is ever changing as according to the need and requirement. The judiciary has doing its role in the line of justice. Administering the question of the law is very much associated with the bench. The judges are very keen to incorporate the solution for the arisen question of law. In the beginning of the constitutional history of India, the judges were very particular about the literal interpretation. They were interpreted the constitutional right in a narrow way. In the way, some divergent thinking had elevated by dissenting opinion. Those divergent thinking were created an active approach towards the right and law. Dissenting opinion had been accepted by the judges in the later cases. Significantly the judges acknowledged the divergent thinking, if not in the same but later. Thus the dynamics of law and rights has been changing as according to the need of the society. The judicial interpretation is one key role to operate the changing dimension of law and rights. In this paper an attempt has been made to highlight some case where the judiciary had changed the dynamics of certain rights through the judicial interpretation.

Keywords: Judiciary- Creative Interpretation - Constitutional Rights-Changing Dimensions.

Introduction

Judiciary is one among the organs of the governmental functioning according to the Constitution. The sixty years of our experience, after the Constitution came into force, reveals an idea how the judiciary has playing an eminent role in the society. The tendency of the judiciary was different in the beginning and the present context. The judges who took placed in various period shave changed the pattern of judicial interpretation. The interpretation of Constitution and existing law is the core in the activist role of judiciary. The understanding of provision is different from one judge to another judge. Thus, the creative idea of the judge is the root in the well grown tree of judicial activism. An attempt is tried in this paper to evaluate the activist role of judiciary and how the judiciary has entertained various cases through liberal interpretation.

Judiciary- A Safe Guardian

The Constitution accords a place of pride to the judiciary. Among the three organ of the government, the people have directly nexus with the judiciary. In every democratic country the judicial role is very significant. Under Article 32¹ and Article 226²

¹Art. 32 : Remedies for enforcement of rights conferred by this Part

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
- (3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
- (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

²Art.: 226. Power of High Courts to issue certain writs

- (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose
- (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories
- (3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without
 - (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
 - (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day



of our Indian Constitution, every person has entitled to move for knocking the door of the Constitutional Court forgetting justice. Thus, the judiciary through rendering justice has closely related to every person. Any legislations or an executive action is suppose to try to encroach the right and liberties provided by the Constitution to the subjects, the judiciary is there to protect the people. It is well established that the fundamental rights safeguarded through the judiciary. A final hope of a person is lies on the judiciary³.

The Indian judiciary has always commended considerable respect from the people of this country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. Respect for the judiciary is part of the common man's aspiration for maintaining Rule of Law and building a just society. The real source of strength of the judiciary lies in the public confidence in the institution. Today, it is because of the public perception that the higher judiciary in the country occupies a position of safe guardian of the people.

Initial Phase of Judicial Interpretation

Initially the judiciary followed a policy of adhering to narrow doctrine and tended to shy away from development of the law. The judicial interpretation in the imitate period followed by the Constitution came into force, was much literally and very narrow. It is pertinent to note the judicial view in *A.K.Gopalan vs. State of Madras*⁴, Kania C.J., Mukarjee and Das JJ., held that in Article 21⁵ the word "law" had been used in the sense of "state made law" and not in the sense of law embodying the principle of natural justice; and "procedure established by law" meant "a law made by the union parliament or state legislature". It was understood by the judges that "procedure established by law" do not mean "due process of law" as understood in the United States. The reason for this narrow interpretation lies on the constituent assembly rejection of the terms "due process of law" and favours to the expression "procedure established by law".

In *Kharak Singh vs. State of Utter Pradesh*⁶, Justice Ayyangar denied that "personal liberty" was confined to freedom from physical restraint or freedom from confinement within the bounds of a prison. 'Personal liberty' was used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the personal liberties of man other than those dealt with in the several clauses of Art 19 (1). The honourable judge also added that "*the right to privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III*". This is position how the judiciary interpreted the constitutional provisions. The majority of judges are very favour with literal interpretation rather than a creative interpretation. However, it should not to say that creative role of judges was not exercised, because in *A.K.Gopalan* case, the dissenting judgment delivered by Justice Fazel Ali is more appropriate to understand the creativity of judges then also. Justice Fazel Ali disagreeing with the majority view, held that the principle of natural justice that 'no one shall be condemned unheard' was part of the general law of the land and same should accordingly be read into Art. 21. The nucleus of his view on this point that the phrase procedure established by law in Art.21 as implying procedure due process.

In same manner in *Kharak Singh* case also the creative role played by Justice SubbaRao is another creative stand of judiciary, even though it was a minority opinion. He held that right to privacy is an essential ingredient of personal liberty. The initial stand of judiciary was paved a way to the subsequent case decided by very narrow basis. The narrow view of judiciary has no long continued.

Literal Interpretation to Liberal Interpretation

The concept of fair hearing is important in the jurisprudence of any civilized country and it does not have to depend for its efficacy on any term like due process. The Supreme Court could have interpreted Art.21 somewhat liberally and purposefully and implied natural justice therein s they have done in many other cases. In *S.N .Sarkar vs. West Bengal*⁷, the Supreme

afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32

³Dr. Ashok Dhamija, "Need to Amend a Constitution and Doctrine of Basic Features", 1 Edition, 2007, Wadhwa and Company, Nagpur

⁴AIR 1950 SC27

⁵Art. 21: Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁶AIR 1963 SC 1295.

⁷AIR 1973 SC 1425



Court overruled the interpretation put by the majority in *A.K.Gopalan* on Art.22 (7) (a)⁸, and accepted the minority view. Accordingly, the court held Sec.17 (A) of Maintenance of Internal Security Act, 1971, invalid on the ground that it did not comply with the requirements of Art.22(7) (a), whereas the Sec.12 of Preventive Detention Act, was held valid, which corresponding to sec 17 (A) of MISA. The interpretation of the word ‘and’ has made significance in *A.K.Gopalan* case it was interpreted as either the circumstances or, the class or classes of cases, but in *Sarkar* case it was interpreted such as it was necessary for the Parliament to prevent both the circumstances and the class or classes of cases a person may be detained for a longer period than three months without obtaining the opinion of an Advisory Board.

Thus the judges has made a different stand over various cases, their creative interpretation has took place to safeguard the people, who is the ultimate sovereign of the country. The rigid judicial view to be soften somewhat. The beginning of the new trend is to be found in the *R.C.Cooper vs. Union of India (Bank Nationalization case)*⁹. The apex court established a link between Art. 19(1) (f) and Art.31 (2) to provide some protection to private property. In *Bennett Coleman and Co vs. Union of India*¹⁰, the judiciary broken the bar already exists that law was passed directly in respect of matter falling under Art .19 alone could be assed the reasonableness with Art 19 (2), the court changed the view through a creative interpretation that a law which affect the freedom of speech but not enacted directly with respect Art.19 (1) (a), is also could be assessable its reasonableness with referred to Art 19 (2).

*Maneka Gandhi vs. Union of India*¹¹ a land mark case how liberal tendencies have influenced the apex court in the domain of interpretation of fundamental rights. The dissenting opinion in *A.K.Gopalan* case has highly influential factor in *Manekacase*. Justice Bhagwati, established the test of reasonableness of procedure in Art.21 through Art 14. The judges in the current case was observed their favours to the liberal understanding which formulate an interlink between Art 14, Art 19 and Art21. Justice Chandrachoud, made a creative meaning over the word ‘law’ is, it should correlate the fair, just and reasonable and it should not be fanciful, oppressive or arbitrary. Justice Krishna Iyer gave the same kind of interpretation and added that ‘law’ in Art 21, is reasonable law, not any enacted piece. Thus, Justice Iyer understanding of law under the sphere of personal liberty is not cover every legislation passed by the legislature, but it should be within the ambit of reasonableness, non-arbitrariness. Justice Iyer understanding of Art.21, it is the spirit of man is at the root of Art.21, and personal liberty makes for the worth of the human person¹².

Justice Iyer rightly held in *Sunil Batra vs. Delhi Administration*¹³, “it is true our Constitution has no ‘due process’ but after *Cooper and Maneka Gandhi* the consequence is the same and Art 21 is the counterpart of the procedural due process in the United States”. It is well known that Art. 21 have been emerging since *Maneka* as the Indian version of the American concept of ‘due processes. Art. 21 has been the source of many substantive rights and procedural safeguards to the people.

Creativity of Judges-Paved a New Path:

A burst of creative decision of the apex court fast on the heels of *ManekaGandhi* gave a new meaning to the Art.21 and expanded its content and connotation. Due to the transition there was an era of progressive judicial activism for protecting the people. The Supreme Court, in its anxiety to protect the wellbeing of the people, has at time undertaken the creative role. The judiciary has identified creative form of actions to provide relief to the poor, underprivileged, downtrodden section of the society. It leads the judiciary into the epistolary jurisdiction, which allows access to justice to the poor and the weaker section of the society. A letter can be considered as a writ petition through this active stand and it ignored all procedural norms and technicalities. In *OlgaTellisvs. Bombay Municipal Corporation*¹⁴, Supreme Court considers the letter of one journalist from

⁸Article 22(7) : Parliament may by law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4) Right against Exploitation

9 AIR 1970 SC 564

10 AIR 1973 SC 106

11 AIR 1978 SC 597

12S.P.Verma, “Indian Judicial System-Need and Directions of Reforms”, ed, I Edition,, 2004,Kanishka Publishers and Distributers, New Delhi.

13 AIR 1978 SC 1675

14 AIR 1986 SC 180



Bombay as a writ petition, and granted interim reliefs to pavement dwellers. In *Bandhua Mukti Morcha vs. Union of India*¹⁵, also the apex court accepted a letter from an organization which dedicated to the cause of release of bounded labours, as a writ petition and ordered release and rehabilitate of bounded labours. In *Sunil Batra*¹⁶ case, the epistolary jurisdiction had been invoked who a prisoner had written a letter from Tihar jail. All these cases the judges need not wait for a formal procedure, when they informed about the violation of rights and liberties, they consider the letter itself a legal document.

Moreover, there is no express provision in the Constitution of India for granting of compensation for violation of a fundamental right to life and personal liberty. But the judiciary has evolved a right to compensation in cases of illegal deprivation of personal liberty. In *Rudal Shah vs. State of Bihar*¹⁷ is an illustrate case in human rights jurisprudence. The apex court awarded monetary compensation against the Bihar government for keeping a person in illegal detention even after his acquittal. The judiciary departed from the traditional approach, ignored the technicalities while granting compensation.

In *M.C.Mehta vs. Union of India*¹⁸, the Supreme Court held that the powers of the court under Art.32 (1) is not only in sanative in nature, that preening the entwinement of a fundamental right, but it also remedial in scope. In *Nandhini Satpathy vs. P.L.Dani*¹⁹, the judiciary had taken a view that Art. (22) (1) directs that the right to consult an advocate of his choice shall not be denied to any person. The spirit of Art 22(1) is that it is fundamental to the Rule of Law that the lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. It's made a clear departure from the liberal interpretation stance and added an additional fortification to the right to counsel. In *M.H.Hoskot vs. State of Maharashtra*²⁰, the judiciary did not hesitate to imply the right in Art.22 (1) and Art. 21 jointly while pressing into service application of a Directive Principle of State Policy under Art.39 A of equal justice and free legal aid. The court observed that where the prisoner is disabled from engaging a lawyer on reasonable grounds such as indigence or incommunicable situation, the court shall, if the circumstances of the case, the gravity of the sentences and the ends of justice so require, assign competent counsel for the prisoners defense, provided the party does not object to the lawyer. The state shall pay to assigned counsel such sum as the court may equitable fix.

In *Francis Coralie Mullin vs. Administration Union Territory of Delhi*²¹ the Supreme Court elaborate the scope of the right to life which cannot be restricted to mere animal existence. It means something more than just physical survival. The judiciary, at times, is forging new tools, devising new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. While treating a letter, addressed to the Supreme Court seeking release to bonded labour in the country, as a writ petition under Art.32 it was held that when the poor comes before the court, particularly for the enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure.

In *State of Himachal Pradesh vs. Umed Ram Sharma*²² based on public interest litigation the judiciary is taking affirmative action by issuing direction in case of governmental inaction or lethargy. Scheduled caste residents of hilly area of Shimla District addressed a letter to the Chief Justice of Himachal Pradesh, High Court complaining that there was no proper road in their area. This not only affects their livelihood but also their development. The judiciary directs the officials to proceed with the construction of the road and to complete the works assigned to it before of that financial year. The state of Himachal Pradesh filed a petition for special leave to appeal before the apex court challenging the High Court's powers to regulate financial matters in the state under Art. 226. The apex court rightly held that the High Court was within the limits of its jurisdiction in directing the official. It is submitted that the High Court in this case has exceeded its domain and taken over the functions of the executive.

In an unprecedented manner the Supreme Court, in *D.K.Basu vs. State of West Bengal*²³, issued 11 requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf. The Supreme Court did not hesitate to

¹⁵AIR 1984 SC 802

¹⁶ AIR 1978 SC 1675

¹⁷ AIR 1983 SC 1086

¹⁸ AIR 1987 SC 1086

¹⁹ AIR 1978 SC 1025

²⁰ AIR 1978 SC 1548

²¹ AIR 1981 SC 746

²² (1986) 2 SCC 68

²³ AIR 1997 SC 610



assume direct legislative function in the core of *Vishaka vs. State of Rajasthan*²⁴. The Supreme Court has virtually enacted a piece of legislation on the ground that there is a vacuum in the legislative field of sexual harassment of working women. These are a paragraph similar to the statement of objects and reasons. There is a definition clause and these are 12 points similar to 12 sections. The Supreme Court laid down some guidelines and norms which are directed to be treated as law.

In *Suresh Jindal vs. BSES Rajdhani Powers Ltd*²⁵, the Supreme Court has observed that creative interpretation of the provisions of the statute demands that with the advance in science and technology, the court should read the provisions of a statute in such a manner so as to give effect there to. In *Food Corporation of India vs. m/s Seil Ltd*²⁶, the Supreme Court rightly admitted that Art.14 of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by active interpretation of the court. In Supreme Court in *People Union for Civil Liberties vs. Union of India*²⁷, has held that voter's right to know about the antecedents of the candidate contesting for the election falls within the realm of freedom of speech and expression guaranteed by Art.19 (1) (a) and could be fulfilled on good and substantial grounds.

In *BALCO Employees Union (Regd.) vs. Union of India*²⁸, the Supreme Court has cautioned that there are some of the dangers in the public interest litigation which in court has to be careful to avoid. It is also necessary for the court to hear in locusstandi and justifiability and it is not every default on the part of the state or public authorities that is justifiable. The court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution. It is a fascinating exercise for the court to deal with public interest litigation because it is a new jurisprudence which the court is evolving a jurisprudence which demands judicial statesmanship and high creative ability.

The activist role of judiciary empowers to address the environmental jurisprudence also. Right to live in healthy environment forms apart of human rights. Environmental concerns are placed in a high position in the human rights by virtue of the creative interpretation given by the judiciary in *Virender Gaur vs. State of Haryana*²⁹, and many other cases. The right to environment is a fundamental right on the other hand right to development is also. Hence the right to sustainable development cannot be singled out. Therefore, the concept of sustainable development is to be treated as an integrated part. Thus, the judicial creativity made the environment of the living society is one of the limb of the right to life.

Conclusion

One major outcome of the divergent concern of judicial exercise is the rise of a number of unremunerated constitutional rights protecting citizens from state actions. The present status of Directive Principles of State Policy is quite clear that many of rights therein, now acknowledged by the judiciary through the creative interpretation, from unenforceable into enforceable. The judicial approach to the fundamental rights and DPSP or that both should be interpreted and read together. It has now become a judicial stand to read fundamental rights along with DPSP with a view of defining the scope of the fundamental rights. The judiciary began to adopt these techniques to broaden the scope of fundamental rights and to add some rights termed as new rights into the list of expressed fundamental rights. The tendency of using the DPSP to interpret the fundamental rights expands the scope of Art.21. Thus, various Directive Principles when read into Art.21, made Art.21 practically a multi-dimensional fundamental right. This creative approach of judiciary has converted many rights from unenforceable to enforceable.

The judicial creativity is not only necessary but also inevitable. Thus, the judges are playing a pivotal role in upholding the rights and liberties through given a wide meaning of the existing Constitution and legislations, and also create a suggestion over the issue when the legislature is not made a comprehensive legislation. It is clear the creativity of judges for the active role of judiciary is not an obstacle to the other organ, i.e., Legislature and Executive, but it is an initial which further strengthened by them.

24(1997)6 SCC 241

25 AIR 2008 SC 250

26 AIR 2008 SC 1101

27 AIR 2003 SC 2363

28 AIR 2002 SC 350

29(1983)2 SCC 577