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Judicial Law Making in India: A Critical Appraisal

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Abstract

Now a days, it has become the ultimate resort due to the malfunctioning of the other organs of the government namely legislature and executive. Through its articulation judiciary has been trying to prove that it is the real protector of the rights of the people and the constitution. However, judicial articulation has been subjected to severe criticism from various parts . The judicial articulation is not the result of one day; it is the transformation of several years. During the initial stage of its functioning, judiciary acted as mere adjudicator keeping in mind the letters of law and the social realities of the time was not looked into by the judiciary. In other words, there has been a transformation of judicial decision making from positivist to sociological approach. The transformation of judicial decision making from positivist approach to sociological approach has a great impact upon the socio-political conditions of the countries of the world.

Key Words: Judiciary, Law, Law making, Decision making, Extraneous factors

"The judge is the living oracle working in dry light of realism pouring life or force into the dry bones of law to articulate the felt necessities of the time..."- Justice K Ramaswamy[1]

Introduction

The role of the judiciary in the modern times has been immense. Now a day, it has become ultimate resort due to the malfunctioning of the other organs of the government namely legislature and executive. Through its articulation judiciary has been trying to prove that it is the real protector of the rights of the people and the constitution. However, judicial articulation has been subjected to severe criticism from various parts. The judicial articulation is not the result of one day; it is the transformation of several years. During the initial stage of its functioning, judiciary acted as mere adjudicator keeping in mind the letters of law and the social realities of the time was not looked into by the judiciary. In other words, there has been a transformation of judicial decision making from positivist to sociological approach. The transformation of judicial decision making

from positivist approach to sociological approach has a great impact upon the socio-political conditions of the countries of the world. During the course of interpretation, whether judiciary creates law or not has been a centre of debate among the schools of law. Here an attempt has been made to analyze decision making process of the higher judiciary. In the first part of the paper attempts have been made to outline the concept of decision making from the perspective of legal formalism. After this it has been endeavoured to outline the outlook of the different schools of jurisprudence on judicial law making. The factors influencing the decision making of the judiciary have also been discussed in brief detail.

Basics of Legal Formalism

Formalism signifies the denial of the policy-political and ideological components of law. It treats law as if it is a science or math. It further states that the law consists of a body of rules and nothing more and judges should merely apply the law. The judges have no authority to act outside it. The growth of formalism can be traced back to the 1870s and 1920s America when theorists like Gilmore, Horwitz, and Kennedy "lawyers and judges saw law as autonomous comprehensive, logically ordered, and determinate and believed that judges engaged in pure mechanical deduction from this body of law to produce single correct outcomes". They termed it as heyday of legal formalism in United States of America. In contrast to this concept Tamanaha has classified two types of formalism .i.e., "First, there was a "formalist" theory of the nature of law (the common law, in particular)" according to which "in new situations judges *did not make law* (even when declaring new rules) but merely discovered and applied preexisting law" (p. 13). Second, there was a "formalist" theory about judicial decision, about 'how judge mechanically apply law (precedents and statutes) to the facts in particular cases' "[2] The opposite thought of formalism grew in a pragmatic way which is fashioned as realism. The realist school promoted by Wendell Holmes, Roscoe Pound, and Benjamin Cardozo showed "that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results."[3] Judges, according to these realists, "decide according to their personal preferences" and come up with *post-hoc* legal rationales for the decisions so reached. Perhaps the best expression on formalism is found in the words of Guthrie, C.; Rachlinski, J. J and Wistrich, A. J. According to them, "According to formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." Legal realism, on the other hand, represents a sharp contrast. ... For the realists, the judge "decides by feeling and not by judgment; by 'hunching' and not

by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster "[4]

Judicial Law making: A Preliminary Idea

Traditionally, the legislature of a country is assigned the task of formulating legal rules governing the relation of its subjects with state or between subjects. The task assigned to the judiciary has been to interpret law and to settle disputes between the parties. But often it happens that the legislative enactment cannot cover all the aspects of human life. So, the vacuum created by the legislature and executive comes before the judiciary for adjudication. Sometimes, the letter of law does not fit the changing circumstances of time and it needs renovation. In these circumstances, the judiciary being a protector of the fundamental rights of the people and constitution steps in and makes a judicial law. The world is governed by at least two legal systems, i.e., common law system and civil law system. The common law system of which Indian legal system is a part and parcel is characterized by active role of the judiciary. In common law, the judiciary plays a vital role by formulating, developing and re-modeling the law. Commenting upon the role of the common law judiciary it has been commented by a learned author in the following way "common law is predominantly judge-made law. Under it the judge is the creator, interpreter, and modifier of laws. Even when he merely "interprets" law, he may well be creating it"[5] James L. Houghteling, Jr. has lucidly expressed his idea on judicial decision making or law making. In his words "they do so every time they decide as case that no existing rule quite fits. They make law when, in order to determine what rule applies to case, they interpret a statute or a constitutional provision. They also make law when, in the absence of either an applicable legislative rule by building on precedents established in analogous cases." In the common law tradition, judicial law making can be seen in some of the important areas like contract. In these aspects of law, judiciary played a vital role and the precedents evolved by it are still in use. The history of judicial law making in England may be traced back to the 11th century. When Normans conquered England in 11th century, there was absence of any systematic legal rules which compelled the Norman kings to send Royal judges to decide the disputes. They decided the disputes based on the customs, traditions, business usages and oral standards of the people. The body of rules framed by these judges came to be known as 'common law' in due course of time. Although, judicial law making or creativity of the judges can be traced back to the post Norman Conquest of England , yet in the modern sense it is related to the concept of judicial review. Through the power of judicial review, the judiciary exercises a commendable control upon the lives of the people. Through the power of judicial review the American Supreme Court in the case of Marbury v. Madison[6]

declared that "it is for the court to say what the law is". Perhaps the role of the judiciary in law making can better expressed in the words of Charles Evans Hughes " we are under a constitution, but the constitution is what judges say" [7]

In contrast to the view expressed by the scholars, the Supreme Court of India recently expressed the view that court only adjudicates and not legislates. The Supreme Court through Justice Katju said that "Once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people."[8]

Schools of Jurisprudence and Judicial Law making

Various schools of jurisprudence have expressed different views on role of the judiciary on law making. Here an attempt has been made to give a summary of the views expressed by the schools of jurisprudence on law making.

The natural law school symbolizes physical law of nature based on moral ideals which has universal applicability at all places and times. However, the phrase natural law has different meanings in different stages of history. The analytical positivists lay stress on the role of the sovereign in law making. Bentham who is considered as the real founder of positivism in the modern sense of the term, defined law as "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain caseby a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon whose conduct is in question."[9] According to Austin, law is the command of the sovereign, backed by a threat of sanction in the event of non-compliance. Thus, the positivists lay stress on the sovereign or state as the law maker.

The historical school emphasizes on the organic process or organic development of law. According to Savigny, law develops like language, manners and political organizations, law develops with the life of the people as language. According to historical school, law is not made, it is found.

The philosophical school believes that law is the evolutionary products of reason. According to Hegal, both state and law are evolutionary products of reason. According to Immanual Kant, law is the sum total of the conditions under which the personal wishes of man can be recognized with the personal wishes of another man in accordance with a general law of freedom.[10]

The sociological school of law says that law should be to represent common interaction of individual in social groups. According to Dean Roscoe Pound, "the sociological jurist look more for the working of law for its abstract consent" [11]

The realist school attaches a great emphasis on the judicial law making. One of the exponents of this school Gray believed that law is what judges declare. According to Jerome Frank law is what the court has decided in respect of any particular set of facts prior to such a decision. The opinion of the lawyers is not only a guess as to what the courts will decide and this cannot be treated as law unless the court decides by its judicial pronouncement.[12] The realist school lays stress on the extralegal factors that have influence on the decision making of the court.

Impact of Judicial law making in India with reference to the schools

In India, the judicial law making has travelled from positivist approach to the sociological approach or from a literal interpretation to the liberal interpretation. After the framing of the Constitution of India, the approach of judiciary was towards positivism. This traditional approach that judges do not create law but merely declares the law prevailed at that time. In Indian context, the response of the judiciary towards positivist approach may be found in the words of Justice Mukherjea. In his words "in interpreting the provisions of our constitution, we should go by the plain words used by the constitutional makers."[13] Commenting upon the positivist approach of the Indian judiciary one author has remarked in the following way. - "the Supreme Court adopted and developed its philosophy and postures trying to determine rigorously the phrase 'the procedure established by law' to mean two things. Negatively speaking it was rejection of the American doctrine of due process of law. Positively it meant an emphasis on legality- the enacted law of the legislature in its strict and logical sense divorced from the social context. "[14]

The positivist approach of Indian judiciary may be highlighted by citing the following cases-

1. A.K. Gopalan v. State of Madras[15]: This case is a high watermark of legal positivism of Indian judiciary. The Supreme Court was asked to interpret Article 21 of the Constitution of India. The court held that in respect of fundamental right to life and personal liberty, the persons have no remedy against the legislative action. Giving a narrow interpretation to the phrase 'the procedure established by law ', the court held that it meant 'according to substantive and procedural provisions of any enacted law.'

2. State of Madras v. Smt. Champakam[16]: The Supreme Court of India struck down government order regulating admission to an educational institution supported by the state. The court guided by legal positivism observed that since there was a conflict between fundamental rights and directive

principles of state policy and since the latter were non-enforceable the order should be declared void. The court refused to give a sociological interpretation to the problem.

3. Raja BahadurMotilal Poona Mills Pvt. Ltd. V. TukaramPirajMusale[17]:- The Supreme Court gave a narrow interpretation to the term 'strike' and restrained itself from entering into the real problem which promoted the strike by workers. The main issue before the court was whether the management of the mill could introduce any change in the running of the looms without giving notice of such change to workers who were forced to go on strike as a result of such alleged illegal change. The court declared the strike as illegal without inquiring into the factors that had promoted the strike.

4. Golak Nath v. State of Punjab[18]: Chief justice Subba Rao in positivist tune remarked that " we declare that the parliament will have no power from the date of this decision to amend any of the provisions of part III of the constitution so as to take away or abridge the fundamental rights enshrined therein"

Due to the abandonment of positivist approach, the Indian judiciary has diverted its attention to the sociological school. Keeping in mind the sociological approach of law , the Indian judiciary has liberalized standing procedure and introduced the concept of public interest litigation. Relying on sociological school, Indian judiciary has been engaging in bringing social order based on rule of law. Some of the instances where the supreme court of India adopted sociological approach may be outlined in the following ways-

1. Delhi Judicial Service Association v. Union of India[19]:- In this case the Court tilted a balance between the power of the police to arrest the judicial officers and judicial independence. The court in this case observed that "Before arrest the District Judge or High Court should be intimated. If immediate arrest is called for by the facts and circumstances, a technical or formal arrest may be effected. The factum of arrest should immediately be communicated to the District Judge or the Chief Justice of the High Court. The Judge so arrested should not be taken to the police station without the order or direction of the District and Sessions Judge. Immediate facilities be provided to the judicial officer for communication with his family members, legal advisers and judicial officers including the District Judge. No statement of the Judge be recorded, punchnama drawn up or medical tests conducted except in the presence of his legal adviser or another judicial officer of equal/higher rank. No handcuffing of the judge be made. But if it was necessary the same should immediately be intimated to the District Judge and the Chief Justice of the High Court. The burden to the necessity of handcuffing would be with the police officer. If the same was found to be unjustified, the police officer would be guilty of misconduct and would be personally liable for compensation.

2. In Unnikrishnan P. J. And Others v. State Of A. P. and Others[20] the Supreme Court of India held that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the directive principle on education (Article 41). The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45 which provides that the state is to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14.

3. The Supreme Court of India in paragraph no 12 of the judgement in Mohini Jain v. Union of India[21], observed that "Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facility at all levels to its citizens"

4. In Olga Tellis & Ors v Bombay Municipal Council[22], the Supreme Court of India examined the right to livelihood. The court held that the word life in Article 21 of the Constitution of India includes the right to livelihood. The court observed in the following way, "It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because; no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes like livable, must be deemed to be an Integral component of the right to life".

5. Shatrughan Chauhan & Anr. vs. Union of India &Ors.[23]: The Supreme Court held that execution of sentence of death on the accused notwithstanding the existence of supervening circumstances, is in violation of Article 21 of the Constitution. One of the supervening circumstances sanctioned by this Court for commutation of death sentence into life imprisonment is the undue, inordinate and

unreasonable delay in execution of death sentence as it attributes to torture.

6. Mohd. Ahmed Khan vs Shah Bano Begum And Ors[24]: The honourable court in this case observed that, a wife who is not maintained by her husband can approach the court under section 125 of the criminal procedure code. The said section includes a divorced woman who has not married again. Religion is not at all a qualification for this section. The reason behind the exclusion of religion from the section is that, the section forms a part of the criminal law and not of the civil laws. Generally civil law deals with rights and obligation of parties belonging to a particular religion, like the personal laws. The appellant in this case has built up his argument on the basis of section 125 and 127 Criminal procedure code (exact texts of the two sections are given in the end of this article), but these two sections are "too clear and precise to admit of any doubt or refinement". Section 125(1) (b) includes divorced wife within the meaning of the word "wife" and there is no justification for the exclusion of Muslim wife from its scope.

7. Rupa Ashok Hurra v. Ashok Hurra[25] : In this case a five judge constitution bench of the Supreme court, has unanimously held that in order to correct the gross miscarriage of justice in its final judgment, which cannot be challenged, the court will allow curative petition by the victim of miscarriage of justice is entitled to relief ex-debitojustitia to seek a second review of the final order of the court.

Basic Structure and Judicial Law making

The doctrine of basic structure can be considered as a high watermark of judicial activism in India.. The concept of basic structure of the constitution has not been precisely defined by the Supreme Court. The Supreme Court has only given some examples of basic structure of the constitution. Justice Shelat and Grover have rightly pointed out that the basic structure or fundamental features of the constitution cannot be catalogued but can only be illustrated. The basic features of the constitution given in the Kesavananda Bharati case is not exhaustive and is determined by the court on the basis of the facts and circumstances of the case. Starting from Kesavananda, the Indian judiciary has evolved the basic structure doctrine in numerous cases. Some of the basic features of the constitution as held in various cases include sovereignty of India, republican and democratic form of govt, supremacy of the constitution, secular character of the constitution, preamble, judicial review, , parliamentary form of govt, principle of free and fir election, rule of law etc. In Kesavananda Bharati case the Supreme Court inventing the basic structure theory made a good mixture between positivism, justice and morality. While restricting the power of parliament to amend the constitution including Article 368 itself forewarned the

people of India that amending power can be abused by a political party with two third majority in parliament so as to debar any other party from functioning, establish totalitarianism, enslave the people and after having affected the purposes makes the constitution unamendable or extremely rigid. The doctrine of basic structure not only put some break and fetters on the process of the parliament to alter the basic foundation of the philosophy and principles of our democratic polity but also open the gate of new horizon for the Indian parliament to usher a society according to the need and aspirations of the people from time to time to meet the exigency of the situation. It may safely be concluded by citing the words of Professor Upendra Baxi," Kesavananda Bharati generates many paradoxes. Although it is in the ultimate analysis a judicial decision, it is not just a reported case on some Articles of the Indian Constitution …it is, in some sense, the Indian Constitution of the future."

Judicial Decision making and Extraneous Factors

Legal formalism has asserted the view that judges apply legal reasons to the facts of a case in a rational, mechanical, and deliberative manner. On the other hand , the realists assert that making certain factors influence the judge which includes social, political and economic dimensions of the cases as well as the idiosyncratic views on politics and policies of the judges themselves. In Indian context, the caste and religion have also pervasive role in judicial decision making. One of the learned authors studying the composition of the Supreme Court of India found the following results- (1) The average age of appointment to the Supreme Court of India has increased, while the average age of appointment to the High Courts has decreased between 1985-2010, and consequently, Supreme Court judges on average have greater High Court experience but shorter Supreme Court tenures. (2) The High Courts of Bombay, Allahabad and Karnataka have been amongst the most well represented on the Supreme Court. Andhra Pradesh and Madras have in more recent times had relatively fewer judges on the court when compared to the states of Bihar and Delhi. (3) The overwhelming majority of judges on the Supreme Court today have served as Chief Justice of at least one (if not more than one) High Court. (4) There is evidence of between 3-4 consistently non-Hindu seats on the court. (5) Educationally, the number of Supreme Court judges who studied law abroad has fallen substantially.[26]

The recent controversy of the way registry allocates the cases in Supreme Court adds another factor to the judicial making process. The acceptance of the chief justice of India that the registry committed mistakes in the allocation of the cases shows the influence of the registry in the determination of the case by the court.[27] It shows the existence of realist schools in Indian context.

Concluding Observation

Thus it is clear that the judiciary plays a vital role in the process of law making by filling up the gaps created by legislature and executive or when the statute needs renovation due to the changing time. The Indian judiciary by resorting to sociological jurisprudence has been instrumental in bringing social change. The existence of legal realism also can be seen in Indian context. The extralegal forces have influenced the judicial system of India to a great extent. In fine it may be concluded in the words of honourable justice B. Sudershan Reddy that "the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility to resolve the issues which are otherwise not entrusted to it by adopting procedures which are otherwise not known." [28]

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