



THE CHIEF DUTY OF JUDICIARY TO PROTECT HUMAN RIGHTS IN INDIA

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ABSTRACT

Judicial Process is an important armor of judiciary. However, when exercised to protect human rights guaranteed under international law and the treaties to which state is a party, and in the absence of proper executive, legislative action to uphold the rights guaranteed by constitution, it attracts a stern amount of criticism. A This paper subtly attempts to examine the concept of judicial process or judicial activism employed by Indian judiciary, especially, upholding fundamental human rights of citizens. It further delineates, the limitations within which the judges need to exercise due caution to avoid such criticisms, and, to provide the sought remedial mechanism without crossing the limitations as advocated by the constitution.

Key words: Indian Judiciary, International Law, Judicial Process, Human rights.

Introduction

The statement of Justice Holmes, "the actual life of the law has not been logic; it has been experience is more relevant in the contemporary era, compared to that of yester years. The expanding horizons of social needs, and, the impact of other disciplines on law, the courts and judges are more frequently called upon either to evolve remedies against the tenacious procedures of law or administrative orders of the Executive to live up to the expectations of people, to unearth the real meaning of Constitution and Legislative enactments. Whenever Supreme Court, to extract the real meaning of law, or, to fill the gaps in a statute in order to ascertain philosophical ideals of constitution, or binding nature of the principles of international law, delivers a progressive judgment there is "muddling all along." Commenting on the activist role played by judges, Lord Reid is of the opinion that "We do not believe in fairy-tales anymore," that judges are not making law and only are in strict adherence to the theory of Legislative supremacy. If one examines from the pragmatic perspective, whenever the Government, or the Legislature derelicts its responsibility to address social concerns, especially, to discharge its treaty obligations by way of incorporation of the principles of international law to which it is a party, well, the judges ought to have to take an active lead role to discharge their constitutional obligations. From a jurisprudential angle of international law, the ample experience, reputation, impartiality and the ability for which judges of municipal courts are known for, in imparting the principles of international law by way of extracting jurisprudential ideology adopted by the province of international law through the prism of legislative and constitutional dictum of theirs not only are able to temper principles of international law to special situations under which it has to be applied, but also tries to accommodate the hard legal principles of it, especially, in the field of human rights to meet exigencies, according to the changing needs of society in the municipal sphere, so long as they are not inconsistent with law of the land.

Furthermore, in cases where in they are particularly called for to look at positive side of the remedial mechanism already exist in international law; they are bound to interpret the real meaning and philosophy of constitution in order to provide the much-needed remedy to citizens at large and to address the gaps that exist in legislation. The progressive outlook of approach adopted by judges many a times invites criticism especially, from the juristic sphere that judges are subtly overpowering the legislative or governmental terrain. On the name of public interest, judges upset the apple cart of constitutional scheme of demarcation of powers many a times. It is also viewed that such temperament of principles in a particular case may not constitute as a precedent, and not binding upon other courts subordinate to the highest court of a country, unless and until such decision lays down a rule of law.

It is a well-accepted view, there is a possibility to exist certain unbridged gaps and un-resolved ambiguities in a statute even drafted

with all the possible care. To fill such gaps in order to ascertain the real objective of a statute, or where in no legislative dictum exist, judiciary alone is empowered to interpret the principles of municipal or international law to read with constitution or with the philosophy of international law of human rights. The judiciary especially, the highest court of a country has primary responsibility to discharge the obligations entrusted by constitution, to uphold rule of law as a third estate of a state. In cases, where in a state fails to fill the treaty obligations of international law of human rights, judiciary has an obligation to incorporate such principles as long as they are not inconsistent with the law of the land. In such a situation, is it fair in mudslinging on judges that they are making law, whenever a judge interprets a statute to find out a solution or expanding the horizons of constitution to discharge their duty, especially, to uphold the guaranteed human rights of an individual? Is it correct to attribute that they are impinging the powers of Executive and Legislature?

In the last two and half decades, in a number of cases, when the judiciary framed guide lines basing on the established principles of international law, in absence of legislative and executive action, to uphold the human rights of individuals to which state is a party, there is certain amount of criticism in both academic and judicial circles. Many of the critics suggest that the role of a judge is to declare law than to make a law. If judges choose to make law, as lawmakers than to declare the principles of law, they need to apply legal principles with a sense of understanding, and their opinions need to be guided by public opinion that should reach the grassroots level of a society⁷.

In view of different perceptions that are aired on the role of judges in addressing the tranquility of law, this paper makes a modest attempt to delineate, whether judiciary really encroaching the ambit of Legislature and Executive to address social concerns of people to uphold the values of human rights on the name of "Judicial Activism or Judicial Review." It further address, whether the independence conferred on judiciary by constitution infinite, or there are any limits in which judges have to act with due diligence in interpreting the principles of law on the name of exercising its supreme armor power of judicial review.

Judicial Process and Human Rights

Judicial process basically means, the role played by a judge in a court of law while espousing the concept of law over specific aspects of legal guarantee either by constitution, a legislative enactment or an order of the Executive. In other words, it is referred to as the procedure adopted by a Judge in civil or criminal proceedings according to the law of the land or espousing the real meaning of constitution or a statute or executive or administrative order of a country. The common law countries, especially the English courts have evolved the normative principle of judge made law. However, the modern concept is much concerned with the American system. The Anglo-

American system mainly based on Kelson's pure theory of Law which was later expanded by other eminent jurists such as H.L.A. Hart, and Roscoe Pound, John Rawls et.al.

In countries where constitution is supreme, it is the duty of a judge, especially, that of the higher courts to expand the meaning according to the contemporary pace of social conditions. This is otherwise referred to as *boni judicis est ampliare jurisdictionem* (which means, it is the duty of a good judge to extend the jurisdiction-based as it is on the principle that law must keep pace with the society to retain its relevance for if the society moves but the law remains static; it shall be bad for both). The Supreme Court of India since its inception acted basing on this maximum, especially in the last few decades to uphold the fundamental rights (civil, political or socio-economic and cultural rights) are concerned

Human Rights enables the mankind to lead a decent, civilized and modest life in which the inherent dignity of each human being need to be protected always at any cost by ensuring life and liberty of individuals. Though human rights are of recent origin in international law, well protected and received legal acumen all over the world for a long period. In a strict sense, it is law that embraced human rights in order to expand the tenets of jurisprudence in extending protection to the individual who is the sole object and subject of legal perceptions.

In the words of Ronald Dworkin "rights as trumps" which limit state action whenever it encroached upon individual freedoms. In view of their indivisibility with that of human beings, no human right is inferior to that of another right stated either in the Universal Declaration or in the Covenants or any Conventions and treaties. As a part of universal law, they impose three major obligations on every state Viz., to respect, to protect, and to fulfill human rights Judiciary being the third estate, particularly, the higher Judiciary in all most all written constitutions has the mandate to protect and enforce human rights as the command of the constitution. This being the position, rule of law or judicial review being part of constitutional mandate, the judiciary has to discharge its constitutional obligation.

In the Indian context, human rights are not a new concept. From the Vedic times, they are in existence as a part of the concept of „Dharma.” The constitution of India inspired by its ancient perspectives and by the goals of the UDHR has clearly annunciated in its tone and tenor, it is the duty of state to secure justice, liberty, equality and dignity of individuals in its preamble itself. Apart from the Preamble, the Civil and Political rights have been added to part III of the Constitution as Fundamental Rights, and Economic, Social and Cultural Rights, as Directive Principles of State Policy in Part IV. The Directive being nonjusticiable rights and enlists the duty upon the state to implement them in the promotion of the rights of citizens, cannot be challenged directly in the courts of law, if the state fails to act upon. However, as rightly observed by Patanjali Shastri J., the constitution has not adopted the doctrine of Parliamentary supremacy alone. A close reading of Articles 13 and 32 clearly specifies, the judiciary too is empowered to review the provisions of Constitution. This is more so, especially, while dealing with Fundamental Rights of the citizens guaranteed under Part III on the lines of the American constitution in directing the state to adhere by the provisions of Part IV, if it fails to act in a reasonable manner or time.

Judicial Process and Human Rights: The Role of the Supreme Court

Gandhi's cases the Apex Court largely confined itself with in the confines of statutory limitations. In a majority of decisions, the court did not exercise the inherent power of judicial review in protecting the life and liberty of the individual against a statutory enactment or an Executive order curtailing the freedom's of the citizenry that are guaranteed explicitly by the constitution.

Conclusion

Further, in spite of recognition of incorporation of customary principles of international law that are not contrary to municipal law of India, through Article 51© of the constitution, it is doubtful to what extent will it fully accept the binding nature of customary principles of international law in every area. Firstly, in a number of cases

that came up before it, immediately after the adoption of Constitution on the vexed issue of human rights of aliens who were subjects of a predecessor state in recognizing the principle of „Vested Rights” after succession. Secondly, in all most all the cases, it held that the Vested Rights of persons of former Princely States valid to continue in the new state, only if the new State recognizes the rights of the citizens of the Predecessor without resorting to the doctrine of “Act of State” developed by the Privy Council. Thirdly, in the Indian context, by the time the constitution came into existence after independence, all most all the princely states have merged with the Union of India. Hence, the liabilities and obligations solely devolved on the Union of India. Even then, the court refused to inject the principles of human rights, confined itself to Statutes and to the Executive orders, and disposed of the cases toeing the line of Privy Council.

Fourthly, it did not give any scope even to read Articles 294 and 295 of the Constitution, which clearly specifies that all the obligations of whatever may be their nature entered by previous government of India and the Princely States shall be the obligations of the Union of India. Fifthly, it did not examine the status of the Principle states in international law, which is of controversial nature and never regarded as states in international law. Finally, when the former sovereigns themselves became part of the Union of India and assumed its citizenship, then where in the question arises that people of those States will continue to be aliens and to produce evidence that the theoretical sovereigns had recognized their rights

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