



RULE OF LAW THROUGH CONSTITUTIONAL JUSTICE AND MORALITY

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INTRODUCTION

The constitution confers on the individual certain basic rights enforceable against the state. It can perhaps be best described as a document which, while upholding and protecting individual interest in the form of fundamental rights guaranteed against the state, envisages a positive role for it in ensuring realization of these basic rights by every individual. In other words the fact that an individual has a right would mean the state has a duty not to interfere with it. This can be best explained in terms of Rawl's first principle of justice that each person is to have an equal right to the most extensive, total system of equal basic liberties compatible with a similar system of liberties for all¹.

Against abstract a priori detriment, ideological, metaphysical mist, the modern liberalism which consists of legal positivism and utilitarianism was developed from the philosophy of Jermy Bentham. The legal positivism says that the truth of legal propositions consists in facts about rules that have been adopted by specific social institutions. Utilitarianism on the other hand promotes the idea law and its institutions should serve the general welfare.

Thus, the constitution aims at the creation of new legal norms, social philosophy and economic values which

are to be effected by striking synthesis, harmony and fundamental adjustment between individual rights and social interests to achieve the desired community goals. Moreover constitutional morality would mean an effective coordination between conflicting interest of different people and the administrative cooperation to resolve them amicably without any confrontation amongst the various groups working for the realization of their ends at any cost.

The Indian constitution is tested through times. Even though the challenges were there to the very existence of the constitution in the past, it was proved successful in facing the challenges. But new challenges are developing often and often and some challenges posed a problem even for the survival of the country and the constitution. The 56 years constitutional working experience provides us an opportunity to understand these challenges in the past and present as impediment to achieve the constitutional goals. How far the goals were achieved even against the challenges and what are the possible solutions to make the present constitutional system more effective, what is the role of judiciary in promoting constitutionalism while protecting human rights thorough constitutional frame work in India are to be examined.



HUMAN RIGHTS FOR RULE OF LAW

The greatest problem of the human race, to the situation of which nature drives man is the achievement of a Universal civic society which administers law among men. Mans dignity and uniqueness lie in his capacity to use reason. According to Plato, justice is a concept according to which one should perform once vocation Aristotle understands Justice as sum of all virtues. Stoics and roman legal system further refined the natural law thought of reason, justice and equality. Following David Hume, Kant introduced transcendental method where in reasoning came to mean the cognition of mind with perfect freedom. Kant's basic treat in this field of practical reason is freedom of human volition.

Free human volition is not just a faculty of desire but rather the faculty of desire governed by reason of the subject before the choice is made. It is in this sense human will is called as free will. Categorical imperative which is supreme principle of presuppositions governs the operation of free willing individual. The free willing individual with dignity, respect and development of personality of the individual has added many new rights in the form of Human Rights in the present day legal philosophy.

Human Rights are the rights of human being and without those basic inalienable sacrosanct human values; there is no meaning to human life. All the civilized countries recognized that basic human rights jurisprudence. The Universal Declaration of Human Rights is the culmination of human rights movement in the world. The constitution may not include all human rights and the state

may deny these rights by force illegitimately. Human rights are different from constitutional rights even if they include these rights. It is a necessary condition of all political regimes to fulfill these rights of their own legitimacy. If these rights are not fulfilled there can be justified intervention by other people laying sanctions or even using force. The Sovereignty of the state is thus limited. Human Rights are above any positive law or the sovereignty of state.

On the functional side, this doctrine of "free willing individual", found expression in Blackstone's Concept of natural rights of Man". Impressed by the role of the vital concepts namely protected rights, and the judicial review (Both these concepts came only as an after thought in the American Constitutionalism) in U.S. the framers of the Indian constitution introduced those individual rights as fundamental rights in chapter III of the Indian constitution and placed the power of judicial review explicitly in Art 32 and 226 of the Indian constitution. The metaphysical "Free willing individual" of Kantian brand had a spectacular role to play in the decision of the Indian supreme court when it interpreted art 14 (equality) and Art 21 (Personal liberty) of the constitution of India and the role continues to expand³.

PROTECTION OF RULE OF LAW THROUGH CONSTITUTIONAL MANDATE

The pattern of social legislation in India since Independence has been in accordance with the constitutional mandate. In fact, ninety per cent of social legislation enacted by the Parliament has been concerning human rights of Indians be it laws concerning



agrarian reforms, abolition of zamindari system, ceilings on land holdings, regulation and control of labour problems, laws, concerning labour welfare, safety, health, wages, bonus, gratuity social insurance and social security, protection of migrant workers, women and child labour, contract labour, bonded labour equal remuneration for equal work, laws concerning social and family relations of Hindus in particular regarding marriage, divorce, dowry succession, adoption, guardianship, reforms in social status of Harijans, Girijans by protecting their civil rights, abolition of untouchability, suppression of immoral traffic in women and girls, prohibition laws, laws concerning bail, detention, arrest, control of population explosion by way of medical termination of pregnancy, punishment of tax evasion, trafficking narcotic drugs, protection of environment pollution etc, the judiciary in its activist role from time to time reviewed all these legislations. Law, therefore, has been extensively used as a tool of effective social change and for eradicating social and economic evils⁴.

CONSTITUTIONAL JUSTICE THROUGH JUDICIAL PROCESS

The dialectics of law and society in Indian has been determined by the historical experience during the passage from colonialism to nationalism. In this process both legal and social systems have evolved. Indian experience can be viewed as a conflict resulting from a search for a balance between the use of law by elite for purposes of domination and the use of law to moderate elite domination by providing avenues of participation for the disadvantaged.

Our own time has been burgeoning “Constitutional Justice” which has in a

sense combined the forms of legal justice and the substance of natural justice. Desirous of protecting the permanent will rather than the temporary whims, states have reasserted higher law principles through written constitution. Thus there has been a synthesis of three separate concepts – the supremacy of certain higher principles, the need to put even the higher law in written form, and the employment of judiciary as a tool for enforcing the constitution against ordinary legislation. When the positivised higher law principles were sought to be defeated by means of constitutional amendments, the least dangerous branch has thus entered into the arena by performing its role as sentinel on qui vive to restore the higher law principles⁵.

RULE OF LAW AND FRONTIERS OF JUDICIAL ACTIVISM

As rightly pointed out by justice D.A Desai, the justice delivery system in the initial stage, India was not useful to the poor and it was only beneficiary to the neo rich classes emerged during the foreign rule. Accordingly, he rejected the Anglo-Saxon jurisprudence being anti people, draconian and cancerous⁶. Justice chinnappa reddy with Marxist appraisal of legal ideology, remarked the courts have evolved a great jurisprudence around the doctrines of natural justice, ultravires and hebeas corpus. The rights of prisoners, destitute women, bonded labour, Agricultural and industry labour are protected through the dynamic interpretation of art. 14 and 21 by developing public interest litigation and compensatory jurisdiction. Environmental and human rights protection through the integrated approach towards fundamental rights is



the culmination of judicial activism in India.

In post emergency, Justice Bhagavathi, Justice Krishna Iyer, Justice D.A. Desai, Justice Chinnapa Reddy, Justice Kuladeep Singh, and many other activist judges made the Indian Supreme Court accountable to the true spirit of the Indian Constitution. Judges up to 1973 under the influence of Oxbridge culture in their legalistic and positivist approach nullified even the progressive legislations for the protection of right to property, the then fundamental right. Judges in seventy's modified their attitudes towards fundamental rights. Judges in Eighty's and beyond adopted humanistic approach in addressing the human right problems in India. Even they did not hesitate indulging in judicial law making. However through out the Seventies the executive made its wish public that the judges and courts should be committed to the constitution and the premise of progress and justice within it. The new role that judges and courts have assumed since 1980's through public interest litigation (Upendra Baxi called it as social action litigation) is revolutionary change in judicial process.

The Kesavananda Bharathi⁷ expounded a new jurisprudence in Indian Constitutionalism. In this case, the supreme court through judicial review has created both a philosophy of law and theory of politics based on values like reason, nature, morality, liberty, justice, and restrained consist with the true spirit of the constitution and traditions of the people⁸. The Menaka Gandhi⁹ is another landmark case in point of Human rights and remedial jurisprudence. As early as 1963, The Supreme Court in Kharaksingh had held that life as used in Art. 21 is more than mere animal existence. In post

Menaka cases this liberalistic, holistic, and dynamic interpretation of art. 21 along with art. 14 and 19 widened the scope of human rights jurisprudence in India. Poverty jurisprudence, prison Jurisprudence, Service Jurisprudence, Gender Jurisprudence, Environmental Jurisprudence were developed by Indian judiciary through its activist role by creating new tools like awarding compensation for the gross violation of fundamental rights, public interest litigation etc., to promote human rights jurisprudence in India¹⁰.

The recent teleological approach of the judiciary provides basis for the meaningful understanding of the Human Rights. In that direction the scope of right to life and personal liberty under Article 21 was widened to the extent that life means life with human dignity. The scope of Right to equality under Art. 14 was dynamically interpreted as distributional equality that is equality of result along with equality of opportunity in recent times. The apex court started taking Directive principles of State policy as basis for meaningful enforcement of Fundamental Rights. Now the Directives of Part - IV are not mere directives. They are supplementary and complimentary to fundamental rights. Now the Legislature also wanted to enlarge the fundamental rights in tune with the judicial activism particularly regarding free and compulsory education up to 15 years age through out India by bringing 85th Constitutional Amendment through which a new art. 21 A was added to the fundamental rights chapter. National Human Rights Commission was also constituted to ensure the effective implementation of Human Rights in India. Even though it has no teeth, its reports strike the conscience of the



Indian Society. Various Human Rights Courts were also established at district level to promote Human Rights jurisprudence in India

The Supreme Court of India wields immense power and authority and occupies a place of paramount importance in our Governmental structure as the independent, judicial arm of state power. As such it has played a pioneering role in moulding and articulating the quintessence of our constitutional conscience. With the inauguration of the Constitution, the Supreme Court became the symbol and custodian of the democratic values, ideals and aspirations of the Indian people for social, economic and political justice as epitomised in the soul stirring phraseology of its evocative preamble. What is even more significant from the perspective of the lawyer, is the fact that the acknowledgement by the Supreme Court, at its inauguration, of the Constitution as the Supreme law of the land and of its special responsibility in its guardian angel role under Art. 32 of the Constitution, as the protector of the citizens fundamental rights, heralded a paradigm shift in judicial approach and attitude to the demanding tasks of judicial review. On any balanced estimate, it has to be fairly acknowledged that the Court has responded to the new challenges of judicial review which the transition from the Raj to the Republic engendered with a judicial statesmanship befitting its position as the highest judicial tribunal of the country.

JUDICIAL POWER A *SINE QUA* NON FOR RULE OF LAW

The scope of judicial power and its Independence are of utmost importance in day to day life. Black's law Dictionary, 6h Ed., defines judicial power as:

“The authority exercised by that department of Government which charged with declaration of what law is and its construction. The functions of judiciary, observed that it is absolutely essential that the judiciary must be free from executive pressure or influence”.

India is said to have the most powerful and independent judiciary in world. Unlike many countries with federal Constitutions, India has a single, integrated, hierarchical-India judicial system. Indian judiciary owes its origin to the judicial system existing in the British India. There were three High Courts of the judicature established in 1861 at Calcutta, Bombay and Madras under which there existed large volley of subordinate courts. Then in 1937 the Federal Court came into existence under the Government of India Act of 1935 enacted by the British Parliament.

For a common man “The judiciary” means the judges and magistrates who sit in Indian courts in a hierarchical manner. In the hierarchy of courts there exists Supreme Court as the apex court of the country, the High Courts, the highest courts, in each of the State and District judiciary at the level of the Districts. At top of the system is the Supreme Court of India.

India is a country with vast area and diversity of culture. To preserve same, a geographical divisions in the form of States are formed. Each State is having its own High Court to be the Highest Court of that State subject to the jurisdiction of the Supreme Court. The decision rendered by the State High Court can not be declared or as overruled by some other High Court and could be declared as not valid only the Supreme Court or by a larger bench of the same



High Court. The subordinate judiciary is complement to Constitutional Courts as a part of the constitutional scheme and plays vital part in dispensation of justice. Its decisions are subject to appeal / revision to the High Court which exercises control and supervision over proceedings and decisions of subordinate Courts, tribunals and other bodies persons who carry out administrative or quasi-judicial functions within its territorial jurisdiction.

JUDICIAL INDEPENDENCE FOR RULE OF LAW

It is universally acknowledged that the constitution of modern democracy governed by the Rule of Law must effectively guarantees judicial independence.

The independence of judiciary is not an idle wish or slogan or a humdrum of words as an eye-catching device. Alexander Hamilton pointed out in Federalist No.78 that the judicial independence is needed to prevent any outside influence from dictating the rulings of judges and also that this independence is equally requisite to guard the Constitution and rights of individuals.

Judicial independence has been defined in many ways but basically it involves the freedom to make a judicial decision without interference or influence from any source. These principles were there in existence in a different form than now even during the pre-colonial times.

Independence of the modern judiciary has many facets. The external factors held to undermine independence are well recognised by the judiciary has not so well recognised by the political branches of government or by the public. Judicial

independence is the priceless possession of any country under the law. The public is entitled to insist on its observance by the judges and protection by the Parliament and the Executive. But in the ultimate, judicial independence rests on the calibre and the character of the judges themselves.

The Constitution of India is the basic law of the country. Any inconsistent with or in derogation of the provisions of the constitution is void. Basic Principles embodied in the Constitution is Judicial independence among things such as popular sovereignty, socialism, and secularism, Fundamental Rights. Directive Principles of State policy

During the British rule executive and judicial functions were combined in Collector-Magistrate in a district, making him a local dictator. The makers of the Constitution did not want this to happen in the independent India. So they established a judicial system under which from the highest court of the land to lowest, every layer and each unit in every layer, functions in a spirit of judicial independence.

The Supreme Court plays a unique role in the scheme of Constitutional Government in the country as the highest appellate judicial authority and the final interpreter of the constitution as well as the guardian of our fundamental rights. Although, the Constitution has established a Federal system of Government, unlike many other countries with Federal Constitutions, India has a single judicial system which has brought about not only jurisdictional unity but also the establishment of a single judicial cadre, as it were for the whole country. With the Supreme Court at its apex, the Indian Judiciary is a fully



integrated system under which the writ of the Supreme Court runs not only over the Country, Central, State and local areas- but also within all fields of law - Constitutional, Civil, and Criminal. An independent and impartial judiciary is said to be the first condition of liberty. It is the custodian of the rights of the Citizen. The following provisions of the Constitution are intended to secure independence and impartiality of the Supreme Court and the High Court.

CONCLUSION

Our experience in parliamentary government under the present constitution has been the subject of examination in the recent past mostly at the hands of politicians, power brokers, power groups and elite sections of society. Our complex plural society with problems of mass poverty, colossal illiteracy and long periods of socio-cultural exploitation has to be protected.

India is bringing about fundamental changes in the economic field aiming at globalization through liberalized economic policies. Free market has been accepted as the model in India. Foreign capital and multinationals are not only welcome but are being positively induced to participated in a big way in India's economic system will be far reaching importance with regard to the question of reach of fundamental rights.

The liberalized policy of the recent times of India or else where is the best example for this. The solution for this is only that the thesis of more market, less state and the antithesis of the constitutional call for social solidarity and welfare must merge into a synthesis immediately to achieve social justice because without social justice no social stability will last longer. The Indian Judiciary should take

care of all these developments which posed a Diminishing State as a 21st Century challenge and develop its own techniques to face this challenge. The survival of our democracy and unity and integrity of the nation depend upon the realization that Constitutional morality is no less essential than constitutional legality. Joseph story the great American jurist who was quoted by sachichidananda Sinha in his inaugural address as provisional chairman to the Constituent Assembly on 9-12-1946, warned long back that the constitution has been reared for immortality, if the work of man may justly aspire to such a title. It may nevertheless perish in an hour by the folly, or corruption or negligence of its only keepers, the people. The Judiciary who is accountable to the constitution of India must be strengthened in all respects for the promotion of RULE OF LAW oriented Human Rights Jurisprudence.

The National Judicial Appointment Commission Act or the Collegium system regarding the appointments of judges to higher judiciary under the Indian constitution should be for the promotion of limited, accountable and responsible good governance with more transparency. Rule of Law, constitutionalism, constitutional morality, constitutional legitimacy and philosophy are to be interpreted for the protection of the Indian parliamentary democracy, failing of which leads to anarchy, chaos and total failure of the democratic system. Human societies moved from *Rule of Man* to *Rule of Law*. Judicial activism promotes *Rule of Life*. *Rule of Law* is to be enforced against *Rule of Man*, but it should be synthesized with *Rule of Life*. Hence, the need of the hour is the balance between *Rule Of Law* and *Rule Of Life*.



END NOTES

1. See John Rawls - Theory of Justice (1973)
2. HLA Hart - The Concept of Law Oxford (1961)
3. The Core of the Constitutional Commitment to socio economic reconstruction lies in part-III and part IV, the Fundamental Rights and Directive Principles of the Constitution. Together they constitute the conscience of the constitution. Judicial review, Judicial activism, Judicial law making, evolution of various tools by the judiciary are to be understood in the light of this constitutional mandate.
4. Dr. S.N. Dyan - Fundamentals of Jurisprudence - The Indian approach (2002).
5. Prof. A. Lakshminath - Editorial Note, A.U Law Journal, Vol-3 (2002).
6. Supra note at Page 332
7. Kesavananda Bharathi versus State of Kerala A.I.R 1973 S.C. 1461.
8. Upendra Baxi - Kesavananda is not merely a reported case but it is the Indian constitution of the future. (1976) 9 JILI 323.
9. Menaka Gandhi Versus Union of India. A.I.R 1978 S.C. 597
10. The scope of life and personal liberty of Art. 21 was widened by The Indian Judiciary in post Menaka cases.