

CHAPTER-I

**Introduction–The Problem - Conceptual
Framework.**

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INTRODUCTION : THE PROBLEM - CONCEPTUAL FRAMEWORK

The Indian judicial system is perhaps, the most widely structured institutional arrangement that has been designed not only to interpret the constitution but also to protect in an effective way. The interests of all sections of the community, during the fateful years when the constitution of independent India was being framed by the founding fathers, serious discussions took place about the structure of the judicial system and the expected role it would perform for a polity which had been under the shackles of imperialist powers for more than two centuries. It was agreed that the new nation would be confronting among many problems, the two most important and primary demands, economic freedom and the social justice. In fact, leaders like Nehru and Ambedkar even went to the extent in suggesting that in a newly independent polity like India, these twin tasks should simultaneously be undertaken as failure in one sphere might jeopardize the progress of the nation.

It is known that at the time of attainment of independence, the whole country was shattered both in social and economic senses. Consequently, the makers of free India thought it very correctly that what the country needed at the time was a sound political system based on a well-ordered economic foundation. The organizations at the governmental level, namely, the executive, the legislative and the judiciary were accordingly assigned specific tasks within the well-designed frame. But it was also realized that only institutional frame cannot bring about social change – the much needed destination for a free nation.

The Supreme Court of India being the only court, performs this dual task of providing justice to the people as well as identifying the

road map following which desired level of social changes can be bought.

A brief look into the working of the Supreme Court as evidenced from its pronouncement in leading cases, relating to important social issues will establish the fact in many cases; the Supreme Court paid utmost importance to issues like suppression of rights, coercion on economic front and social injustice. The Supreme Court, through the Power of judicial review has done reasonable job in this respect. It is true that the judiciary in India has not followed a consistent and uniform policy in interpreting issues involving Fundamental Rights relating to private property as it was originally guaranteed by the Constitution. But it is equally fascinating to note that the Supreme Court in many cases has taken a very liberal and informal attitude in determining the nature and scope of Fundamental Rights and Directive Principles when there were clashes between individual rights and social demand. It established the principle that social cause should get precedence over individual claim. In fact, that was the philosophy which guided the course of constitution – making in India. Both Nehru as K.M. Munshi spoke in favour of a just social order that can only be safeguarded through the active role of the judiciary. In the words of Munshi, the Supreme Court and for that matter, the judiciary can “transform the past into present and the present into the future without risking instability” [CAD-VOL-I]

Here comes, a very important question, it is true that the makers wanted to provide sufficient powers with the Supreme Court to bring about transformation in the existing social order, there is not specific indication how the judiciary would have to respond to the demands for socio-economic justice to the common man. One may cite Article 13(2) in its original form, which was drafted to protect the Fundamental Rights of the individual in the event of their being any violation, but that power is essentially individual centric, very little to

do with social justice. In an attempt to define the nature and extent of social economic justice, Nehru categorically said, "It means the ending of poverty and ignorance and disease and inequality of opportunity".
[CAD Vol-I]

One may recall what Justice, M. Hidayatullah observed in assigning the proper role to the judiciary. In his words, "Judges try to interpret it (constitution) as a living instrument and not a set of rules. The legislature and the administrative machinery also interpret the constitution but they do so for themselves. Judges interpret not only for themselves but for all."

Justice P.B. Mukherjee also spoke in the same spirit while assigning the role of the judiciary: "The judiciary prevents the disruptive forces, both statutory and behaviouristic in state and society and thus helps in continuity of life, habit and structure One day, perhaps, history will record on how many occasions and where, the judiciary has brought nations back from the precipice of revolution, disorder and anarchy"

A look into role of the Indian Judiciary in General and that of the Supreme Court in particular will establish that right from the beginning two social ends have guided the course of judicial pronouncements: individual liberty and the social control and justice. At some point it appears that the Supreme Court identified its role in the narrow confines of strict and formal interpretation of the Constitution, thereby ignoring the greater social demands on requirement. In some cases it was seen that the Supreme Court had acted on subjectivism or judicial discretion. One may refer to the case of Champan Dorairajam Vs the State of Madras (1951) where for the first time the issue of social justice come to the force. Clearly it was a conflict between the legal formal position vis-à-vis a liberal social interpretation, of the constitutional provision. This trend was visible in

all subsequent leading cases including Golabenath Case (1967) and the Keshavananda Bharati Case.

A note on judicial activism will indicate the present contextual situation. In the words of Professor Upendra Baxi, "The notion of activism remains inescapably localized, shaped by number of factors:-

- a) The arrangement of Constitutional Power, especially in the structuring of relatively autonomous judiciary.
- b) Social Constructions of judicial role and function, and the rather indifferent potential for social learning of justices.
- c) The flows of political events
- d) The powers of social movements to judicialize governance
(preface in *Transgressing Borders and Enforcing limits* by S.P. Sathe, Oxford 2002 PP XV-XVI)

Another dimension of profound legal and social importance demands greater attention. There is a section of opinion which believes that in the Indian situation, it is urgently needed to locate social formation, identities and notions on the basis of 'objective' criteria of an economic nature. Again other hold that 'caste identity' is the special feature of Indian Social Consciousness and social structure as it affects the nature of social group formation as well as individual behaviour to a great extent.

But at the same time one cannot ignore the demand by a section of scholars, who believes in the overlapping nature of caste and class of phenomena. This thesis is based on a different set of ideological theoretical construction. It has been very forcefully argued that insistence was perhaps necessary of the fact finding stage of social analysis often points of view had to be exaggerated in order to give it an edge and put forth a paradigm or even facts that were supposed to be 'new'.

Analysis of social structure in terms of the consciousness of different bases like caste, class, power, religion, language region and other related issues is a “problematic” for examining the Indian social structure and the role that different bodies are expected for play in it. This has led Professor S.N. Jha to remark that the components of social structure experiencing certain configuration of forces at a certain time exhibit class characteristics and the same structure allow the caste to be the dominant identity at another point of time under a different configuration of forces.

This is where precisely the role of the judiciary comes in out of group conflict, cumulative cleavages might appear in the society which is predominantly caste based. Such ‘cumulation’ of interests may create some of sense of deprivation among the section of population who might not be in a position to get fair deal from the society at large.

While dealing with this problem issue Benjamin Akzin observed:

“It is vain that we shall search in the nature or in the extent of objective similarities and dissimilarities for a clue to the middle why some ethnic groups have become or are showing signs of developing into nationalities while others have not crystallized into nations, or have ceased to appear as such”.

In this context, both at social and political planes, issues like ‘horizontal mobilization’, ‘power structure’, ‘status, summation’, ‘multiple stratification’, ‘secular order’ should be considered for a proper theoretical formulation. In this connection, the following observation by Rudolph and Rudolph seem to be relevant:

“Accompanying the fission and fusion of differentiation and federation, has been a dilution and diffusion of effective and structural bonds By enlarging the reach of sympathy, broadening horizons and multiplying reference groups, they have helped to deparochialize

the intimate and closed world of village By pursuing the goals of social mobility self help and political power, caste association and federations have played a major role in the decompression of village life Caste is losing functioning norms and structures once associated with it and acquiring new ones. It is serving the rituals and occupational goals of traditional society less, the mobility and participation goals of modern society more”.

Thus, an analysis of the currents and cross currents of social forces can help one identify the role that the judiciary in India can play not only as a protector of individual rights but as a facilitator of social change. The present study, while looking into the structural aspect of India’s governing system, seeks to go beyond the formal legal frame in order to bring within its fold many other forces which are not strictly speaking political but social in their context and coverage.

Constitutional Role of the Supreme Court:

In the light of the wide ranging powers rested in the Supreme Court, it has to perform a multifaceted role as:

- a) Guardian of the Constitution [Vide arts 132, 133(2) and 367]
- b) Custodian of the liberties of the people by virtue of its writ jurisdiction under Art 32.
- c) Balance wheel of the Constitution to maintain the Constitutional balance.
 - i) Between the Union and the State and between the states interest.
 - ii) Among the three organs of the government;
 - iii) Between the Fundamental Rights and the Directive Principles in the light of the Fundamental Duties of the citizens.

- iv) Between equal justice and equity, in the other words, between the claims of non discrimination and those of the protective discrimination.

All these factors, in turn, depends upon the nature and the independence of the judiciary. It is believed that judicial independence is based on three essential elements which may be outlined as follows:

- a) Whether the judiciary is free from 'fear or favour' of the executive.
- b) Whether judicial measures are adequate both quantitative and qualitatively.
- c) Whether judicial actions and in tune with the general principles of justice and equality for all sections of the people.

It is needless to suggest that the members, in the Constituent Assembly, in general, stood for a mechanism, whereby the appointment, removal etc. of the judges could be kept outside the scope of political interference. Dr. Ambedkar strongly pleaded for a system wherein these cases would be guided by healthy conversions and these should be done through the process of consultation of certain levels.

But the experiences in India so far proves that barring a few cases, these appointments are free from political consideration. The case of super-session once occurred but that too in a different situation and the concept of 'committed judiciary' as it was advocated could not enlist support for its acceptance.

A note on the emergence of PIL (Public Interest Litigation) in India would further suggest that the judiciary in India and for that matter, the Supreme Court, has developed this mechanism by which it can enable the judiciary to take justice at the doorsteps of the poorest of the poor either by direct appeal or by the third party

initiative. Through this PIL mechanism, the Supreme Court, in recent times has been able to give a remarkable social justice dimension to give a remarkable social justice dimension to judicial procedure and the justice delivery system.

Though innovative in many respects, the PIL is considered to be neither extra legal nor unconstitutional. On the contrary, it is based on substantial provisions of the Constitution, as well as the ideals, objectives and values of the Constitution. First of all, it is supported by Art 32 and 226 where the Superior Courts have been empowered to exercise writ jurisdiction. It is also covered by the Directive Principles as they proclaim to provide legal aid and equal justice in Art 39A, protection of environment and wild life in Articles 48A, 51A(g) and 51A(e) and finally by a broad construction of the Fundamental Right to life and personal liberty under Art 21.

Justice PN. Bhagwati considered the PIL as a strategic arm of the legal aid movement that is intended to bring justice within the reach of the poor masses who constitute “the low visibility area of the humanity”.

To Justice V.R. Krishna Iyer, PIL transforms, closed-door legalism “to open door judicialism”. He held the PIL as a weapon of the people in general, the poor in particular against an arbitrary executive and exploitative rich and capitalist classes.

The problem of the backward classes is, in its most general form, the problem of achieving equality in a world permeated by inequality. The significance of the category ‘Backward Classes’ lies not only in its size and content, but also in the uniquely Indian way of deficiency its boundaries.

Judicial pronouncements on the subject reflect the ambiguity inherent in the situation. There are judgements which imply that there is ought to be, a clean distinction between “caste” and ‘class’.

(M.R. Balaji Vs. State of Mysore, AIR, 1963, SC 649). There are other judgements which maintain that a 'caste is also a class of citizens'. (P. Rajendran Vs. State of Madras, AIR, 1968, SC 1012 and A. Periakarappan Vs. State of Tamil Nadu, AIR 1973, SC 2310). The discrepancy between the two interpretations arises from the fact that in the first case, it was a 'sociological' position, while in the second, it was formal legal position, whatever may be position, it is admitted that the roots of this issue should be traced in the roots of traditional Indian social structure.

This disharmony needs to be examined in the widest historical and comparative perspective. It is seen that all modern societies tend to make a reconciliation between the ideal of equality with the facts of inequality. It refers to what R. Aron once observed, "Modern industrial societies are both egalitarian in aspiration and hierarchical in organization." (R. Aron, Progress and Disillusion, Pall Hall Press, 1968, p.XV).

In this context, the importance of social legislation and the views of the judiciary appear to be of great significance. In a society, where inequality exists, justice is denied to certain sections of the people who are backward in many senses. Social legislation seeks to remove inequalities and benefit the whole community rather than a few individuals. The primary aim of the social legislation are two : (a) to provide for the orderly regulation of social relationship and (b) to provide for the welfare and security of all individuals in the social unit.

Objective of Proposed Study:

The proposed study seeks to analyse the role of the Indian judiciary, and more particularly that of the Supreme Court in protecting the rights and privileges of the citizens in general and those of the backward classes in particular. It may not be out of place here

to mention that the makers of the Indian Constitution tried to project the Supreme Court and other courts as the 'Catalyst' not only in the protection of individual rights but in the transformation of the society in general. A kind of expectation was generated where in it was believed that the Supreme Court or for that matter, the judiciary in general would be able to generate a climate which would be congenial for the speedy and much desired social changes.

Here a reference may be made to the nature of relationship that existed between the Executive – Legislature on the one hand and the Judiciary on the other. Although the makers tried in an elaborate way to define the respective role of those two organs, but in course of time, due to different positions, the relationship became one of confrontation instead of cooperation. An analysis of the leading judgements of the Supreme Court in the cases relating to Fundamental Rights will establish the fact that it was mainly due to attitudinal differences that serious controversies arose which had their profound impact on the nature and course of political process in India.

The proposed study seeks to examine all those and other related issues with a view to understanding the nature of political dynamics and the role of the Supreme Court, its adoptability and responses to these changes, within the general backdrop of social changes and constitutional requirements.

Methodology

The proposed study is essentially historical, comparative and analytical in nature. The role of the judiciary in India has been sought to be analysed on the basis of the theory and practice of the judicial process and for this purpose cross references have been made to the established judicial process as available mainly in the U.K. and the U.S.A. For better understanding of the role of the Supreme Court in

India in relation to the upliftment of the weaker section, its attitude towards reservation policy or affirmative action as it is popularly known in the west has been analysed. Quite naturally, the recent development coercing issues like Public Interest Litigation (P/L) and consequent emergence of judicial activism have also been examined in light of Supreme Courts pro-active role in defending the constitution and protecting the rights and liberties of the weaker section of the society.

Research Questions

The proposed study, while situating the Indian Supreme Court in the context of social change would seek to answer the following basic questions:

- (a) To what extent has the Indian Judiciary in General and the Supreme Court in particular been able to live upto the expectation of the founding fathers to act an arm for what is called “social revolution”?
- (b) What are the reasons for the emergence of conflictual situations in the relationship between the executive-legislature on the one hand and the judiciary (Supreme Court) in the other? Are these conflicts mainly constitutional or something which transcend the limits of the constitution.
- (c) Is it correct to say that the practice of the judicial activism has provided an opportunity to the Supreme Court, in India to become a super chamber?
- (d) How far has the Supreme Court been able to act as what Justice Bhagavati once remarked, “as strategic arm of the legal aid movement intended to bring justice within reach of poor masses who constitute the low visibility of area of humanity?”

- (e) What has been the general impact of judicial activism so far as the protection of social welfare legislation on the Backward Classes is concerned?
- (f) How far has the Supreme Court in India been able to use “Social Action Litigation” as used by Prof. Upendra Baxi in place of Public Interest Litigation” as a counter majoritarian check on democracy for the support of unpopular causes and the protection of politically and economically powerless minorities?
- (g) What is the general perception of the political parties and the Government about the efficacy and justification of judicial activism for the overall protection of the Backward Classes in India?