

## CHAPTER 1

### INTRODUCTION

Society in India has always been very complex. Diversity of culture, religion, philosophy and political thought has been the essence of India. Even before it became a nation state, during the Islamic and Colonial period, the complexity of Indian society was no less. Administering such a society has been an uphill task for both Muslim and English rulers.

In 1950, the Constitution of India came into force and India became a 'Republic' and a nation with federal structure. States were divided on the basis of language and also culture. The multicultural characteristic of the country became more prominent than before. However the 'will of the people' was reflected in the Constitution and the foundation of 'Rule of Law', good governance and respect for multiculturalism was laid therein.

As a result there were two layers in the society, a layer of formal positive law enacted and implemented by the institutions and the agent of the government and another layer of socio-religio-customary legal practices which neither had a formal shape nor could be implemented formally. This was true of all the communities in India be it Hindu, Muslim, Christian, Parsi or Jew. In the latter four cases however the religious institutions supervised such socio-religious practices. These latter matters were termed 'personal' and largely became a matter of the community with restrained governmental intervention. The formal law

enacted by the organ of the government was strictly and rigidly positivist in approach and this came to be known as the public law.<sup>1</sup>

It was not till the emergency period did the ramification of the strict positivist approach to the formal law became clear. It became clear that strict positive approach to law separated from morality could transform democracy to despotism and rob the country of its welfare character. Post emergency period, therefore, saw a sea change in the countries approach to law.

The phenomenal growth and ramification of the Government as a welfare State in the twentieth century and the consequent explosion of the legal and administrative expedencies for implementation of a new social order made the people to look upon some authority as a protector of their interest. The problems arising between the State and man; man and man as a result of the complexities of the functioning of the State needed to be resolved. The problem was to strike the right balance between efficient government on the one hand and the protection of the citizen against misgovernment on the other. This opened up a third social layer where people demanded that the government deliver the goods.

It may be worth recalling the cliché that law is made for man and not vice versa. According to the sociological school of thought, formal law is static and antiquated, lagging behind the living law. The law ordinarily comprehends vast area on the subject and it is not possible for the makers to deal with every contingency attached to human activity. In social dynamics the living law always changes faster than the formal law which is slow to recognise these changes. As a result there is inherent stress between the ruled and the ruler. Thus there is a gap between *lex*

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<sup>1</sup> Both personal and public law are required to adhere to Article 13 of the Constitution of India.

*scripta* (formal law or written law) and *lex non scripta* (living law or uncodified law-or as Austin puts it law improperly so called, given by human beings not in position of political superiority or inferiority to each other). It is here that the judiciary plays a key role to uphold the values as enshrined in the Constitution on one hand and examine the validity of the popular demand of legal change on the other.

The founding fathers of the Indian Constitution created a mechanism for balancing the will of the people and the role of law separately. The doctrine of popular sovereignty was embodied in the legislature, reflecting the popular opinion whereas the task of being guardians of fundamental law and upholders of the rule of law was assigned to the judiciary. Furthermore, the doctrine of separation of powers which guided the drafting of the Indian Constitution ensures the functioning of the three organs, viz. the legislature, the executive and the judiciary separately while adhering to the principle of 'checks and balances.'

The makers of the Indian Constitution opted for the Westminster model of Cabinet Government of the United Kingdom, the theory of separation of powers delineating the functions of the legislature, the executive and the judiciary as embodied in the American Constitution and the Irish example of obligating the State to follow certain directives for the societal well-being. The drafters of the Indian Constitution had envisaged a clear distinction of powers and functions of the legislature, the executive and the judiciary. The enactment of laws is the exclusive domain of the Legislature at the State and Union level. The elected representatives are expected to know the pulse of the people and thus be aware of the aspirations of those whom they represent. They are supposed to be alive to the needs of the society and thus have to enact, amend and

repeal the laws which govern human conduct in the public sphere in a civilised society. The executive is responsible for implementing the legislations enacted by the legislature. To run the affairs of the State in accordance with law is an important obligation of the executive. The role of the judiciary is to administer justice in accordance with the law of the land. The Higher Judiciary is further empowered with the task of adjudicating the validity of the law enacted by the legislature. The High Courts and the Supreme Court are guaranteed the power of superintendence over all the Courts and Tribunals in the concerned State and the country respectively. While ensuring the system of checks and balances, the framers of the Indian Constitution had envisaged the three organs shall be complimentary and supplementary to each other so as to constitute India as a model welfare State.

The responsibility of interpreting the Constitution squarely rests on the judiciary in every democratic country which has a written Constitution. It is this assignment of the Indian Constitution that has entrusted the judiciary to expand and interpret law within the constitutional framework, so as to respond to the hopes and aspirations of the changing society. This process of constitutional adjudication by the judiciary has a dynamics of its own which contributes to the development of law by a methodology which is four-fold namely-

1. The judiciary interprets the laws in a manner to best serve the interest of the society;
2. It identifies the areas where there is need for enacting laws and their proper implementation;
3. The judiciary provides valuable inputs to the other wings of governance so as to secure an ideal enactment and implementation of laws; and

4. The judiciary not only irons out the creases left by the legislature in the texture woven by it, it also tries to fill in the gaps, if any, left by the legislature and when detected.

The old orthodox theory was that a judge never creates law, but then he only declares law. Thus it was not considered to be laws 'strictly so called'. This mechanical view of the judicial function was prevalent in Britain in the early twentieth century. This time-honoured fiction of the declaratory role of the judge has lost much support now. Law has to be interpreted according to the current social standards and popular demands. The law when enacted, in spite of the best efforts and capacity of the legislators cannot visualise all situations in future to which that law requires application. New situations develop and the law has got to be interpreted for the purpose of application to them, for the purpose of finding a solution to the new problems. This is how the law advances and the area or field of judicial creativity to fill in the gap between the existing law and the law as it ought to be. Lord Denning has said, "every decision on every new situation is a development of law. Law does not stand still. It moves continually (therefore it is dynamic). Once this is recognised, then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect thinking of the structure as a whole building for the society, a system of law, which is strong, durable and just. It is on his work the civilised society depends." He further says that the task of common law is to act as an instrument of evolution in accordance with the changing needs of the

society and the demands of justice.<sup>2</sup> The judiciary as an institution for social decision making must strive for an ultimate social purpose of establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man.

No game can be played without an umpire or a referee. No society can run without an arbitrator. Democracy cannot sustain its experiment in the absence of an adjudicator. In a democratic set-up, differences and disputes are inevitable incidents which can be resolved by the judiciary. The judiciary of the present should be a sentinel, monitor, mentor and ombudsman of the Constitution of India. Law, like any other social science, rapidly changes. The dynamic dimension of law which regards persons, individually and collectively, as the cynosure of social justice, the social engineering through law whereby adjustment of relations and ordering of conduct conducive to distributive equity and synthesis of computing claims becomes the end of the jural order, is the order of the day, which is smoothened up by the judiciary.

Rule of Law according to the Constitution is to prevail even amidst clash of arms and will. Human rights do not fade out when social atrophy begins. The inner strength of a system is put to test during these clashes of arms and wills. A more meaningful, modernized, and humanized system of judicial justice that works in Indian conditions as against a system with proud unconcern with social justice has been the clarion call of the hour. While the judiciary has to be alert and sensitive on one hand the law too must mutate and vacate, because social systems have to obey law for survival. In working for progress the Indian system had to discard

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<sup>2</sup> Quoted in Justice Binod Kumar Roy, *Role of Judiciary in the Present Day Context*, AIR 1998 Journal 17 and Dr. Malikiat S. Rahi, *Judicial Activism and Judicial Restraint*, AIR 1999 Journal 44

hallowed past and sanctified orthodoxies. To borrow a leaf from George Bernard Shaw, if the English man had not repudiated the duty of absolute obedience to the king, his political progress would have been impossible. Similarly if popular unhappiness with *A.K.Gopalan*<sup>3</sup> had not been there and excesses during the emergency had not taken place, the present transformation in judicial justice in India would not have happened.

Purpose of law is to establish justice. If law fails in this primary task, it is as good as dead. Karl Marx has said “your jurisprudence is but the will of your class made into law for all...”<sup>4</sup> but the function of the judiciary is to hear the voice of the voiceless. Indian Constitution also stresses on justice. In order that justice should not become the hand maid of the powerful, the expression ‘social, economic and political’ has been added. However, the answer to the question what is justice is yet to be found.

Over the years legal justice has made way for social justice through a dynamic judicial process and creative jurisprudence which affirmatively rights both ancient and recent wrongs. There has now been a remedial realism to forensic formalism. The tryst with Constitution has been redeemed by effective strategies and actual access to curial and administrative justice and the highest articulation of this is Article 39-A.

Justice is not only judicial. The courts have built in limitations of jurisdiction, procedure. Legislative justice is basic and has no such limitation. Without this the judiciary and the executive cannot function. The plea of justice, however, is first directed to the judiciary alone. Legislature may give justice in print but judiciary dispenses justice in life.

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<sup>3</sup> *A.K.Gopalan v. State of Madras* AIR 1950 SC 27

<sup>4</sup> Karl Marx, Manifesto of the Communist Party, as quoted in V. R. Krishna Iyer, *Judicial Justice-A New Focus towards Social Justice*, p. 6 (1<sup>st</sup> Edition 1985)

The latter is a process of actualization of social justice. The functional success of equality, liberty, dignity and life has been possible with Article 32 and Article 39-A.

Another significant development is the contribution of juridical sciences to the justice delivery system. The role of experts in science and social science is an important factor of justice delivery system. Substantial changes in attitude to justice delivery system law have been necessary in accommodating the auxiliary forces within the judicial process. Law alone is not enough where special knowledge of medicine, psychology, chemistry, economics etc are necessary for delivering justice. The judiciary has been able to step out of insulation<sup>5</sup>. It is now established that science and social sciences must be co-workers with law.

The main focus of this study is on remedial revolution and popular alternatives for dispensation of justice at the level of common people and State agencies. The problems, perplexities, and prospects of public interest litigation, the necessary innovations and important limitations within the accepted parameters of judicial justice also call for examination. The structural engineering and realignment of forensic process to enliven Article 14 and 21 is the focus of this work. How far does remedial jurisprudence bill is the matter of examination for this study.

Public interest law and related procedural formalities were welcome since traditional formalities and procedural strategies were conditioned by socio-economic matrix. The novelty of this process made it very popular and there also have been some abuse of the process. The

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<sup>5</sup> *Dhananjay Chatterjee v. State of W.B.* (2004) 9 SCC 751. See also *Dhananjay Chatterjee v. State of W.B.* (1994) 2 SCC 220 where the stress was on retributive theory of punishment.

other side of the story is that there is a popular belief that law has lost the primary function of protecting people's interest. This is the effect of the interpretation of 'procedure established by law' in *Maneka Gandhi's* case<sup>6</sup> also called the procedural due process. The judgment ushered in people oriented jurisprudence. The vastness, diversity, and backwardness of penurious population hungry for social justice have given a boost to social dynamics in India. Thus judiciary has become the founding father for social dynamism.

The most important emerging awareness is the realisation that rights also work as a restriction upon the unbridled power of the sovereign. The post *Maneka Gandhi* era has shown two major trends:

1. That there are rights that are fundamental to the fundamental rights and hence are inalienable at any point of social turmoil. They can be briefly stated as the right to fairness [non arbitrariness], equality and freedom. However these inalienable rights are not free from benevolent maneuverability by the sovereign [government], and,

2. There are natural rights which are absolute which may be equated with the '*grundnorm*' of Kelsen or the '*volkgeist*' of Savigny, or the '*inner morality of law*' of Hart or the '*universal inner conscience*' of the natural school or '*pacta regalia*' of Bentham, or '*positive morality*' of Austin.

The cumulative effect has been a social transformation that demands governance according to the rule of law with more transparency.

A study that seeks to study the social dynamics set at work by the judiciary has but a single methodology. The research work is based on the study of the various decisions delivered by the High Courts and Supreme

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<sup>6</sup> *Maneka Gandhi v. Union of India* AIR 1978 SC 597

Court in India. The methodology adopted is doctrinaire and analytical to get the clear picture of the contribution made by judiciary to the social dynamics in India. The time frame fixed for this exercise is from 1950 till date. The study is topical and not chronological. However the nature of the study ensures a degree of chronological exposition. An analytical and critical study of the relevant cases and the laws has been done. The cases under the different categories of social dynamics have been catalogued, analysed and the decisions have been appraised. The consistency of the judicial decisions has been an important issue to be looked into. The interpretative techniques of the judiciary that maintains the sustainability and law and yet meets and accommodates the newer demands of the dynamic society has been noted and discussed.

The present work has been divided into five chapters. The first chapter, the current one, introduces the backdrop of the study and lays down the methodology and plan of work,

The second chapter explains the meaning of social dynamics and its dimensions. It also traces the development of social dynamics through Public Interest Litigation. This chapter elaborates and follows the development of the concept of Public Interest Litigation as a weapon in the hands of the people to enable the judiciary to bring about social transformation, especially after the emergency. The various procedures and methods of entertaining Public Interest Litigation; along with the misuse and safeguards while entertaining Public Interest Litigation has been discussed.

The third chapter focuses on the role of judiciary in bringing out changes in the society through social dynamics. The cases relating to the field of education, environment, election, women and children, rights of accused and convicts, labour and medical ethics after the Independence

have been examined to find out how the judiciary has developed and supplemented the vacuum in the legislation. The opinion of the Bench has been discussed in detail in order to show the reason of laying down new guidelines and law by the judiciary.

The fourth chapter visualizes the tussle between the legislative law and the judge made law. The function of the judiciary and the application of the doctrine of separation of power in India have been discussed. The power and function of the judiciary has been discussed. The validity of judge made law through Article 141 of the Indian Constitution has also been brought forward. The confrontation between the legislature and the judiciary before and after the emergency of 1975 has been highlighted. An insight into the opinion of the judiciary on the Uniform Civil Code has also been studied. The much heated debate on Judicial Activism and Judicial Restraint has also been discussed while concentrating on the present attitude of the judiciary.

Finally, in the last chapter some observations and recommendations based upon the study have been made.