

## **Role of the Judiciary in Bringing out Social Transformation in India after Independence**

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### **Abstract**

*Society in India has always been very complex. Diversity of culture, religion, philosophy and political thought has been the essence of India. 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. The goal of a new and vibrant India was in the minds of the Legislature, who were mostly the freedom fighters and who had dreamt of a new India. However, with the passage of time the interest of the common man receded in the background and they were left helpless and hapless. It was at this time the judiciary took up the task of acting as a catalyst in bringing about social change according to the changing needs of the society. The Indian judiciary rejected the British concept of dictatorship in the legal framework and evolved new devices to balance the conflicting needs of the society. The Indian judiciary while rejecting the Austinian brand of legal positivism reconciled both the conflicting interests of the society. 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.*

**Keywords:** *Society, Social change, Constitution, Judiciary in India, Judicial Process*

### **I. Introduction**

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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.

The Britishers who remained in India were least concerned with the changing needs of the Indian society. As a result, the Indian legal system before 1947 was static, stale and counter-productive to social change and social justice. It was anti-people where the human dignity was brutally suppressed in order to augment the mission of the British rule. This made the legal fraternity of judges, lawyers and jurists insensitive to the likes and dislikes of the Indian people. The Britishers had taken particular care to ensure that the courts of the *Raj* were not empowered to question governmental action. They imposed severe substantive restraints on the civil liability of the government<sup>2</sup> The judiciary was a unique bureaucracy within the imperial state. Judges were selected for their conservation, loyalty and independence.<sup>3</sup> It was a safe institution for the cover of the British regime. The theory of John Austin was applied to the fullest where “law was the command of the British sovereign”. The concept of master-servant relationship was accepted by a section of Indian society and the Britishers administered justice according to their law, pretending to be impartial and neutral. The Indian society was divided and broken into sections on the basis of

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<sup>2</sup> The civil liability of the government was exempted in *Bank of Bengal v. United Company* (1831) 1 Bignall's Reports 87; *P. and O. Steam Navigation Co. v. Secy. Of Stgate for India* (1861) 5 Bom HC Report Appendix 1; *NobinChander Dey v. Secretary of State for India* (1876) ILR 1 Cal 11; *Secretary of State for India-in-Council v. Hari Bhanji* (1882) ILR 5 Mad 273; *Salaman v. Secretary of State-in-Council for India* (1906) 1KB 813. The clarity regarding civil, tortuous, constitutional liability of the government is also a product of post-emergency social dynamics evolved by the Supreme Court specifically after *Maneka Gandhi v. Union of India* AIR 1976 SC 597

<sup>3</sup> The independence of the judiciary therefore became a key issue which was reiterated in *S.P. Gupta v. Union of India* AIR 1982 SC 149; *K. Veeraswami v. Union of India* (1991) 3 SCC 655; *Sub-Committee on Judicial Accountability v. Union of India* (1991) 4 SCC 699. The assertion of the independence of the judiciary reached its climax when a nine Judge Bench of the Supreme Court observed in *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441, that ‘Independence of judiciary’ is a basic feature of the Indian Constitution and a *sine quo non* of democracy.

caste, creed, region, occupation, language and religion; best suited for the Britishers.

The dream of the freedom fighters to see a new India was realised in 1947 and with the passing of the Indian Constitution in 1950; the dawn of a new era was ushered. The Preamble of the Constitution along with the Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) gave a tool in the hands of the law-makers and law-enforcers to lay the foundations of social dynamics in India.

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>4</sup>

## **II. Indian Judiciary as a Catalyst in bringing about Social Change**

The goal of a new and vibrant India was in the minds of the Legislature, who were mostly the freedom fighters and who had dreamt of a new India. However, with the passage of time the interest of the common man receded in the background and they were left helpless and hapless. It was at this time the judiciary took up the task of acting as a catalyst in bringing about social change according to the changing needs of the society. The Indian judiciary rejected the

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<sup>4</sup> Both personal and public law are required to adhere to Article 13 of the Constitution of India.

British concept of dictatorship in the legal framework and evolved new devices to balance the conflicting needs of the society. The Indian judiciary while rejecting the Austinian brand of legal positivism reconciled both the conflicting interests of the society. This movement was largely possible due to the efforts of the Indian judges like Krishna Iyer, P.N. Bhagwati and others who rejected the Anglo-Saxon jurisprudence as being anti-people, draconian, cancerous and smuggled system which was alien to the genius of the country.<sup>5</sup> Moreover, the realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was.

In the words of Justice Bhagwati,<sup>6</sup>

Today a vast revolution is taking place in the judicial process, the theatre of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of the people who are denied their basic human rights and for whom, freedom and liberty have no meaning. Thus, a new sociological jurisprudential approach wherein law is committed to the service of the people, law as a vehicle of social transformation and above all with social objectives, is geared to remove the social disabilities,

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<sup>5</sup> Justice Reddy had observed that "The colonial rulers when they left our shores, bequeathed to the bourgeoisie who succeeded them, an ideology which paid homage to freedom and fair play. The doctrines were there. The weapons were there. The rulers seized the doctrines and the weapons and their judges fashioned a jurisprudence in which freedom was the key note. But this is now a ferment. The very weapons wielded by the earlier ruling classes are now being steadily turned against them. The courts have evolved a great jurisprudence around the doctrines of natural justice, ultra vires and habeas corpus. The doctrine of equality and the right to life have currently been seized upon to fight the cause of prisoners, destitute women, bonded labour, agricultural and industrial labour, etc. Despite the inherent conservatism of the existing system, public interest litigation has shown signs of warming up." Quoted in Dr. (Mrs.) Mamta Rao, *Public Interest Litigation in India*, p. 108 (1<sup>st</sup> Edition 2002).

This attitude of the Supreme Court lays the foundation of social dynamics and evolves a new jurisprudential theory blending positive law, natural law and realist interpretation.

<sup>6</sup>*S.P.Guptav. Union of India* AIR 1982 SC 149 at 189

discrimination and inequalities. The courts have by now acquired a firm social philosophy founded on humanism, socialism and secularism of the Constitution. It is, therefore, imperative both for Indian jurists and judges to be fully alive to this wind of change and reform and desist from measuring India's law from Austinian or even Poundian philosophy. The emergence of anti-poverty and egalitarian jurisprudence in India seems to have resurrected judicial conscience as the contemporary judicial process is more in tune with the social philosophy of the founding fathers of the Constitution rather than with the erstwhile British colonial rulers. It is now people oriented, social justice oriented, effect and result oriented and above all human rights oriented leaning more on Swadeshi values by ridding of the alien, abstract, legalistic and individualistic slant from Indian law. The fundamental thing for the Indian judges and jurists to remember is that law must work in order to deliver the much needed results or desired goals.

The progress of the society is dependent upon proper application of law to its needs and since the society today realises more than ever before its rights and obligations, the judiciary has to mould and shape the law to deal with such rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters.<sup>7</sup>

Judiciary's role in giving expression to the Constitution and the laws for doing justice is instrumental in the development of new dimensions of justice. Judicial process as a mission seeks justice and tries to do justice. It is a function of

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<sup>7</sup> The implementation of the various provisions of the Dowry Prohibition Act, 1961; Child Labour (Prohibition and Regulation) Act, 1986; The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; The Commission of Sati (Prevention) Act, 1987, was not possible and the enactments lay dormant till the judiciary in order to uplift the welfare of the society and to see that justice is imparted to the various sections of the society irrespective of caste, creed, colour and religion interpreted and declared the law to suit the various social demands.

balancing interests.<sup>8</sup> The function of the judiciary, therefore, is to derive its conclusions from issues before it in accordance with law and with impartiality.<sup>9</sup> The age old myth in the Indian society that the judiciary is only the interpreter of law and not the creators of law has receded into the background.<sup>10</sup> The judiciary has tried to enforce and augment the principles as laid down in the Constitution by evolving new techniques and methods to meet the changing needs of the society. Lack of legislative thinking and executive inaction coupled with exploitation of the masses by the opportuned few; made the judiciary to rise to the occasion and extend its hand of help to at least some of the needy people to bring justice within their easy reach. It is the gap between the text of law and the policy inspiring it, which leaves room for the Judge and some scope of dynamism.

It has been aptly remarked by a nine Judge Bench of the Supreme Court in *I.R. Coelho v. State of Tamil Nadu*<sup>11</sup> that-

It is the duty of this Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution.<sup>12</sup>

The judiciary has grown up with the new demands of the society in order to be a protector not only of the traditional individual rights, but also of the new diffused, collective, and fragmented rights and interests which is a characteristic of the masses. The judiciary has become an effective instrument of social change with the introduction of the concept of Public Interest Litigation (PIL) or Social Action Litigation (SAL) as stated by Prof. Upendra Baxi resulting in a new dimension of judicial process which has given some hope to the justice-starved millions of Indians.

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

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<sup>8</sup> Justice J.S. Verma, *New Dimensions of Justice*, (1997) 3 SCC (Journal) 3

<sup>9</sup> Justice D.M. Dharmadhikari, *Nature of Judicial Process*, (2002) 6 SCC (Journal) 1

<sup>10</sup> The traditional mechanical jurisprudence which treats law as a slot machine has undergone a drastic change due to the judicial activism which has discarded the *status quo* oriented positivism and adversial jurisprudence.

<sup>11</sup> AIR 2007 SC 861

<sup>12</sup> *Ibid* at 871

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 expediencies 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 mis-governance 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 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.

### **III. Boost to Social Dynamics in India through Judicial Process**

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>13</sup> The judiciary as an institution for social decision making must strive for an ultimate social purpose of establishing, maintaining

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<sup>13</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

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 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>14</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>15</sup> but the function of the judiciary is to hear the voice of the voiceless. Indian Constitution also stresses on justice. In order that

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<sup>14</sup> *A.K.Gopalan v. State of Madras* AIR 1950 SC 27

<sup>15</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)

justice should not become the hand made 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.

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>16</sup>. It is now established that science and social sciences must be co-workers with law.

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 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>17</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 transformation.

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,

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<sup>16</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.

<sup>17</sup>*Maneka Gandhi v. Union of India* AIR 1978 SC 597

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.

#### **IV. Summing Up**

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 trust 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. 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 of the Constitution of India.