

CHAPTER - 1

SECTION - 1

SUPREME COURT IN THE INDIAN POLITICAL SYSTEM

At the apex of the Indian judicial system stands the most august institution, the Supreme Court of India. It is indeed the dazzling jewel in the judicial crown. It has aptly been referred to as the fulcrum upon which the constitutional structure and political institutions turn. The Supreme Court is the living voice of the constitution -- that is, of the will of the people expressed in the fundamental law they have resolved to retain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. (1) It is the guarantee of the minority, who, when they are threatened by the impatient vehemence of a transient majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction. Therefore, in a democratic society, and India being a democracy, the Supreme Court occupies a very important place. It is indeed the bastion of India's democratic government.

Art. 124 of the Indian Constitution says :
There shall be a Supreme Court of India. Its declaration of law shall be binding on all courts within the territory of India (Art. 141) , and all authorities, civil and judicial, shall act in its aid.

Even if by a narrow construction, the " quasi judicial tribunals " are excepted from the word "courts" in Art. 141, they necessarily come under the extra-ordinary

jurisdiction of the Supreme Court, under Art. 136. Therefore, in the declaration of what the law of the land is, the Constitution does not contemplate the sharing of power by the Supreme Court with any other body. It is the jealous possession of the Supreme Court and in that respect it knows no rival. ⁽²⁾ Its declarations cover not only federal laws but also state laws. It is the single law of the Supreme Court that rules the whole country.

In India, the supremacy of the Constitution is fully established. Every authority, legislative, executive and even judicial, exercises its power as derived from the Constitution.

The Constitution is a set of living institutions imported and transplanted from many soils of the world; naturally, there must be some device of knowing what the Constitution means when cases arise. Constitutional laws are dead letters without the courts to expound and define their true meaning and operation, they are like big strokes on a vast canvas, ⁽³⁾ they require proper interpretation. Judges enlarge the briefest text when the question arises. They try to unfold the hidden meanings in relation to society. ⁽⁴⁾

The Supreme Court is the accredited interpreter of the Constitution. It has to amplify the contents of

articles of the Constitution whenever a case or controversy actually comes to it for disposal, or is referred to it for advisory opinion by the President under Art. 143. Courts may, by a series of decisions, elaborate the content of a word or phrase. (5) Interpretation is indeed a dialectic process in which the precise meanings of broadly worded constitutional principles are hammered out in the context of specific fact situations. The constitution is not an end in itself, but it is a means to achieve certain social goals. (6) The sanctity of the constitution does not lie in its rigidity but the flexibility to keep pace with the changing needs of the society, the people who form part of it and the institutions operating there. Since the world is in a perpetual flux, the constitution must keep pace with it. It must change with the changing conditions or else it becomes a sort of iron chain to keep the nation at a standstill position while the world marches on. (7)

It being the accredited interpreter of the constitution, it has to render this interpretation in a dynamic fashion which is a continuously operative charter. (8) While the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to the meaning. (9) It is to be noted that in the course of constitutional interpretation,

the scope for choice and discretion which the written rule must leave for the interpreter assumes an unusual quantum of magnitude. (10)

Since the constitution is an organic instrument and permanent in nature, it should receive a construction which fits in with the progress of the people, and developmental needs and requirements of the time. Its language should not be regarded as dead but a mode of expression of the aspiration and the spirit of the nation. It should not be allowed to lag behind the time and become out - of - date. (11)

Of course, the process of amendment brings changes in the constitution, but in contrast, the courts move by gradual and often indirect, cautious, well-considered steps, that enable the past to join with the future, without undue collision and strife with the present (12) and thus keeps the constitution contemporary.

INTERPRETATION IN PRACTICE

In *M. S.M. Sharma V. Sri Krishna Sinha*, (13) the Supreme Court held that Art. 194 (1) which conferred freedom of speech on the legislator was independent of Art. 19 (1) (a) and the freedom conferred under the former Art. could not be curtailed by any law as contemplated by Clause (2) of Art. 19. This view was affirmed by the Supreme Court in its opinion on a Presidential reference under Art. 143. (14) It held that

Art. 194 (1) was subject only to that provision of the constitution which regulated the procedure of the legislature and Art. 19 (1) (a) and 19 (2) were not of such a nature. It further held that if all ^{that} the legislators were entitled to claim was the freedom of speech and expression enshrined in Art. 19 (1) (a), then it would have been unnecessary to confer the same right specifically in the manner adopted in Art. 194 (1) .

Part III of the Indian Constitution contains the charter of freedom of the citizens of India. It is indeed the Magna Carta of the essential freedoms of the Indian people. The framers of the Indian Constitution did not leave their task only by laying down Fundamental Rights, because a right without adequate measure of protection would be a heap of sands. They also arranged ^d certain measures to protect them, because they knew that all power corrupts, and absolute power corrupts absolutely. (15) Again, basic human rights of the citizens may be arbitrarily curtailed by the executive or by the legislature. Hence, it is necessary to provide an effective machinery for their protection. (16)

The Supreme Court acts as a laboratory where the validity of the laws and executive actions is tested in the light of the relevant constitutional provisions. (17) In another sense, this Court acts as ^a perpetual watchdog and keeps an unceasing vigil to protect the Fundamental Rights of the citizen. Right to constitutional remedies constitutes the sheet anchor of democracy in India. (18)

Dr. B. R. Ambedkar, while commenting on the provisions of Art. 32, opined, "If I wish to make a particular article as the most important without which this Constitution would be a nullity, I would not refer to any other article except this." (19)

Therefore, Art. 13 (2) declares that all laws contravening Fundamental Rights void, and Art. 32 makes this declaration effective by giving the aggrieved person a Fundamental Right to obtain from the Supreme Court appropriate directions, orders or writs in the nature of Habeus Corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari, restraining the violation of his Fundamental Rights. Art. 226 confers on every High Court the power to issue to any person or authority within its territorial jurisdiction, directions or orders or writs, for ^{the} enforcement of any of the Fundamental Rights. It is by virtue of the powers conferred by these two articles that the Supreme Court and High Courts have been functioning as the custodian of the Fundamental Rights. In course of its functioning for the last thirty years, the Supreme Court of India had many opportunities to elucidate the scope, amplitude and mode of operation of its powers of judicial review, specially under Art. 32 of the Constitution which makes the Court the protector and guarantor of the Fundamental Rights enshrined in the Constitution. (20)

Judicial Review is an institutional arrangement by which the courts of law pronounce judgement on the

constitutional validity of the disputed pieces of legislation enacted by the law-making organ, viz. , the legislature . (21)

Considered as a mechanism for upholding the supremacy of the basic law in a country governed by the ideal of political constitutionalism, Judicial Review implies a comprehensive judicial enquiry into , and examination of the actions of the legislative, executive and administrative branches of government, with the specific purpose of ensuring their conformity to the specified constitutional provisions . (22)

It is pertinent to point out that constitutional guarantee of the rights of man has generally been regarded as the indispensable basic condition of ordered human progress and political stability in a community governed by the doctrine of rule of law . It is an essential condition of the modern democratic constitutional government that the freedoms and liberties must be so embedded in the positive law of the country as superior to the powers of any government that they become effective guarantees against the arbitrary action of the state. In order to make these rights secure and inviolable, adequate legal remedies should be provided in the constitutional document of a country. Judicial Review provides this protection of Fundamental Rights against possible abuse by the government . Judicial Review of legislative acts is thought to be a necessary requirement in order to preserve individual liberties against the rule of the majority and to protect individuals and groups against invidious attacks by public officers and departments of government . Judicial Review has been considered as a

' bulwark of liberty and to public order ' (23)

Therefore, it is clear that Judicial Review is the basis of action on the part of the Judges to apply the rules to protect Fundamental Rights from encroachment by different agencies, and it is this Judicial Review which is the key to the researcher to find out the attitude of the Judges while deciding a case. In fact, the most landmark decisions of the Indian Supreme Court, that is, those with important consequences for the political system, have been Fundamental Rights decisions . (24)

There is no denying the fact that in India , as in the U.S.A. , though in a much more restricted sense and limited sphere, Judicial Review has political implications, and that, in exercising this power, the Supreme Court sometimes performs a policy-making role. There have been occasions when this power has been exercised to serve as an instrument for constitutional and political change, and some of the Judges have used this authority to achieve certain policy goals . One can trace the socio-political and legal factors that have oriented the Judges toward judicial activism or judicial self restraint as two contrasting philosophies of judicial policy making. It can generally be observed that the Indian Supreme Court has, by and large, managed to forsake the doctrine of judicial self restraint and judicial defence to legislative policy, and acquired a rigid^{and} conservative role in respect of property rights. By its rigid adherence to the sanctity of the right to property, it ignored the emergency claim of social justice. While in the U.S. one can easily discern,

an element of dynamism and adjustability in the judicial decision-making process, through a pragmatic exercise of the powers of Judicial Review, no such tendency is noticeable in respect of the exercise of this power by the Indian Supreme Court. (25) One looks in vain for that kind of conscious and creative policy-making that is discernible in the U.S. in the famous doctrine of 'Preferred Freedoms', that goes to make the American Supreme Court such a living, dynamic institution within the American political system. These are, however, mere generalized statements. A detailed indepth and incisive content analysis of the judicial decisions can only provide the clues to the understanding of judicial values, judicial roles and the attitude of the Judges which emerge from the exercise of this Power.

PROTECTION IN PRACTICE

In Chiranjit Lal's case, (26) Justice Mukherjee said, " Thus any body who complains of infraction of the Fundamental Rights, guaranteed by the constitution, is at liberty to move the Supreme Court for the enforcement of such rights and this Court has been given the powers to make orders and issue directions or writs .

Again, Justice Kania observed in the V.G. Rao's case (27), " If then, the courts in this country face upto such important and none-too-easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This

is specially true as regards the Fundamental Rights, as to which this Court has been assigned the role as a sentinel on the qui vive.

Justice Patanjali Sastri also opined in the *Ramesh Thappar case*, (28) " this court is thus constituted the protector and guarantor of Fundamental Rights , and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications , seeking protection against the infringements of such rights .

Justice Subba Rao, in a later case, (29) observed, " A large majority of our People are economically poor, educationally backward, and politically not yet conscious of their rights individually or collectively, they cannot be pitted against the state organisations and institutions it is the sacred duty of this Court to protect their rights.

A federation postulates an agreement and a distribution of the legislative, financial and executive powers between the federation and the federating units. Both the federal government and the federating units have to function within their demarcated and delimited spheres. A federal government being essentially a composite government, conflicts are inevitable ; hence it is an essential feature of a federal polity that there should be a judicial body. India, being a federation, (although many scholars have expressed doubt as to its federal character) the task of conflict - resolving rests with the Supreme Court .

The Supreme Court maintains the delicate balance of powers of governance distributed between the centre and the constituent units by either party to invade the domain assigned to the other. (30) In a federation, there will be conflicts between the centre and the states, between the parliament and the state legislatures, between one state and another, between the state and people, between Fundamental Rights and Social Justice. Naturally, the Supreme Court has to play the role of an umpire to resolve these conflicts. The role of the courts in maintaining a working federalism is precisely the task of mediation between large principles and particular problems the task of interposing intermediate principles more tentative, experimental and pragmatic. Prof. Freund has beautifully expressed the sense. According to him, the courts are sub-stations which transform the high tension charge of philosophers into the reduced voltage of a serviceable current. (31)

From another point of view, it would be both convenient and useful to look upon the Supreme Court and the judicial hierarchy as a 'system' with other sub-systems and components in terms of the systems framework. For a meaningful discussion and analysis of judicial-decision making process and judicial behaviour, such an approach has much to commend itself, as it brings to light in very clear perspective the entire operation and functioning of the judicial and legal process as a part of the political process of the country.

Judges and lawyers who practise before the courts, the interest groups that support and sponsor litigation, and the litigants themselves are some of the material, living elements and components of the system . Many of the interactions between them are obvious to even the most casual observer.

Litigants hire lawyers to represent them ; lawyers argue cases before the judges, and so forth . Traditional judicial institutions such as ' stare decisis ' and ' judicial restraint ' ; legal rules of procedure, evidence and statutory construction ; accepted codes of ethics ; and political and economic ideas and theories are among the non - material, non - living elements of this system . These too can be observed to be interrelated with one another and with the material living elements of the system . Not only are the material and the non - material elements interrelated with one another, but these interrelations have some degree of order in them .

Of even greater import and interest are the somewhat ordered relationships among individual judges and other elements of the system in rendering judicial decisions.

The boundaries of the federal judicial system can be defined as the authoritative allocation of values presented in the form of litigation which the larger political system allows by its rules of jurisdiction and which the courts further define by their notions of justiciability and standing. Because the

federal judicial system is an open system, it is subject to influences, stresses and disturbances from these political as well as the non - political environments. The way in which a political system reacts to and copes with the influences, stresses and disturbances emanating from the environment shapes the nature of that system . Systems theory uses four theoretical constructs to explain how this occurs , namely : inputs, conversion, outputs and feedback .

The federal judicial system can be treated analytically by these four interrelated constructs . The input of the federal judicial system consists both of demands in the form of litigation and supports in the form of lay and professional attitudes about the way the courts fulfil their role. To maintain positive support, the courts must behave according to the role - expectations of these publics. This includes, among other things, a conformity to the formal legal rules and the norms and mores of the legal and judicial professions. Following these role expectations determines to a large degree what demands can be processed and in a broader sense represent the limits of authority within which the federal judiciary will receive positive support from the larger political system. On the input side, therefore, we need to explore the kinds of cases, petitions or demands which come to the court, who goes to the court for redress and why, and under what conditions.

The conversion or judicial decision - making stage occurs as the inputs are processed, reshaped and evaluated by federal Judges. With regard to conversion, we would need

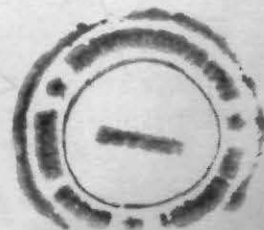
systematic studies of the process of judicial recruitment and socialization, the activities and roles of the Judges, the values of the institution, the methods used for disposing of official business, individual and group strategies for decision - making , and norms of constitutional interpretation.

The outputs consists of actual decisions or outcomes of particular cases as well as specified or implied policies concerning how similar cases are to be processed in the future . Judicial output has an impact on the larger political system and its component sub - systems . On the output side, therefore, we would want to know how the tribunal in question uses its power to influence public policy and to mobilise support for itself, both specified and diffuse.

The reactions from these systems are fed back into the federal judicial system as feedback. Feedback influences the new demands and supports at successive input stages.

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1 : 2AN INTRODUCTION TO BEHAVIOURAL RESEARCH

The rise of public law as an important component of the volume of litigation made the public aware of the impact of the judicial decision on the socio - economic process . So long as the Courts were primarily concerned with private law litigation, the nexus between the judicial process and the socio - economic process was not so obvious . The new realisation naturally makes judicial function a subject for public curiosity, controversy and closer scrutiny .

The behavioural revolution in social sciences radically transformed our thinking on political behaviour , and as a corollary, that on judicial behaviour too . Behaviour was analysed in ultimate terms as the results of stimuli acting on instincts to produce responses, and the application of these notions to the study of judicial behaviour took the boundaries of the subject beyond linking judicial decisions to socio - economic predispositions . The new concept of behaviour would enable us to understand the myriad other factors that go to make the personality of a Judge . Further, the new concept of behaviour also led to a new emphasis on the interactions among a team of decision - makers notions like small - group behaviour, the role of the leader in decision making .

The new concept of judicial behaviour also

meant that attention should be paid to the entire legal process . The systems approach further reinforced this trend, for this model has the implied notion that the legal process is but a sub - system of the larger political system . The systems model brought into prominence other areas of the study like the litigants, lawyers, legal culture, etc .

Public law is in a state of flux . A field which has for a time drifted close to the outer margins of political science, is now fast returning to the fold . As with most other fields in the discipline, recent changes in the scope and method of judicial research have been sweeping in character and breath-taking in pace . (1)

From the traditionalist point of view a judge's decisions are determined in part by an authoritative structure of norms (the law), in the manipulation of which he is skilled ; and in part by what is called the judge's philosophy . (2) By judicial philosophy public law scholars mean the judge's view on question of public policy, which usually are related to a broadly defined linear continuum of liberalism and conservatism .

From the conventional point of view, judicial - decision making is the product of interaction among social groups and the Judge functions as a transmission belt for the articulation of group (social) interests . (3) But group interests are equated to particular positions in regard to proposed dispositions to questions of public policy .

The behavioural approach seeks to explain legal phenomena in terms of operationally defined concepts and empirically verifiable hypotheses concerning human behaviour. (4) Judicial behaviouralism is an attempt to construct a systematic theory about human behaviour, analysing data about Judges and adjudicatory process of decision - making (5) by using theories and methods from all the behavioural sciences according to their relevance to the particular enquiry at hand.

Two theories of jurisprudence have been used to explain how the Justices reach decisions concerning the meaning of the constitution. Prior to the twentieth century, the so-called 'mechanical theory' was dominant. According to this theory the meaning of the constitution was fixed and unchanging. The function of the Judges was to discover this meaning and simply apply it to the cases before them. Constitutional interpretation and conflict - resolution was something of a 'matching game', in which the constitution was compared with the statutes in question; if inconsistencies were present, they would be obvious and clear.

According to this view, the values and policy preferences of the Justices are not involved to any significant degree in the process of constitutional interpretation. The human element in this process is denied and Judges are seen as brokers or objective intermediaries between constitutional prin -

-ciples and the legal issues raised before them . Once the constitutional principle is discovered, it is matched with the issue in the case and the decision follows mechanically . (6) The Judges are mere instruments of the law ; they do not make law . A Judge's legal training, political party affiliation, political experiences, background , and policy preferences are not important factors in constitutional interpretation.

Though this theory has many supporters, it has given way in the twentieth century to what is called the theory of 'free legal decision' . This theory recognises the element of human creativity in the constitutional interpretation . It admits that values,biases,fears,hopes,and policy preferences enter into a Judge's interpretation of the constitution . They are not introduced into the process deliberately or capriciously . But they cannot be isolated because judicial decisions are human decisions , therefore Judges cannot cease being themselves when they accept appointments to the Bench . The value and policy preferences of Judges are thus recognised as important factors in the development of the constitution .

The old approach defines as its data the verbal statements of opinions that are written to justify the decisions of appellate court minorities , and seek to discover the effect of such opinions upon a metaphysical essence which is called 'law' .

The new approach focuses upon individuals who

act in adjudicatory roles, and are interested in understanding Judges as people --- or, better the people as Judges. The old approach studies institutions which it calls courts and what courts do purport to be the objective of investigation. The new approach is deeply concerned with the understanding of the effect that cultural and sub - cultural differences have upon adjudicatory behaviour.

But the theories (old) of judicial decision-making that have been associated with this approach have not led to any new understanding. The highly formal abstruse images suggested by the traditional approach are descriptive of a static universe of political organs in which human beings appear to play a relatively significant part.

As pointed out by Cardozo,⁽⁷⁾ and Jerome Frank,⁽⁸⁾ Judges are really human, and inescapably subject to all the ills (as well as the satisfactions) to which the flesh is heir.⁽⁹⁾ It must therefore be assumed that for judges and others active in the adjudicatory process, as well as for people in general, each human biological sub-system establishes parameters within which personality has function, and which affects how it will function within those bounds.⁽¹⁰⁾

The first really major break within the past came with publication in 1948 of C. Herman Pritchett's book, "The Roosevelt Court".⁽¹¹⁾ This book was seminal for two reasons.⁽¹²⁾ First, Pritchett conceptualised the Supreme Court as a small decision-making group, whose voting and opinion behaviour could best be explained in terms of imputed differences in the attitude of individual Justices towards th

recurrent issues of public policy that characterise cases that reach the court for decision . Second , Pritchett based his analysis upon quantitative measurement of a large sample of data . As he explicitly stated, his interest was " in the social and psychological origins of judicial attitudes and the influence of individual predilections . (13)

Clearly, then, Pritchett's work can best be understood as a fact of a much broader movement that was at the very time that he wrote, on the threshold of making its first real impact as a major trend within the profession . Thereafter, the nineteenth century stereo - type of the court as a body of aloof, bearded gentlemen in black robes who did not make law but merely discovered it by processes too mysterious for layman to understand, was already resolving in the cynical acid of the twentieth century . (14)

It is to be pointed out that behaviouralism in public law builds upon the traditional lore, while at the same time checking its reliability and validity by focusing upon human characteristics of Judges as decision - makers . (15) This requires an investigation of Judges as discrete individuals, as members of the social groups, and as actors in social systems . The goal of the study of judicial behaviour is to acquire valid, reliable and precise knowledge of the extent to which the actions of the Judges conform to and / or deviate from the social expectations that constitute the substantive content of the norms that

define the ideals of judicial systems . It becomes necessary ,
therefore, to analyze not only who Judges are, what they do, and
when and how they act but why they make their choices .

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