

## JUDICIAL CREATIVITY AND PROTECTION OF HUMAN RIGHTS

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The change in the way the law is studied, from a purely analytical manner to a functional Point of view is one of the Primary factors for the growth of judicial Creativity Since the 20<sup>th</sup> Century. One positive outcome of the creative judicial exercises in the rise of a number of unremunerated Constitutional rights Protecting citizens from the state action.

The traditional view of the law making process is that parliament makes the law through Acts of parliament and if in delegated legislation and judges merely apply it in court to the cases presented before them.

The main reason for this being that member of parliament are democratically elected to make law. Where as judges are appointed by the lord chancellor to decide cases.

Although theoretically this should be true in reality judges can and do make law through the operation of the doctrine of judicial precedent and statutory interpretation.

The supreme court of India displayed remarkable craftsmanship to promote and protect human Right. Though, what justice Krishna Iyer termed “*judicial creativity*” the Apex court has succeeded in incorporating some of the Directive principles of State Policy into part III of the Constitution – a judicial creativity Commended even by the highest Court of other jurisdiction for instance, justice Albert Sachs of the South African Constitutional Court once had occasion to comment that “*the supreme Court of India Smuggled the right from part IV to part III of the Constitution.*”

The degree of judicial creativity depends largely on whether the Legislation is confined to enunciation of General principle or goes on to deal with specificities the constitution for most parts is restricted to laying down of general principles and hence offers greater scope for creativity.

A large part of the creative exercise with respect to the Indian constitution has taken place in the context to Article. 21. The extended meaning of life and personal liberty has allowed the Court to read in a number of unremunerated rights into Article 21.

By playing a vital role in the task of protecting human rights, the Supreme Court has made a positive Contribution in this fertile field. In pre *Maneka era* the judiciary assumed rather passive role. The turning point came in 1978 in *Maneka Gandhi v. Union of India (1)* in this case the supreme Court held that any state action affecting life and liberty of a person has to be “right, just, fair and reasonable and not arbitrary. Thereafter these appeared era of progressive judicial activism for protection of human rights. A new trend was set in *Maneka Gandhi case*. The Supreme Court in its anxiety to protect human rights has at times under taken the roles of both organs of the government. The legislature and the executive. The constitution does not Confer such omnipotent power on the judiciary.

Judiciary has invented novel form of action to provide relief to the poor, underprivileged, down trodden section of the Society. In *Bandhua Mukti Morcha v. Union of India (2)* an organization dedicated to the cause of release of bonded labourers informed the Supreme Court through a letter that there were a large number of labourers working in the stone-quarries situated in Faridabad District under inhuman and intolerable Condition and many of them were bonded labourers. The court treated the letter as a writ petition. The court after inquiry ordered release and rehabilitation of bonded labourers.

There is no express provision in the Constitution of India for grant of Compensation for violation of a fundamental right to life and personal liberty. But the judiciary has evolved a right to Compensation in Cases of illegal deprivation of personal liberty. *Rudal shah v. State of Bihar (3)* in an instance of breach through in life and Liberty Jurisprudence. The Court granted monetary Compensation of Rs. 35,000 against the bias Government for keeping a person in illegal detention for in years even after his acquittal.

In *M.C. Mehta v. Union of India (4)* the supreme Court held that the power of the Court under Article 32 (1) is not only in remedial in nature, that precluding the entwinement of a Fundamental right, but it also

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remedial in scope.

In *M.H. Hoskot v. state of Maharashtra* (5) case, the Supreme Court did not hesitate to imply this right in Article 22 (1) and Article 21 jointly while pressing into service application of a Directive Principle of State Policy under Article 39-A of Equal Justice and free legal aid. The Court observed that where the prisoner is disabled from engaging a lawyer on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the Sentence and the ends of justice so require, assign Competent counsel for the prisoner's defense, provided the party does not object to that lawyer. The state shall pay to assigned Counsel such sum as the court may equitably fix.

The judiciary, at times, is forging new tools, devising new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. While treating a letter, addressed to the Supreme Court seeking release of bonded labourers in the Country, as a writ petition under Article 32 it was held that when the poor comes before the Court particularly for enforcement of their fundamental rights.

It is necessary to depart from the adversarial procedure and to evolve a new procedure. (6)

The supreme court did not hesitate to assume direct legislative function in the case of *Vishaka v. State of Rajasthan* (7) In this case, the supreme court has virtually enacted a piece of legislation on the ground that there is a vacuum in the legislative field of sexual harassment of working women. This is a paragraph similar to the statement of objects and reasons.

There is a definition clause and these are 12 point similar to 12 section. The supreme court laid down some guidelines and norms which are directed to be treated as law.

The role of judiciary in the protection of human rights is certainly commendable, however, in the quest for socio-economic justice the judiciary seems to overstep the limits of its judicial function and trespass into the areas assigned to the executive and the legislature.

The judicial creativity is not only necessary but also inevitable. The reading in of an enumerated rights into Article 21 the judiciary can creatively adjust the law to meet the changing social circumstances.

### **References-**

1. A.I.R 1978 S.C 597
2. A.I.R 1984 S.C 802
3. A.I.R 1983 S.C 1086
4. A.I.R 1987 S.C 1086
5. A.I.R 1978 S.C 1548
6. *Bandhua Mukti Morcha v. Union of India* A.I.R 1984 S.C 802
7. A.I.R 1997 (6) SCC 241 .