

“DYNAMICS OF JUDICIAL ACTIVISM IN THE IMPLEMENTATION OF HUMAN RIGHTS IN INDIA--- AN ANALYTICAL STUDY”

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Abstract:

This paper is an attempt to focus the dynamics of judicial activism in the implementation of Human Rights in India. Judicial activism means the action of an activated judiciary in the protection of Fundamental Rights of the citizens contained in the Part-III of the Constitution of India. Fundamental Rights of the citizen are the basic or birth or natural rights. In India now a day while interpreting the Fundamental Rights of the Indian Constitution, the Supreme Court has draws from the International Declaration on Human Rights. Democratic country like India where there is a written and supreme constitution, the judiciary plays a very vital role to maintain the supremacy of the Constitution. Judicial activism is a delicate exercise involving creativity. It is the process by which new juristic principles are evolved to update the existing law, to bring it in conformity with the current needs of the society and for the development and growth of law. The Constitution of India is one of the most right-based Constitutions in the world. It contains the Fundamental Rights and Directive Principle of State policy which are expanded by the judiciary on the basis of International Human Rights. In this paper an attempt is made to focus the role of judiciary in India through judicial activism in the implementation of Human Rights.

Key Words: Judicial, activism, Fundamental Rights, Human Rights, dynamics, implementation.

Introduction:

Human Rights are those fundamental, basic and inalienable rights which are essential for life as human being. Human Rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex etc. simply because he or she is a human being.¹ Human Rights are regarded as birth rights as because no one can violate these rights. Human Rights are inalienable, inter dependent and inter related having a clear linkage with human development and both share a common vision with a common purpose.² Human Rights have to do with the all round development of the human

¹ Kapoor S.K., Twentieth ed. (2016) Central Law Agency, p. 817

² Anand A.S., Justice for Women, Universal law Publishing, p.6

being in harmony with that of his fellow-beings in the totality of the relations in a society.³ Human Rights being are essential for all round development of the personality of the individuals in the society, be necessarily protected and be made available to all the individuals.⁴ Human Rights are based elementary human deeds of imperatives. There are certain deeds which should never be done, certain freedom which should never be invaded, something which are supremely sacred.⁵ Human rights are above politics and these rights certain humanity.

Durga Das Basu defines Human Rights as those minimum rights which every individual must have against the State or other public authority by virtue of his being a member of human family, irrespective of any other consideration.⁶

According to Bennett, "Human Rights includes those area of individual and group that are immune from governmental interference or that, because of their basic contribution to human dignity or welfare, are subject to governmental guarantee, protections or promotion."⁷

The concept of Human Rights represents an attempt to protect the individual from injustice, biasness and oppression. In other words, we can say Human Rights protect individuals against the excess of the state power.

Development of Human Rights in International Law:

The concept of Human Rights is not of recent origin, it was remained hidden in the mind of the people in the ancient time. The concept of Human Rights can be traced to the natural philosophers like Locke and Rousseau. According to Locke, man is born with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of nature and he has by nature a power to preserve his property i.e. his life, liberty and estate against the injustice and attempts of other men.⁸ The development of the concept of Human Rights started from the era of 1215 Magna Carta, which was the first written document relating to the Fundamental Rights of citizens. The France Declaration of Rights of Man and the Citizen 1789 declares the natural, inalienable and sacred rights of man.⁹ Following the spirit of the Magna Carta of the British and the Declaration of the Rights of Man and citizens of France late in 1776 USA introduced US Declaration of Independence, a Bill of Rights having constitutional status.

The Universal Declaration of Human Rights is regarded as the main foundation of international human rights law which was adopted on December 10, 1948 by the General Assembly.¹⁰ The Universal Declaration of Human Rights incorporates a list of Human Rights for all human beings. Through this

³ Mani V.S. Human Rights in India

⁴ Agarwala H.O, Human Right, Central Law Publication p.3

⁵ Cranstone Maurile quoted in L.J. Macfarlane, The Theory & Practice of Human Rights (1985) p.7

⁶ Basu Durga Das, Human Right in Constitutional Law, First Edition (1994), Lexis Nexis, Butterworths Wadhwa, p. 5

⁷ Bennett,A. International Originations : Principles and Issues, 3rd edi.,

⁸ Jain M.P., Indian Constitution Law, Wadhwa Nagpur, p. 827

⁹ Pandey J.N., Constitutional Law of India, Central Law Agency, p. 51

¹⁰ General Assembly resolution 217 (iii) December 10, 1948

Declaration it was universally recognized that the basic or fundamental rights of a human being are universal, inalienable and can be enjoyed by all people irrespective of caste, creed, religion, sex, language. The Universal Declaration of Human Rights was the first of the series of documents intended to constitute an International Bill of Rights and was followed by two Covenants- International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. These two covenants were adopted by the General Assembly on 16th December, 1966 and the Covenant on Economic, Social and Cultural Rights came into force on 3rd January, 1976, which developed most of the rights contained in the Universal Declaration of Human Rights. Later on the General Assembly also adopted two Optional Protocols to the International Covenant on Civil and Political Rights. The two Covenants together with Universal Declaration on Human Rights and the Optional Protocols comprise the International Bill of Human Rights which represents a milestone in the history of Human Rights. Now a day various international treaties and instruments were adopted for the protection of Human Rights. These include:

- 1 The Covenant relating to the Status of refugees
2. The Convention on the Elimination of all Forms of Racial discrimination
3. The Convention on the Elimination of All Forms of Discrimination against Women
4. The United Nations Convention against Torture
5. The Convention on the Rights of the Child
6. The Convention on the Rights of Persons with Disability
7. The Convention on the Prevention and Punishment of the Crime of Genocide
8. The International Convention for the Protection of All Persons from Enforced Disappearance
9. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

The Constitution of India and the international Human Right

The Constitution of India is one of the most rights based Constitution in the world. In view of the importance of the worth of the individual and the significance of the participatory role of the citizens in governance of the nation, a Bill of Rights is incorporated in Part-III as the Fundamental Rights. When the Constitution of India was framed the founding father took

inspiration from the Bill of Rights and incorporates a list of rights in terms of Fundamental Rights in Part –III of the Constitution of India. The Constituent body of the Constitution of India influenced by the concept of Human Rights as India was one of the original signatories to the international Covenant on Civil and Political Rights. When the Constitution was framed in 1950 it is worth recalling that it was only the third written Constitution of a common law country which incorporated within, a justiciable bill of rights-

the other two constitution being those of the United State and of Ireland.¹¹ The constitution of India was Drafted around the same time as the Universal Declaration of Human Rights (1948), the founding fathers of the Constitution of India captures the essence of Human Rights in its Preamble, the Part-III and Part-IV of the Constitution of India.

The Preamble of the Indian Constitution reflects the inspiring ideals with the expression “dignity of the individual”. The Fundamental Rights enshrined in Part III of the Indian Constitution are regarded as the basic right of the citizens of India. These are regarded as the natural right so no one can interfere with the enjoyment of these rights. When these rights are violated the party can get remedy under Article 32 of the Constitution of India and Article 226 by the judiciary through the doctrine of judicial review. Directive Principle of State Policy as incorporated in Part IV of our Constitution epitomise the ideals, inspiration the goal, the precepts and the aspirations of our entire freedom movement.

In *Keshavananda Bharati vs. State of Kerala*¹² the Supreme Court observed that the Universal Declaration on Human Rights is not binding instrument in India but it is properly implemented by the founding father while they framed the Constitution of India. The Fundamental Rights incorporated in the Constitution of India are the natural rights. These rights are enforceable rights. Article 13 provides the key provision for which we can say that Fundamental Rights are justiciable. The Constitution of India entrust upon the judiciary to declare a law as void or valid which depends on the conformity with Part II of the Constitution. The constitutional remedy of enforcement of Fundamental Rights is provided in Article 32 and Article 226 of the Constitution of India enables a citizen to approach the Supreme Court of India and the High Courts respectively directly for the enforcement of the Fundamental Rights in case of any violation thereof.

Judicial Activism in the implementation of Human Rights:

Judicial activism is a delicate exercise involving creativity. Judicial activism is the processes by which new juristic principles are evolved to update the existing law, to bring it in conformity with the current needs of the society and thereby to sub serve the constitutional purpose of advancing public interest. Judicial activism is the main weapon in the protection of the rights of citizen and implementation of constitutional principles. The primary cause for judicial activism is the inaction of other authority. In the field of basic Human Rights, the judiciary has been consistently building new linkages of a new egalitarian democratic and free society in consonance with new universal socio-political and economic order by raising some rights as Fundamental Rights under Part –III of the Constitution of India.¹³ Displaying the activist role, the court has gone to the extent of issuing numerous directions requiring affirmative action on the part of the state authorities and laying down new principles. The judicial activism has led to the dilution of the

¹¹ Saksena K.P., Human Rights and the Constitution, Gyan Publishing House, New Delhi, p.29

¹² AIR 1973

¹³ Dr. Maruthe T.R., Implementation of International Human Rights in India, Asian Law House, p. 232

traditional rule of 'locus standi' as a result of encouragement given to public interest litigation in effectively implementing the international Human Rights in India.

I.Right to speedy trial:

Right to speedy trial is not mentioned as a specific Fundamental Right under the Constitution of India. In the United State speedy trial is one of the constitutionally guaranteed rights. So also Article 3 of the European Conventions of Human Rights provides that every one arrested or detained shall be entitled to trial within a reasonable trial or release pending trial. Under our Constitution though speedy trial is not specifically enumerated as a fundamental rights, it is implicit in the broad sweep and content of Article 21 as interpreted by the Supreme Court in *Maneka Gandhi vs. Union of India*¹⁴ in which it was observed by J. Bhagwati that the procedure visualized by Article 21 of the Indian Constitution has to be right, just and fair and not arbitrary, fanciful and oppressive.¹⁵ In *Hussainara Khaton vs. Home Secretary*,¹⁶ State of Bihar the Supreme Court held the right to speedy trial a Fundamental Right is implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Indian Constitution. Again in *Raghuvir Singh vs. State of Bihar*¹⁷ the Supreme Court held that the right to speedy trial is one of the dimensions of the Fundamental Rights to life and liberty.

II.Prisoner's right to be treated with humanity:

Article 10 of the Covenant on Civil and Political Rights lays down that all people deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

In *Chares Shobraj vs. Superintendent Central Jail, Tihar, New Delhi*¹⁸ J. Krishna Iyer recognized that the right to life is more than mere animal existence. In this case the petitioner had contended that barbaric in human treatment was hurled at him and international discrimination was done with him. The Court restricted such treatment as a violation of right to life guaranteed under Article 21 of the Constitution of India. Again in *Sunil Batra (I), M.H. Hoskot*,¹⁹ the Supreme Court has held that the Part III of the Constitution should be given widest possible interpretation. It was stated that protection to prisoners in jail from inhuman, barbarous treatment, speedy trial, right to have met with the family members are not expressly mention in Part III of the Constitution of India, but it is regarded as the Fundamental Right and included in Article 21 of the Constitution of India. *Sunil Batra* case is regarded as the watershed in the evaluation of the prison jurisprudence in India and the said case also evolve the Human Right jurisprudence in India in respect of the preservation and protection of the prisoner's rights.

¹⁴AIR 1978 SC 597

¹⁵ Bansal V.K., Right to life and personal liberty in India, Deep and Deep Publication,p.159

¹⁶ AIR 1979 SC 1460

¹⁷ (1989) 4 SCC 481

¹⁸ AIR 1978 SC 1514

¹⁹ 1980 SCR (2) 557

III. Right to free legal aid:

Article 14 (3) (d) of the Covenant on Civil and Political Rights provides that the right to be tried in his presence and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, in any case where the interests of justice so required and without payment by him in any such case if he does not have sufficient means to pay for it.

The Indian Constitution does not explicitly provide this right as Fundamental Right, but Judiciary has provided its favour towards the poor prisoners who are unable to engage an advocate for his case. The 42nd Amendment 1976 has incorporated the free legal aid in Part IV of the Constitution which deals with the Directive Principles of State Policy. In *M.H. Hoskot vs. State of Maharashtra*²⁰ the Supreme Court took note of Article 39-A and laid down that Article 21 read with Article 39-A and 142 requires inter-alia that where a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court Article 142 read with Article 21 and 39-A of the Constitution the power to assign counsel to the prisoner provided he does not object to the lawyer named by court. It is now fairly settled that the right to legal aid and speedy trial are part of the guarantee of human rights envisaged by Article 21 of the Constitution of India.

IV. Right to compensation:

The Covenant on Civil and Political rights under Article 9 Para 5 laid down that anyone who has been the victim of unlawful arrest or detention shall have the enforceable right to compensation.

In *Rudul Shah vs. State of Bihar*²¹ the Supreme Court held that Article 21 which guaranteed the right to life and liberty will be denuded of its significant content if the power of this court were limited to passing orders of release from illegal detention. The right to compensation is some palliative for the unlawful acts of instrumentalities which acts of in the name of public interest and which present for their protection of power of the state as a shield.

V. Right to privacy:

Right to privacy is contained in Article 17(1) of the International Covenant on Civil and Political Rights. Privacy does not expressly include in the Constitution of India, but the judiciary in India has given emphasis on the right to privacy due to the growing invasion of privacy in different areas. It provides that no one shall be subjected to arbitrary, unlawful interference with his privacy, family, home or correspondence not to lawful attacks on his honour and reputation. But this right has not been enumerated as Fundamental Right in Part-III of the Constitution. The issue of privacy is pregnant matter in India. It

²⁰ AIR 1978, SC 1548

²¹ AIR 1983 SC p. 1086

shows the lack of privacy consciousness on the part of the Indian citizens. Privacy is one of the necessary ingredients of personal liberty.

Article 21 of the Constitution miraculously has been playing a major role in the safeguard of privacy as an essential ingredient of personal liberty. In *Govind vs. State of MP*²² the Supreme Court recognized the right to privacy as the Fundamental Right by reading it into the right to free speech under Article 19(1) (a) and the right to life and personal liberty under Article 21 of the Constitution of India. In *PUCL vs. Union of India*²³, the Supreme Court has stated that right to hold a telephone conversation in the privacy of one's home without interference can be claimed as right to privacy. In *State of Maharashtra vs. Madhulkar Narain*²⁴ it has been held that the right to privacy is available to a woman of easy virtue and no one can invade her privacy. Again in *Rajagopal vs. State of Tamil Nadu*²⁵ the Supreme Court has held that right to privacy is guaranteed by Article 21 of the Constitution of India.

Conclusion:

Human rights are the basic rights of all human being. No one can violate these right as because these are the birth rights. For the incorporation of Human Right in India the Constitution of India incorporates the basis right as Fundamental Right in Part –III of the Constitution of India. The judiciary in India tries to enlarge these rights mention in Part –III to met the international documents on human rights. With the interpretation which we discussed , the Supreme Court exemplifies judicial creativity and sensitivity at its best level by discovery of new rights.

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²² (1975) 2SCC 148

²³ 1996(9) SCALE

²⁴ AIR 1991 SC 207

²⁵ (1994) 6SCC 632