



Short Article

Tools and Techniques Applied by Indian Judiciary in Creativity

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Abstract: *Democracy is incomplete without an active and creative Judiciary reflecting the voices of the people and an effective Legislature and Executive in the modes of law-making. A true democracy not only represents the Judiciary but also the voices of the people that raise to seek solutions for every controversy arising from the conflict of rights, providing the Judiciary to fill in the gaps, if left, in the letters of the law, applying all its creativity and discovery. Judiciary has the maximum responsibility in interpreting the Indian constitution to maintain Supremacy, Rule of law, and the Separation of Power. The steps of creative activism of the Indian Supreme Court and the role of Judges would have remained incomplete without the power of Judicial Review and Writs. The essence of natural justice has always been upheld by Judges on the three jurisprudential schools being the Natural School, the Historical School, and the Analytical School, along with the Philosophical views of different Judges. However, the techniques of the Judges remained constant, making the Liberal Interpretation fill in the gaps left by the Legislatures in law-making and making recommendations for mediation proceedings also if required. A plethora of cases of creative decisions reshaped the society broadening the thoughts and touching all spheres of life and reflecting dynamism. The wider interpretation of life and its needed support system would have remained incomplete if tools and techniques were misused in Judiciary. Thus, making a feverish society. The Indian Judiciary indeed represents itself as the guardian of the Indian Constitution (the greatest democracy ever in the world).*

Keywords: *Activism, Judiciary, Judges.*

Introduction

Be you ever so high the law is above you.

- Lord Justice Denning¹

We live in a democratic form of government. In a democratic form of a government, the voice and expression of the people are given more importance than that of the power of money and dictatorship. Our Indian government or the democracy of the Indian Government is by the people, of the people and for the people. The mechanism of the country is maintained by the three organs namely Legislative, Executive and the Judiciary. The judiciary holds the maximum responsibility in running the judicial process of the country. It interprets the law and reminds the supremacy of the law of the land. The Judiciary being a body of legal experts reminds the Supremacy of the law of our Indian Constitution and to uphold the Constitutional values, protecting the citizens, whenever there is an encroachment and or infringement of the rights. The judiciary includes the active roles of the Judges, lawyers, activists, parties of disputes, constitutionalist together forming the working of the judicial process. A judicial process also includes the hierarchy of the Courts and the system of appeal. The Judicial process is regulated by the Indian Constitution gives immense scope for justice with the effects of Article 32², Article 226³, Article 141⁴, Article 144⁵, and Article 145⁶.

The Supreme Court from time to time has shown activism actively in providing justice to the citizens with dynamism and showing creativity while innovating new rules providing directions or guidelines to fill in the gaps, where the law has been silent, or the legislatures missed out some gaps in the law-making. There has been a plethora of cases which shows that Judicial Creativity

¹ The famous English lawyer and Judge, being the Lord Justice of Appeal, he made varieties of judgments especially in family law and rights of deserted wife.

² The right to move to the Supreme Court by appropriate proceedings for the enforcement of any rights conferred in Part III of Indian Constitution. The Supreme Court may issue directions, orders or writs in nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* appropriate for the disputing cases.

³ Power of the High Court to issue writs.

⁴ Enforcement of orders and decrees of the Supreme Court as necessary shall remain effective throughout the territory of India.

⁵ All authorities civil and judicial, shall act in aid of the Supreme Court in the territory of India.

⁶ The Supreme Court to make rule from time to time, with approval of the President make rule for regulating the practice and procedure of the Court.

has been applied in the judicial process differently as the situation demanded. The tools and the techniques used are definitely based on past circumstances, social issues with a present dynamic approach not beyond natural justice. The throughout process however may not go without applying the rules of interpretation by the judge. The skill of interpreting our own written Constitution, the observation and understanding of the facts of different cases, different circumstances have resulted in a number of creative cases reflecting the magnanimous attitude of the Court. This paper provides a small reflection of such.

Purpose of the Judicial Process

Judiciary is one of the four important pillars of our country acts as the watchdog on the social issues with the different approaches of law balancing the interests and providing the socio-economic and political justice to the people of the country while interpreting the Indian Constitution (the mother law of the land), maintaining Supremacy of Rule of Law and the Separation of Power. It follows the jurisprudential thoughts emphasizing the command of the sovereign according to Austin. The maximum good or benefits to be provided with minimum friction according to Bentham and the social interdependence among the people reflecting the relation of law and society to maintain the social order. The judges help the judicial process to revolve maintaining check and balance, separation of power with other organs while they keep rotating themselves, updating and rethinking with the various social issues societal changes depending on the need and wants of the people and increasing its speed on demand. With time it shows its activism in strictly following the statutory interpretation and the innovative methods by providing directives and various guidelines filling the gaps left out by the legislatures.

Role of the Judges

The judges reconstruct the society balancing the individual interest and the social interests with the change of time and the changing of society. They form various techniques and skills to resolve the social conflicts on their experience, observation, logic, aesthetic thoughts and intuition. The Judicial review had been the steppingstone for the judicial process to revolve like a wheel. The origin of the *Marbury v. Madison* case gave the supreme power in the hands of the judiciary to check and declare anything unconstitutional to be void. This has been followed by

the Indian Judiciary maintaining the Rule of Law, Separation of power and the Supremacy of the Constitution. The Judiciary had used various provisions like Article 13, Article 32, Article 131 to 136, Article 141, Article 144, Article 145, Article 226, Article 227, Article 245, Article 246 Article 372 and while utilizing such various doctrines evolved such as the *Doctrine of Eclipse*⁷, *Doctrine of waiver*⁸, *Doctrine of severability*⁹, *Doctrine of prospective overruling*, *Doctrine of colorable legislation*, *Doctrine of pith and substance*¹⁰, depending upon the facts and situations of the upcoming cases. The judges had always been interpreting the Constitution in the new ways to deduce the application of the legal rules through the Judicial Process. The legal rules find its origin and identification through the three basic schools namely First, the natural school to find out the reason, Second, the historical school tracing the culture, custom of people making comparison and the Third, being the analytical school considering the command of the sovereign. Through these legal rules, the Judge establishes the fresh application of the basic ancient rules to make it fair, just, or reasonable. The adjudication process focuses to curb the behaviors not acceptable to serve own interest or it shows the limitations of the behavior within authority's norm. It helps in the participation of the litigants, their representatives and enables them to settle matters outside the court if needed. The essential part of the process is the placement of evidence and establishing facts through arguments. The Judges shows their creativity where no rules of law are mentioned, or a gap has been left by the legislatures while framing an Act. However, such creativity cannot go beyond the Natural Justice. The two basic principles of Natural Justice being: i) *Nemo debet esse judex in propria causa* ii) *Audi alteram partem*. The Judges who also live in the society before providing any proper guidelines or directives on the disputing social facts coming up to them, they shall make an empirical study and observation of the society, the process being different and unique for each judge. However, before interpreting the statutes and focusing on construction, they will tend to revisit the philosophical historical, sociological, and analogical backgrounds of all the disputing upcoming

⁷ A law inconsistent with the fundamental rights, though becomes inoperative from the commencement of the Constitution is not dead but shall remain in a dormant stage. *Bhikaji v. State of M.P*

⁸ The person entitled to right or a privilege is free to waive that right or privilege.

⁹ Was used in the *Minerva Mills v. Union of India*, where the irrelevant part was struck down keeping the rest of the act valid.

¹⁰ Where the question arises of determining a particular law relates to a particular subject the court shall look into the substance of the matter. *Prafulla Kumar Mukherjee v. The Bank of Commerce*.

cases of social interests. Every time he moulds the law with circumstantial issues, he follows some techniques with the tools he uses.

Tools and Techniques of Judges in the Judicial Process

The judges while working with the legal method focuses on the legal reasoning which is mainly meant to establish the content of law on disputed issues. To find out a decision the Court must reach for solution and explanation of such particular decision taking all things or facts into consideration. Certain tools the judges emphasize are as follows:

- i) ***Philosophical Method*** - In here the logical development is given importance to find the symmetry of the form and substance, however not changing the true nature of law and its response to the sentiments be such that the same questions whenever raised repeatedly in future shall not be treated on opposite principles. The essence of the *elegantia juris* to be maintained with impartiality. The judge here utilizing his own reasoning makes his own subconscious element for the public good in the society, focusing on what is right or wrong, just or unjust with equality, justice and fairness.
- ii) ***Historical Method*** - Here the Judges uses the past method to make decisions, following the doctrine of precedent. Compares the present cases with the past decisions and makes use of the one which closely resembles the present one, yet to be decided. He has to choose that precedent which serves best in the society having stability and certainty in law as well as liberal and beneficial for the future. Development and change in society can only be understood and observed through various historical growths. A study of comparative jurisprudence has always been beneficial to understand the changing trends of society in various parts of the world and its influence is reflected in Indian society and the disputes arising through it. It has always been considered that, while judging or observing something, a page full study of history and background is much needed rather than only studying logic or reasoning. The history always builds up the system and the law that went with it. So, when we are considering the study of Hindu Law, while classifying the void, voidable marriages we are actually revisiting the historical background. We are studying the customs, which undoubtedly has the

creative energy in the development of the common law. A custom is necessary and important to study for judicial decision, not to popularly bring it in action. Throughout the stages of Legal History, the Judges are not making new customs but are framing rules with reflection to the customs. So, while reframing the new laws securing the rights of consumers of various public services, the study of history is needed. Hence, it is only through the application of old rules that the new rules are coming out. Customs always steps in where history and philosophy do not work properly. There is a triangle of laws in England divided into the common law, statute law and the customs. The common law further re divide custom into the general custom, particular custom, and the certain custom.¹¹

- iii) **Sociological Method** - Through this method, the judge shall focus on the Roscoe Pound Social Engineering theory in constructing the society revisiting the flaws found and correcting it where the state shall act as the Well fare state for the wellbeing of the people providing maximum benefit to the society at large. The judge shall focus only on the social justice focusing where the balance of all the interests is served and in total but not in the individual. Such interest shall be of symmetry, certainty, social interest, equity and fairness. All the methods shall focus on the rebuilding of the norms when need with new protections to provide for the rights.

- iv) **Analogical Method** - The simple method of borrowing other methods having a different jurisprudential reflection. It may observe the various precedents quite similar to the problem at present, frame and reframe it with logics to come to a new judgment. It was in the case of *Bijoy Emmanuel v. State of Kerala, 1986* where the SC observed the cases of a similar issue in Australia and U.S.A to deal with the special cases dealt there. Even the concept of the Judicial Review was observed and taken from the famous *Marbury v. Madison* case.

¹¹ Benjamin N. Cardozo, *The Nature of the Judicial Process*, 27 (Wildside Press LLC, New York, 1921).

It is only with through these tools that the Judges brings out his various techniques in utilizing them and framing the law and order to bring the social order. The techniques are as follows:

- a) **Interpretation** – The judge shall interpret the community with its sense of law and order and must supply with various doctrines and rules to harmonize the results to come after removing the uncertainty and correcting the portions needed. He needs to apply the facts of the cases, the questions arising, and solution needed to serve social justice. While interpreting the statute the Judge need to go to the literal or the liberal approach of interpretation. In case of the *liberal interpretation*, the court simply follows the Supreme law of the land (the Constitution) and the other statute and legislatures developing through it, and carefully interpreting and deducing the cases as per the interests of the individuals. The Liberal Interpretation emerges because of the change in the theory of the role of the Judge. In the course of time, the role of the judge has been abandoned. The law creative role of a Judge is very well recognized in modern times. The American Realist Jurists greatly emphasized such a judicial role. A judge so has several alternatives. The creative interpretation of the Constitution hence shall focus on the two parts *firstly*, interpreting the powers of the government affecting the people and the property *Secondly*, interpreting the people's rights broadly and liberally rather than mechanically and literally. The SC in a case ¹²observed that 'the Constitution prevails over the will of the people as expressed through the majority party' in Legislature. The will of the people as expressed through the majority party prevail only if it is in accord with the Constitution.¹³ The court also provided a liberal view in interpreting the *Maneka Gandhi v. U.O.I.*¹⁴, in case of the *literal interpretation* the court sticks to every letter of the word lacking to show any kind of creativity in it. The statute shall be presumed to be constitutional and as mentioned in the case of the SC¹⁵ that while interpreting the provisions of the Constitution, we should go to the plain words used by the constitutional makers. In the case of *Keshavan Madhava Menon*, the Supreme Court applied to the Constitution the rule of statutory interpretation that every statute *prima facie* is prospective unless expressly or by necessary implication,

¹² *B R Kanpur v. State of Tamil Nadu*, AIR 2001 SC 3455.

¹³ M.P.Jain, *Indian Constitutional Law*, 1678(LexisNexis, Gurgaon, 1962).

¹⁴ AIR 1978 SC 597.

¹⁵ J Mukherjee on *Chiranjit Lal's case*, AIR 1951 SC 58.

it is made to have retrospective operation.¹⁶ Another strict constitutional interpretation has been found in Gopalan's case while interpreting Article 21.

- b) **Filling the gaps** – The role of the judge is not to legislate but to interpret the Statute and while doing so he has to maintain and protect the spirit of the law and harmoniously co-relate the various provisions of the statute. The Judge cannot legislate but he can definitely make an attempt to fill in the gap the legislature left out, while making the law by default or not rethinking in-depth that a new kind of problem beyond the letters may arise. He will act with the necessary supplements to fill the gaps to fill the basic needs of society. Cardozo has famously stated that a judge is not a Knight errant roaming at will in pursuit of his own ideals of beauty or of goodness. He is supposed to draw his inspiration from consecrated principles.¹⁷
- c) **Make recommendations** – Where the law remains completely silent and the judge has to decide cases on the basis of the public needs, he has to frame his own guidelines depending on the variety of cases coming before him in respect to the public issues. With the effect of PIL, a lot of cases emerged before the court which made the Judges frame the guidelines as found in the *Vaisakha's case*¹⁸ where the SC gave a number of guidelines regarding the sexual harassment of women at workplaces. The *D K Basu case*¹⁹ where the various guidelines were provided regarding the custodial deaths and the process of arrest by the policemen and how the arrested persons are treated in the lock-ups. Further in the *Association for Democratic Reforms V. U.O.I, 2001*, the Delhi High Court and on appeal the SC had given guidelines relating to the electoral process from the impact of criminals and their wealth and bringing the electoral reforms in India.
- d) **Mediation Proceedings** – The Courts also act as the mediators in maintaining the peace in case of disputes where parties agree to settle outside court. In various kinds of the

¹⁶ *Supra* note 1 at 1677.

¹⁷ Cardozo, 'The Nature of Judicial Process' 144 (Yale University Press, London, 1921).

¹⁸ *Vishakha v. State of Rajasthan, 1995*.

¹⁹ *D. K. Basu v. State of West Bengal, 1997*.

mediation process in case of the tribunals, consumer courts and in the institution of marriage they allow the settlement of disputes.

Some Cases Reflecting the Creativity

1. *State of Haryana v. Bhajan Lal & Others AIR 1992 SC 604*: The SC provided guidelines regarding a cognizable offence when received, the FIR shall be based only on the rational inference.
2. *State of W. B. v. Swapan Kumar Guha & Others 1982 SCC 561*: The SC gave guidelines on the basis of the investigation
3. *Nandini Satpathy v. P. L. Dani AIR 1978 SC 1025*: In this case, the guidelines were provided regarding any person cannot be coerced or influenced into giving a statement, the accused person shall be informed of his or her rights to consult a lawyer at the time of the arrest or in detention.
4. *PUCL v. Union of India and Another AIR 1997 SC 568*: Guidelines were given on the restricting the tapping of the telephones without any authorization from the Home Secretary Govt. of India.
5. *Delhi Domestic Working Women Forum v. Union of India & Others 1995 SCC 14*: These were guidelines relating to as soon as the rape victims report the crime at the police station, she must be informed about her right to get a lawyer before any questions are asked to her.
6. *Joginder Kumar v. State of U. P. and Others 1994 SCC 260*: The court mentioned that the arrests are to be made in a routine manner and the arrested person shall be allowed to inform their friend or relative about where such arrest is being made.
7. *D. K. Basu v. State of West Bengal AIR 1997SC 610*: The SC gave the directives on the 3rd -degree torture and the exact number of methods used to extract information in case of any custodial violence the arrested person must be allowed to consult a medical officer within 48 hours of such and undergo treatment if needed.

8. *Lalita Kumari v. Govt. of U. P. W. P. (Crl) No. 68/2008*: Where the mandatory registration of FIR was needed in the following matter like matrimonial disputes, commercial offences, medical negligence offences, corruption cases, was mentioned by the SC.
9. In *M. C. Mehta v. U.O.I*: The SC gave directions in setting the mechanical stone crushing activities in and around Delhi, Faridabad and Ballabhgarh complexes and directions were issued for allotment of sites in new 'crushing zone' set up at village Pali in Haryana to the stone crushers.
10. *A. P. Pollution Control Board v. M. V. Naidu, 1999*: In this case the SC referred to the need of establishing environment courts which would have the benefit of expert advice from environmental scientists or technically qualified or knowledge persons, this being a part of the judicial process, after taking juristic view of various countries.
11. *Maneka Gandhi v. Union of India, 1978*: In this case the judiciary actually opened the ambit of right to life through which blossomed other rights relating to life. It was the first case to evolve the concept of a golden triangle all together.

Conclusion

Judicial Process is the wheel which has no conclusion but keeps revolving along with time having its innovative tools and techniques left in the hands of the Judges to give the magical conclusion when it relates to showing some creativity in giving magical solutions to the society which the law framers, the makers and the breakers never thought of framing or arising. On the other way, the judiciary has its night guards and the social monitors who use the tools and techniques actively to take control of the adverse situation contrary to the legal system arising and another wonderful part is the review where the Judges focuses on the ears to listen, any part or portion that have been left out or needed to be reheard and rechecked. Had there been no creativity the judicial process would run the lack of fuel and gradually come to a stagnant situation making the system to clog. The SC in order to maintain the social order in the society provides various guidelines relating to the school buses, school bags of children, to quickly resolve the POCSO cases within 60 days and to set up exclusive courts particularly for such. Besides this guideline for women, on sexual harassment at workplaces, for a clean healthy environment, traffic safety

rules and on the policing system has been provided from time to time. In a nutshell, without the creativity, the status of the human being would have been vulnerable having nothing to claim for change.