

# Supreme Court of India and Social Jurisprudence

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"Choosing freedom is not, as we are told, choosing against justice.... If this cruel century has taught us anything at all, it has taught us that economic revolution must be free just as liberation must include the economic."<sup>1</sup>

â€”Albert Camus

The Supreme Court of India, during the last decade, has been developing a new jurisprudence which for want of a better expression may be called 'social jurisprudence'. It has achieved a balance between political rights and social rights. In this achievement, the social rights have been given greater importance in some cases. This achievement may be described as unique.

Even, in the United States of America, there is a move to recognise some rights as core rights which are called subsistence rights or rights to minimal economic security. These rights include "unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care". These rights are justified by Professor Louis Henkin. He says, "In the United States, rights are essentially freedoms.... Neither the Constitution nor the economic, social, political system of the United States entrenches economic and social rights in the spirit of the Universal Declaration of Human Rights and the Covenant on Economic and Social Rights".<sup>2</sup> If this view of the Constitution of the United States of America is true, it is much more true of the Constitution of India which includes Article 51, Article 51-A, the Directive Principles of State Policy and a clear statement in the Preamble that the Union of India has been constituted to secure to all its citizens social, economic and political Justice. Now that the Supreme Court of India has impliedly accepted the theory of 'unenumerated rights' in its interpretation of Article 21, it is submitted that there is adequate scope for the development of the theory of 'core rights' or 'subsistence rights'. These subsistence rights do not conflict with traditional liberties. On the contrary, they enhance these liberties. For, traditional liberties arose out of protest against oppressive political institutions, while the subsistence rights arise out of protest against oppressive social and economic institutions. The concept of human rights is complete only when there is acknowledgment of subsistence rights along with traditional liberties. As a matter of fact, the Supreme Court of India accepted this principle when it laid down in *Minerva Mills* case<sup>3</sup>, that there is harmony and balance between fundamental rights and the directive principles of State policy and this harmony and balance is a basic feature of the Constitution. The Supreme Court upheld traditional liberties i.e. fundamental rights when there is political threat to these rights. Similarly, the Supreme Court has to uphold subsistence rights when there is social and economic threat to these rights. Political threats to traditional liberties may be conscious or otherwise. But, the social and economic threats to subsistence rights being conscious these rights command greater attention from the judiciary. As the Supreme Court ensures the enjoyment of fundamental rights by warding off political threats, similarly the court has also to ensure enjoyment of subsistence rights by warding off social and economic threats. This is the new role of Indian Supreme Court. It is through this role, the new jurisprudence is being evolved.

There is another factor which also contributes to the evolution of social jurisprudence. Indian Constitution aims at a Welfare State. Main characteristics of a Welfare State are explained by Prof. W. Friedmann.<sup>4</sup> Importance of a Welfare State is twofold : it provides a wide range of benefits to be made available by the State to the citizens as of right, but at the same time it enhances the power of the bureaucracy, since the benefits thus provided are inevitably administered by government departments or their agents. Hence a Welfare State creates its own legal problems.<sup>5</sup> These problems cannot be solved by judiciary if it adopts the traditional rules of interpretations. Nor can they be solved by Judges who play the role of disinterested umpires. Judges are a part of the constitutional set-up. They have to play their role in securing to all citizens of India social and economic justice. The Judges can play this role effectively only when they participate in their limited way in the process of securing social and economic justice. Hence Judges have to become 'activist Judges'. They have to protect fundamental rights of the citizens which are individual rights against the tyranny of the government and the socio-economic rights, particularly of the unprivileged against the tyranny of bureaucracy, anti-social forces and unscrupulous politicians.

The Supreme Court of India during the last decade starting from 1978 has been responding to this new responsibility in an admirable manner. It has been guarding both the political liberties as well as socio-economic rights of the citizens, particularly of the unprivileged and the downtrodden people. It has developed new strategy of 'public interest litigation' for upholding and enforcing the rights of the unprivileged. It has devised new methods, forged new tools and innovated new strategies. Credit of this new development goes primarily to activist Judges like P.N. Bhagwati, Krishna Iyer, D.A. Desai, Chinnappa Reddy, JJ. Their attitude was influenced by radicalism and insurgency, Madon, J. of the Supreme Court of India justifies the role of activist Judges. He says, "A Judge who denies to himself judicial activism, denies to himself the role of a judge. Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant sphere".<sup>6</sup>

In the United Kingdom also, the judicial philosophy of activism has been accepted by some Judges. Lord Devlin propounds the theory of activist Judges. Lord Denning was considered as an activist Judge. Prof. H.A.L. Hart while

discussing the elements of the legal system mentions that Judges also exercise more explicitly legislative or creative function of altering established rules and formulating new ones.<sup>7</sup>

In the United States of America also some Judges have played the role of activist Judges. Cardozo rightly expressed the role of a Judge. He wrote<sup>8</sup>:

There is an old legend that on one occasion God prayed, and his prayer was, "Be it my will that my justice be ruled by my mercy". That is a prayer which we all need utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course that Judges are commissioned to set aside existing rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and distance.

Chief Justice Earl Warren was one of the last activist Judges in the U.S.A. The activist Judges resorted to non-interpretative review. They determine the constitutionality by reference to value judgment other than the one constitutionalised by the framers of the Constitution. This has happened particularly in cases of improving conditions in prisons and mental institutions. The Judges gave meaning to public values and social morality. Thus, they attempted to secure accountability of the government to the people it purportedly serves. Non-interpretative review is a part of public law movement. There are critics of non-interpretative review. It is pointed out that judiciary by its very composition is not competent for resolution of issues raised in institutional reform and other similar cases. Moreover compliance with the order of judiciary would in such case be a burden on public treasury. It is also urged that judiciary not being accountable to any other organ, should not play this role. These points are well met by Michael J. Perry.<sup>9</sup>

The Supreme Court of India has faced the challenges of a Welfare State in a unique manner. It has accepted new concepts of 'locus standi' and 'public interest litigation'. It has interpreted the constitutional provisions relating to the fundamental rights and the directive principles of state policy in a harmonious manner, thus enabling the citizens of India to march towards the goal of socio-economic justice. It laid down that there is harmony and balance between the fundamental rights and the directive principles and this harmony and balance is one of the basic features of the Constitution. The Supreme Court also played its role in upholding human rights and political rights. It interpreted the term 'life' in Article 21 to include the right to livelihood, the right to speedy trial etc.<sup>10</sup> It read in Article 14 the notions of 'fairness', 'reasonableness' and 'absence of arbitrariness' and thus widened the protection of Article 14. It evolved doctrine of basic structure of the Constitution and put a check on whims of Parliament to amend the Constitution as it liked. Thus, both in the sphere of political rights and also of economic and social rights the activist Judges of the Supreme Court have evolved a new Indian jurisprudence. This is described as 'judicial law-making' and is not approved by some critics. But, for interpreting a dynamic constitution as the Constitution of India is, a creative attitude is necessary. If such an attitude is not adopted Indian Constitution will cease to be a social document which it is.

This creative role can be played successfully only by a well-equipped Judge. It is only a Bhagwati or a Krishna Iyer and others of their category who can play the role effectively. Douglas, J. of the United States Supreme Court rightly observed, "The problems before the Supreme Court require at times the economist's understanding, the poet's insight, the executive's experience, the politician's scientific understanding, the historian's perspectives"<sup>11</sup> A Judge who has a high intellectual ability coupled with wide reading of history, economics, philosophy and a penetrating genius alone can play the role of an activist Judge consistent with the oath he takes under the Constitution. A Judge's reputation as an activist Judge should arise from his judgments and not from public speeches delivered from public platforms.

Even an activist Judge has to remember that he is first a Judge. He has to imbibe and cherish in his personal life the qualities of aloofness, independence and integrity. In addition, he must have complete command over law and related subjects. Only such Judges can play the correct role of activist Judges and would enable the citizens of India to secure socio-economic justice along with other ideals enshrined in the Constitution. Such Judges will strengthen the movement of the development of 'social jurisprudence'. The pledge of socialism in the Preamble of the Constitution can be fulfilled only by social jurisprudence to be developed by competent activist Judges.

The expectation of the Indian Society today has been well explained by Madon, J. of the Supreme Court of India. He writes :<sup>12</sup>

The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should sleep at least with a roof over their head, that if the rich can eat both bread and cakes, the poor should at least eat bread, that if the rich can live in opulence, the poor should at least be able to afford basic comforts of life. If the law is to operate today, so as to secure social justice to all, who else can do it but Judges whose constitutional task is to interpret and apply the law.

The judiciary thus wishes to bring about a silent revolution for the purpose of securing socio-economic justice to all. The urgency of securing socio-economic justice is rightly pointed out by Chandrachud, C.J. He observes :<sup>13</sup>

The promise of better tomorrow must be fulfilled today, day after tomorrow it runs the risk of being conveniently forgotten. Indeed, so many tomorrows have come and gone without a leaf turning that today there is a lurking danger that people

will work out their destiny through the compelled cult of their own 'dirty hands'. Words bandied about in marbled halls say much but fail to achieve as much.

Will the judiciary be able to achieve this? It may or may not. But, it has definitely set in action a new movement. Julius Stone rightly pointed out :14

It is not given to any generation of men to complete the task of human improvement and redemption but no generation is free to desist from them.

It is submitted that the activist Judges are developing a new concept of 'natural law' distinct from the concept of natural law associated with rights to property. Such a development is inevitable in a welfare society. Denning stressed the need for a new equity. Cardozo pointed out that ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live. The concept of social and economic justice is closely linked with ethical principles. Cause of law is the welfare of society.

When the welfare of society becomes the aim as against mere individual rights, a new concept of natural law is developed. This concept is based on ethical considerations and it gives rise to the concept of social morality. This social morality aims at making the life of every human being a decent life. The Supreme Court of India in the process of development of social jurisprudence stresses the importance of social morality and ethical values in our public life. These qualities are essential to make India a strong welfare democracy.

- Quoted by Henry Shue in 'How does the Constitution secure rights' (edited by Robert A. Goldwing and William A. Schambrav) (American Enterprise of Institute Constitutional Studies) (1985), p. 74 Return to Text
- Ibid., p. 76 Return to Text
- *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 Return to Text
- W. Friedmann : 'Law in Changing Society', Pelican edn., pp. 369-71 Return to Text
- Conference Papers and Proceedings of the Third International Conference of Appellate Judges, New Delhi, March 1984, Supreme Court of India, New Delhi, 280 page. For further discussion on the role of judiciary in a Welfare State, see T.K. Tope : 'Expanding role of Judiciary in a Welfare State'. Conference papers Ibid., pp. 277-91 Return to Text
- Ibid., p. 210 Return to Text
- H.A.L. Hart : 'Judicial Discretion and the Concept of Law', 35 Cambridge Law Journal (1976) 137, p. 139 Return to Text
- Cardozo Benjamin : 'Nature of Judicial Process', p. 71 Return to Text
- Michael J. Perry : 'The Constitution, the Courts and Human Rights' (1982), p. 146 Return to Text
- *State of Maharashtra v. Champalal Punjaji Shah*, (1981) 3 SCC 610; *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 108; *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96 ; *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141 ; *Sunil Batra (II) v. Delhi Administration*, (1980) 3 SCC 488 ; *Board of Trustees, Port of Bombay v. D.R. Nadkarni*, (1983) 1 SCC 124 ; *M.H. Hoskot v. State of Maharashtra* ; (1978) 3 SCC 544 Return to Text
- Cornell Law Review, Vol. 45, Spring 1960, p. 3. For other views on this topic see pages of this book Return to Text
- Conference papers, p. 210 Return to Text
- *Minerva Mills case*, p. 650 Return to Text
- Conference papers, p. 298. The Divine Geeta has rightly said:  
"In this path no effort is ever lost and no obstacle prevails ; even a little of this Dharma saves from great fear."Â  
*Bhagwadgita II 40* Return to Text