



Boundaries of judicial positivism: A critical approach

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Abstract: *It is well accepted that every time judges interpret laws they necessarily infuse into law parts of a system of social philosophy, and as such give direction to all law making. Judicial positivism necessarily leads to the age old question: Do the Judges make law? The main cause for the expansion of the role of judges can be said to be the positioning of the judiciary under the constitution as the custodian of Fundamental Rights. It has undoubtedly enhanced the potential creativity of judges.*

Key Words: accepted, judges, interpret laws, necessarily, infuse, system, philosophy, direction, making.

With or without interpreter's awareness, some degree of creativity and discretion is inherent in any kind of interpretation and the result vary enormously depending, inter alia, on the qualities, the understanding and the mood of the interpreter. Away from the pure Declaratory theory the supreme court in India has approved the creative role of judges. In *Kesavanand Bharti and Gujrat Steel Tubes Ltd*,¹ the court has referred with approval to the observations of justice homes, "I recognize without hesitation that judges do and must legislate, but they can do so only interstlessly; they are confined from molar to molecular motions." The creative role being played by the Indian judiciary can be seen in innumerable reported cases it handled during the last few decades.

Judges and courts create jurisprudence because of the way they are structured, but, "Judicial power is the jurisdiction of reason, in ways that neither legislated nor executive power is, in its very native' says Upendra Baxi in his article "Dialects of the face and mask"². The recognition that a degree of creativity, or the element of choice or discretion, is intrinsic in any act of interpretation should not be exchanged for an affirmation of a total freedom of the interpreter, Discretion should not be sheer arbitrariness. He should not be a boundless law maker. There are, and necessary to be followed, the limits of judicial freedom, both procedural and substantive.

"To be sure, precise substantive limits are not a condition sine qua non for the judicial nature

of the decision process. In other words, deciding on the basis of pre-existing substantive laws is not an essential, sine qua non characteristic of judicial activity. Judge can well be entitled to base their decision on equity or any other very broad, and as such, practically empty, symbol of values and still be judges. Who would deny the judicial character of the decision rendered two millennia ago by the classical Roman adjudication or those rendered several centuries ago by the English chancellor and based on acquits or conscience, Mauro Cappelletti.³

Today judges in India needs not have to base their decision on any practically empty symbol of values. The dynamic constitution of India and its vibrant Articles under the heading Fundamental Rights and Directive principles of state policy provides more than mere symbols of value, a clear direction with the power of judicial review, not only of the administrative orders of the executive but also that of the legislative Acts and rules, the substantive limits on the exercise of judicial power in India has more or less narrowed down to these constitutional mandates. However, it is necessary to be guided by the self set standards and the rule for the exercises of its judicial power in various well considered judgments.

In a democracy like India the judiciary could employee creative role, neither than power in two different ways. Either to further the political ideology of the government in power or two establish and promote the constitutional ideal and keeping in view the aspirations of the people, of the majority and



minority, privileged and the unprivileged, rich and the poor and that of every other sections. The first case rather than being creative it can best be only supporting and his likely to fail in its role as an important organ of democratic governance, particularly in-performing its duties under the rules of "check and balances". It is quite common in such cases to become destructive, like in Nazi Germany, before the world war II where judges gave a political interpretation to law and twisted it to further the aim of the Nazi rulers. The inhuman execution and suppression of the Jews were made under the orders of the courts. But in the second case, courts can add to the over all representation of the system in a democracy by protecting groups that cannot gain access to the political process, says Professor Martin Shapiro According to him.

"It is these marginal groups, who find it impossible to gain access to the political branches which the court can best serve. The court proceedings are judicial; that is; they involved adversary proceeding between two parts viewed as equal individuals. Therefore, marginal groups can expect a much more favorable hearing from the court than from bodies which, quite correctly, look beyond the individual to the political strength he can bring into the arena. The court's power are essentially political. Therefore, marginal groups can expect of the court than political support which they can not find elsewhere.

Independence of judiciary is an essential requirements of an egalitarians welfare democratic state and therefore, rather than playing a second fiddles to the government in power it is expected of the judiciary to be a primary organ of the state with original and independent thinking and judicial ways of expanding its creative power positively towards achieving the constitutional ideal. It is unnecessary to be worried about the judiciary creating any hindrance on the way of national progress chartered

by the government in power, because a proper excise of judicial creativity can only be supportive and supplementary to any considered welfare and progressive measure of the executive, provided of course, the judiciary learns to be pragmatic to the extend the current social order demands.

However, a judge should not forget those age old rules of caution i.e. if judicial nature of at adjudication not be perverted, the judge is bound to procedural passivity, in the sense that he can not initiate a case of his own motion, he is bound to procedural impartiality, neutrality, and detachment, in the sense that he has to be above the parties and is not to decide a case in which he is him self a party in interest, and, he is bound to procedural fairness, in the sense that he has to guarantee that all the party have a fair opportunity to be heard.

"When you are in doubt, think of the most weak and deprived member of the society and consider whether the line of action you propose to take is going to benefit him in any manner and to what extent." According to Justice Dharmadhikari this talisman given by Mahatma Gandhi to judge social and individual action should also guide the interpreters of the constitution and those working it.

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