

THE JUDICIAL PROCESS AS AN INSTRUMENT OF SOCIAL ORDERING

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Abstract:

While an attempt to understand the judicial process requires deep understanding of formal law and procedure which often results to understand what is judicial process in India. We must first understand what is Justice and the meaning of judicial and Process separately. Justice is an irrational term. In laymens term it means absence of fear it comes with lack of arbitrariness, freedom of liberty and equality and equal asses to quick affordable satisfactory credible dispute settlement forum. Justice in nut shell means ruleof law. critical analysis of judicial process? Is it merely a statement of criticism or something beyond the imagination of one's thinking? However, if we closely analyses our present topic, then all the doubts become crystal clear because sixty two years after independence, the entire judicial system is on the verge of collapse. While the superior courts have earned praise from citizens for intervening in citizen's concerns raised through public interest petitions, only those with resources or cunning can hope to get ordinary justice. Over three crore cases are presently pending in various courts. In most cases, citizens have little hope of getting justice in their lifetime. Corruption and abuse of court processes are rampant. Judicial process is basically "whole complex phenomenon of court working" and what went wrong with this phenomenon is the issue in my current project.

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Introduction:

The Nature of Judicial Process: The duty of the judge is to interpret and apply the law to the cases before him. When a judge decides a case, he does something more than simply applying a law; he interprets and moulds the law to fit in with the facts and circumstances of the case. According to Cardozo, while moulding the law, he may use the methods of philosophy, of history, of sociology or of analogy. He moulds the law so as to best serve the requirements of the society. The methods of philosophy, history, sociology and analogy are the tools using which a judge performs his duty. Using these methods, he fulfils his obligations towards the society which require him to give his view, his notion of law.

The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep seated and imperious sentiment. By the method of philosophy, the judge makes use of his own reasoning and standards of public good. Under this method, the judge makes use of his own inner sub conscious element and gives to the society his own notion of right and wrong, of just and unjust, of equality, fairness and justice.

By the method of history, it is meant that the judge makes use of the past decisions. He follows the doctrine of precedent. He compares the case he has in hand with the past decisions and makes use of the one which most closely resemble with the one he has to decide. The doctrine of precedent is based on the principle that like should be treated alike and that there is stability and certainty in law. However, while dealing with the precedents, the judge has to distinguish between those which are liberal and beneficial for the future and those which are oppressive to the society. The judge has to choose those precedents which best serve the purpose of the society.

According to Cardozo, the method of sociology demands that within the narrow range of choice, the judge shall search for social justice. The judge has to see that his work leads to the attainment of social order. He has to provide for the welfare of the society. The judge has keep the welfare of the society as the ultimate aim of his work. He cannot attempt an action which would not be beneficial for the society at large.

By the method of analogy, it means that the judge makes use of the alien jurisprudences. It is a case where the judge borrows from other jurisprudences. While borrowing from other jurisprudences, the judge has to make use of the similarity in laws and prevailing social conditions of the region from where he borrows the provisions. The judge compares the case with similar problems in other regions. In the case of *Bijoe Emmanuel v. State of Kerala*, the Supreme Court of India made use of the law prevailing in other countries to decide the issue. In this case, the Supreme Court made reference of the similar cases decided by the courts in Australia and U.S.A. to deal with the special case of a particular sect. For a judge, law is never static. It is dynamic and keeps changing. The judge has to mould it in accordance with the needs of the society. The judge plays a very dynamic role in shaping the law so as to best serve the society. The judge has to take care that the law is progressive and protects the interests of the society and is not oppressive and suffocating. The aim of judicial process is the attainment of social good. The judge has to see that the law helps the society at large and does not infringe the goals of justice and liberty.

Social order: the purpose of law

There have been different approaches to law. According to Austin, law is the command of the sovereign. Bentham proposed his utilitarian calculus, according to which the aim of law is to bring about maximum good of the largest number. Bentham's hedonistic calculus was based on the concept of social utility. According to Roscoe Pound, the purpose of law is social engineering. Law aims to achieve social good. The welfare of the society is the paramount consideration of law. Law aspires to end all social evils and to bring about social order. Cardozo has stated that the final cause of law is the welfare of society. When judges 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 its distance. Law and society are interdependent and neither can be separated from the other. The good of the society is its greatest requirement. Law serves the role of protector of the social order. Law aims to attain the good and order in the society. Social order is what the law aims to achieve. It is the ultimate object of all laws. Law has to provide social order in order to protect the society from disintegrating.

Role of Judges in bringing about Social Order:

The ultimate aim of all law is to bring about social order. The judge is an important member of the legal institution. He plays an important role in shaping the law to serve the social interest. For a judge, law is never static. A judge is empowered to review the various provisions of law. He is an independent and impartial authority which can verify the reasonableness of a law. Being independent from the influence of the executive and the legislative machinery, a judge can form an unbiased opinion on any question of law.

A social problem requires a solution and judges have the role of resolving disputes. While settling a dispute, the judge is also required to take into consideration the various social requirements. Amongst the various options being available before him, a judge has to choose the one which best serves the interests of the society.

The welfare of the society must be the guiding force for a judge when he sits to perform his duty. His obligation towards the society is to fulfil the various social requirements of justice, order and security. He has to give the welfare of the society a paramount place while dealing with any issue. Being the interpreter of the society of its sense of law and justice, the judge has to be careful in his work as his decisions determine the rights and obligations of various members of the society and affect the people at large.

The judge provides for social order during his job as an interpreter. The various ways in which he can provide for social order are by the methods of interpretation, supplying of omissions, suggesting and recommending changes and new regulations and also through mediation process. These are the techniques by which a judge brings about social order.

(a) Interpretation:

The judge is the interpreter of the community of its sense of law and order and therefore, he must supply omissions, correct uncertainties and harmonise results with justice through a method of free decision. While dealing with a case, the judge is required to apply law on the facts. While applying law he may be faced with a question of law which requires him to interpret the various legal provisions placed before him. While interpreting a statute, a judge can take

either a literal approach or a liberal one. In literal interpretation, the judge sticks to the letter of the word and there is not much creativity in his job. Sometimes when a literal approach does not give a satisfactory result that the judge goes for the liberal interpretation of the statute. In liberal interpretation, the judge makes use of his knowledge of various laws, the customs and his own creativity.

One of the most important rules of interpretation is the mischief rule, in which the judge has to determine the mischief which the law had sought to make good. Using the mischief rule, the judge has to imagine and understand the problems in the society which required that a particular law be made.

Another important principle in interpretation is that there a presumption of constitutionality of the statute. The judge has to presume that the statute is constitutional and the legislator had not intended to infringe the fundamental rights.

Further, there is the rule of harmonious interpretation, which states that all the provisions are to be interpreted harmoniously so as to give meaning to all the provisions. The rule of harmonious interpretation underlines the principle that all the provisions of a statute are complementary to each other and are not mutually destructive. While interpreting a statute, the judge has to take care that he gives such an interpretation to the provision that when the statute is read in its entirety, there is no conflict between the provisions. The role of a judge as an interpreter requires great skill from his side. He is required to give such an interpretation to the legal provisions which best serve the interest of the society. While interpreting the legal provisions, the judge has to think what purpose, what end of the society his interpretation would serve. He has to take the interest of the society as the paramount issue. The statutes affecting the society at large require the most careful interpretation as the interests of a large number of individuals may be lying at stake.

Thus, when a judge interprets a written Constitution, he has to take utmost care while expressing his view on the problem. The written Constitutions are generally given a very wide

and liberal interpretation because they are the supreme laws of the land and all the other statutes owe their authority to the Constitution.

Using liberal interpretation, in the case of *Maneka Gandhi v. Union of India*, the Supreme Court enlarged the scope of right to life to mean a dignified life and not just mere animal existence. While interpreting a law, the judge has to interpret it in a manner that it benefits the society at large.

(b) Filling up of blanks: Sometimes a judge has to do something more than just simply interpret a statute. He may be required to correct all errors in it. He may further be required to fill in the missing blanks in a statute. It is not possible for the legislator to imagine each and every circumstance which could arise in the future. While interpreting a statute, a judge may be required to imagine what the legislator would have provided for that particular circumstance. When a judge starts to imagine what the legislator would have intended, he takes the place of the legislator. He has to act for the legislator, giving sense to the statute as a whole and making up what had been left behind.

A judge cannot legislate infinitely. According to Cardozo, “He legislates only between gaps. He fills the open spaces in the law.”

While interpreting any statute, the judge has to keep within the restraints laid down by the legislator. The role of the judge is not of legislating but of interpreting and applying the law. It is during his job as an interpreter that a judge maybe required to fill in the missing blanks in the statute. However, while filling up the blanks, a judge has to take precaution that what he supplies to the law protects the spirit of the law and does not destroy it. A judge has to take care that he maintains the harmony between the various provisions of a statute. While supplying omissions, the judge has to protect and preserve the spirit of the law.

According to Cardozo, “when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs, that we ask the solution.”

Thus, in order to fulfill the needs of the society, the judge supplies the gaps in the statutes. However, the law making work of a judge is restrained as “He is not a knight errant roaming at will in pursuit of his own ideals of beauty or of goodness. He is to draw his inspiration from consecrated principles.”.

(C) RECOMMENDATIONS:

Often a judge may be required to give his recommendations or suggestions to enact the particular law which would serve the social need. A judge plays a very important part in social ordering when he lays down suggestions or recommendations regarding any social problem. Where the law is silent, the judge may be required to cross his bounds and take up the role of legislators. He may be required to give suggestions in order to resolve certain social problems. These suggestions play a very vital role in satisfying the various requirements of the society.

The public interest litigations play a very important role in protecting the interests of the society. By means of public interest litigations, the lawyers and judges attempt to eradicate certain social problems. Public interest litigations play a very useful role when the legislature and the executive fail to find out a solution for the existing problems. Public interest litigations are a recent creation of the courts by which they aim to provide the cure for the ills prevalent in the society. The judges are very instrumental in eradicating the social problems. The judiciary took a very active role while laying down the procedural requirements required while making an arrest in the case of *D.K. Basu v. State of West Bengal*. In this case the Apex Court laid down various guidelines which are to be followed by the policemen while making any arrest. The reason behind laying down such provisions was that there were complaints of police atrocities in the police lock ups.

Similarly, in the case of *Vishakha v. State of Rajasthan*, the Supreme Court again laid down guidelines for the safety of working women. In this case, the instances of sexual harassment of working women at their workplace were an issue. The Supreme Court laid down various guidelines to be implemented by the employer for the protection of the working women. In this case, the court even declared that the sexual harassment of the female employees amounted to the violation of the right to work and is discriminatory against them.

In the case of *Sarla Mudgal v. Union of India*, while dealing with the problem of anomalies in different personal laws and people making use of these differences to defeat the end of justice, the Supreme Court had expressed a view that the uniform civil code should be implemented. In this case also the judiciary tried to provide for the social requirement for a uniform civil code which would take care of all the problems relating to the differences in the personal laws.

The Supreme Court has also laid down certain rules to be followed when the adoption of an Indian child is made by any foreigner. The reason behind such recommendations was the presence of the menace of the use of young children in beggar and slavery. These rules help in protecting the child from economic, social, physical and sexual exploitation.

Further, in the case of *Association for Democratic Reforms v. Union of India*, the Delhi High court and on appeal the Supreme Court has given guidelines for cleansing of the electoral process from the impact of criminals and wealth and bringing about electoral reform in India. Similarly, the courts have taken active parts in issues related to illegal constructions, anomalies in school admissions, ragging at university level(Lingdow committee report) and so on. The court had taken these steps in order to ensure social justice.

The judiciary may be required to take up the role of legislators when the legislative fails to provide sufficiently for the social requirement. This act of judiciary is known as judicial activism. The judiciary has acquired its activist power from its review power. The judicial activism has played an important role in attaining social order as it satisfies the various requirements of the society.

(D) MEDIATION PROCEEDINGS:

The social institution requires certain relationships to be protected and sanctified. In order to prevent minor problems developing into irresolvable issues, the judges take the role of mediators. The role of a judge as a mediator is a very recent one. Till date, judges used to solve the disputes. Now they try to prevent the disputes from arising. In cases of minor discords, the judges help in solving the issues before they take the form of major disputes.

The judges suggest out of court settlement of disputes in order to prevent certain relationships from breaking down. In the present day society, judges suggest the use of mediation proceedings especially when the need is to protect an institution as sacred as the institution of marriage. Judges serve as the mediator in various cases to prevent a relationship from breaking down. The law mandates mediation and the courts encourage and endorse it. It is a cheaper, simpler and more productive manner of dispute resolution. It helps to restore the broken relationships and focuses on improving the future and not on dissecting the past.

The benefit of mediation is that it is a voluntary process and both the parties are able to assess their case and come up to an amicable solution. The judges play an active role in encouraging and endorsing mediation proceedings.

Conclusion:

A judge is the interpreter of the society. He makes visible the various laws. While interpreting a law, the judge also corrects the errors present in the law, he supplies the omissions in the law. The main object of law is to bring about social order and the judges play an important part in attaining that objective. The judiciary has taken an active role in attaining social order and justice. To serve the purpose of the social utility, the judge had to play the part of the legislator as well. A role, which has been much criticized but is very important for fulfilling the needs of the society.

A democracy needs a forum, other than the legislature and the executive, for redressing the legitimate grievances of the minorities- racial, religious, and political or others. In India, at the present time, the Supreme Court is laying great emphasis on vindication of the rights of the poor and deprived people. The court has acknowledged this fact. Thus, in Punjab Rickshaw pullers' case, the Supreme Court had stated that "Judicial activism gets its highest bonus when its order wipes some tears from some eyes."

Thus, it can be concluded that judicial process has a very active and positive role in social ordering.

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