
INNOVATIONS BY THE SUPREME COURT
OF INDIA TO IMPROVE ACCESS TO JUSTICE

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Sir Alladi Krishnaswamy Aiyar, an erudite member of the Constituent Assembly, in his address delivered at the Diamond Jubilee Celebrations of the Madras High Court Advocates Association on 17th April, 1949 said:

The future evolution of the Constitution will, to a large extent depend upon the work of the Supreme Court and the direction given to it by the court. From time to time, in the interpretation of the Constitution, the Supreme Court will be confronted with apparently contradictory forces at work in the society for the time being. While its main function may be one of the interpreting the Constitution as contained in the instrument of the Government, it cannot in the discharge of its duties afford to ignore the social, economic and political tendencies of the times, which must furnish the necessary background. It has to keep the poise between the seemingly contradictory forces.

He was a great visionary and his words were prophetically wise. Today the Supreme Court is certainly playing the role which was envisioned for it.

A Judge, unlike the Legislature or the Executive, cannot act by himself. Being an impartial arbiter by definition, he has to act only on a cause presented to him by an aggrieved party. The Courts strictly followed the doctrine of “locus standi”. This doctrine means that the doors of the judicial forum would open only to a knock by the aggrieved party and none else. This is a principle inherited from Anglo-Saxon jurisprudence which had become rooted in our

judicial thinking. Unfortunately, a large number of citizens of this country are unable even to understand their rights, leave alone knowing the means of enforcing them, because of wide spread lack of education and poverty. The social condition in which a large section of the society lives renders it impossible for them to seek redress against injustice. For them the high falutin principles of law have no meaning. All sound and fury, signifying nothing. Such persons are unable to come to the court and seek redress. In the celebrated case, **Bandhua Mukti Morcha Vs. Union of India**,¹ the Supreme Court took an activist approach and declared that where a legal wrong had been done to a person or class or persons who, by reason of being in a socially and economically disadvantageous position, cannot approach the Court for justice, any public spirited individual or social action group should be allowed and have the right to file an action in the court on their behalf. The court could be activated even by a mere letter – an innovation which has sometimes pejoratively been called the epistolary jurisdiction. The Supreme Court found jurisprudential support for this innovation by a liberal reading of Article 32 of the Constitution which provides that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is itself guaranteed. In the thinking of the Supreme Court, there is nothing in Article 32 which restricts the proceedings to originate only at the instance of a person who is aggrieved. The emphasis is on the word “appropriate proceedings”. Clause (2) of Article 32 of the Constitution empowers the

¹ AIR 1984 SC 802.

Supreme Court to issue “directions or orders or writs, including writs in the nature of **habeas corpus, mandamus, prohibition, quo warranto and certiorari**, for the enforcement of any of the rights conferred by Part III”. The Court decided that as long as a case of violation of any fundamental right guaranteed by Part III was made out, irrespective of how the case came before the Court, the Court is obligated to exercise its power and render justice. This dynamic and expansive interpretation of Article 32 enabled the Supreme Court to render justice in a large number of cases which, otherwise, would never have come before the courts. It has also given rise to new specie of litigation called “Public Interest Litigation”. As long as anyone, other than a mere busy body, having some interest in the matter, brings before the Court a situation of injustice to some one who is unable to come to court because of social conditions, the Court would examine the case and have it investigated by appointing appropriate Commissioners. If a case of injustice is made out, irrespective of technicalities, the Court would make an appropriate order which would do complete justice. In this direction the Supreme Court has drawn fully upon the reservoir of its power to do complete justice in Article 142 of the Constitution which empowers the Supreme Court “to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it”.

In the interpretation of the human rights clauses of the Constitution, the expansive constitutional jurisprudence built up by the interpretative exercises

carried out by activist decisions of the Supreme Court go much further than what was done in the United States under the 'due process' clause. From **Gopalan v. State of Madras**² to **Maneka Gandhi's**³ case there has been a sea change over the years. In **Gopalan's case**, Article 21 was interpreted to mean that deprivation of life or liberty could be justified by law, by any procedure which had the sanction of law. In **Maneka Gandhi's case** (supra) the Court holds that even the procedure prescribed by the law could always be scrutinized by courts, and any procedure which is arbitrary or unreasonable could not pass the test under Article 21. It is interesting to note here that when our Constitution was being framed, Justice Frankfurter of the U.S. Supreme Court advised Mr. B. N. Rao, who was India's Constitution Advisor, not to put in a "due process" requirement in the Life and Liberty Clause (Article 21) on the ground that it was liable to be interpreted too liberally as done in the United States. Justice Frankfurter advised Mr. Rao that he should adopt the more neutral expression used in the Japanese Constitution: "no person shall be deprived of his life of liberty except by procedure established by law." The irony of the situation is that although the Constitution did not adopt the 'due process' clause in Article 21, instead opting for the phrase 'procedure established by law', after **Maneka Gandhi** (supra), the result today is that "Indian judges have made of the Japanese wording, an American due process", as observed by a foreign author.

² AIR 1950 SC 27.

³ AIR 1978 SC 597.

The expansive interpretation of Article 21⁴ has enabled the Supreme Court to improve access to justice in a variety of cases where otherwise there would have been no remedy available. Article 21 is a fountainhead from which a whole lot of human rights have sprung up, which the Supreme Court has enforced. The right to legal aid;⁵ the right to speedy trial;⁶ the right to means of livelihood;⁷ the right to dignity and privacy;⁸ the right to health;⁹ the right to pollution-free environment¹⁰ and the right to education¹¹ have all been read in Article 21.

The institution of Public Interest Litigation, developed in the wake of avoidance of the rigid doctrine of **locus standi**, has resulted in the prolific growth of social interest litigation. We have a large number of cases decided by the Supreme Court where Public Interest Litigation has been launched to seek redress in matters which affect the community as a whole rather than an individual. Failure of the police investigative machinery to make proper investigation into substantial allegations of large-scale corruption is one such example. The Jain Hawala case is another.

The cases involving environmental concern have attracted judicial attention. Although laws to control environmental pollution and water, air and

⁴ Article 21 of the Constitution – Right to life.

⁵ *Hoskot v. State of Maharashtra*, (1979) 1 SCR 192.

⁶ *Hussainara Khatoon v. State of Bihar*, (1979) 3 SCR 169.

⁷ *Olga Tellis v. Bombay Municipal Corporation*, (1985) Suppl. 2 SCR 51.

⁸ *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332.

⁹ *Vincent Panikurlangara v. U.O.I.*, (1987) 2 SCR 468.

¹⁰ *M.C. Mehta v. U.O.I.*, (1988) 1 SCR 279.

¹¹ *Unni Krishnan, J.P. v. State of A.P.*, AIR 1993 SC 2178.

conservation of forest wealth and so on have been in existence for a long time, for want of political and administrative will the machinery requisite for enforcing the concerned laws had no teeth, and even if it had the teeth, it hardly bit. Consequently, there was large scale depredation of natural resources, deforestation and pollution of environmental resources which, if unchecked, would have depleted the country's resources, apart from deleteriously affecting public health. The credit for catalysing the legislative and executive machinery to take notice and act in such cases goes to the Supreme Court. In a number of such cases, the court directed independent investigations to be made and directed shutting down of pollutant industries and also awarded compensation on the international law principle of "polluter pays". The international law theory of 'sustainable development', accepted by the world community, has been adopted by the Supreme Court as part of our municipal law, in the absence of any specific legislation on the subject to the contrary.

The philosophy of the Constitution for attaining social and economic justice, described as its signature tune, has been identified and played over and over again by the Supreme Court in its decisions. In grappling with conflicting issues which arise in the resolution of human and socio-economic problems, the Supreme Court has frequently turned to the provisions of the Directive Principles for guidance and inspiration, though Article 37 states that the principles enshrined in Part IV are not justiciable, albeit they are fundamental in the governance of the country. Efforts made by the State to implement these

Directive Principles were too slow, and too little. The expansive role adopted by the Supreme Court led to injecting the blood of fundamental rights with the plasma of Directive Principles, making the Constitution less anaemic, robust and healthier. One such example is the celebrated case of **Unnikrishnan V. State of A.P.** (supra) where the Supreme Court elevated the right to education, the mandate of Article 45, to the level of a fundamental right under Article 21, and directed the executive to ensure its implementation.

There is a running controversy as to whether it is open to the judges to disregard the boundary separating the legitimate development of the law by them from what is impermissible to them, namely, legislation. It is worthwhile recounting Justice Cardozo's pithy observation in this regard that the philosophy of the common law has at its heart the philosophy of pragmatism.

The Judge is ever in a dilemma as to whether he should tread the beaten path, or throw to the winds the advantages of consistency and uniformity to do justice in a particular case. In the sagacious words of Justice Cardozo,

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains.

Law is a tool of social engineering. But for the lead given by the Supreme Court in several matters, where the law makers had lagged far behind, the law would be left far behind. In a number of judgments the Supreme Court has looked at the international law principles arising from international treaties, even where our country is not a signatory to those international treaties, and it has ruled that in the absence of a municipal law to the contrary what is accepted by the international community must be held to be the normative standard and, therefore, must be implemented in our country too. The case of **Vishakha** is a glaring example of this bold visionary step. In **Visakha v. State of Rajasthan**¹² the Supreme Court was confronted with a situation of dealing with a case of sexual harassment at the work place. Although India is a party to the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW), with several reservations, the Supreme Court held that, in the absence of domestic law to the contrary, the principles laid down in CEDAW must be treated as the international law norm to be adopted by all civilized nations and must be the legal norm in our country too. This exercise had to be carried out for the reason that there was a total legal vacuum on this issue in the country.

A Judge is by habit cautious in every step he takes, harking back repeatedly for precedents. On occasions, his role demands the blazing of a trail in

¹² 1997 (5) Scale 453

territory hitherto unexplored. It is on such occasions that the Indian Supreme Court has displayed unmatched talent for innovations, even at the cost of inviting criticism of being hyperactivist, for ensuring that access to justice was not barred to the inarticulate, down trodden and under-privileged.

Two recent examples are worth citing. First, the order made in the case of National Human Rights Commission v. State of Gujarat and others (W.P. (Crl.) No. 109 of 2003) and connected matters. (The Best Bakery case). It was a heinous incident of certain rioters setting afire a bakery as a result of which a number of people were burnt alive. Criminal complaints were registered and police investigations ensued. Certain accused were charge-sheeted and were put on trial. The situation in the State at the material time was such that a large number of witnesses turned hostile. The trial was over very quickly. The trial court acquitted all the accused. There was a furore within and outside the State of Gujarat that this was a classic situation of the operation being successful though the patient had died. The persistent clamour for justice resulted in the National Human Rights Commission making its own independent inquiries and investigations in the matter. The National Human Rights Commission (NHRC) was, prima facie, satisfied that it was a case of complete mistrial and miscarriage of justice. It was for the State to appeal against the orders of acquittal before the High Court. No such appeal was presented by the State till the NHRC moved a petition invoking the extraordinary powers of the Supreme Court on the ground that what had

happened in Gujarat was a miscarriage of justice and subversion of the process of criminal justice. Under normal circumstances, an appeal under the provisions of the Criminal Procedure Code would have been the right remedy, but, where the evidence is virtually nil on account of witness after witness turning hostile due to extraneous factors, the probability of an appeal succeeding appeared to be bleak. Responding to this unique situation, the Supreme Court took the view that the right to a reasonable and fair trial is protected under Articles 14 and 21 of the Constitution of India, Article 14 of the International Covenant on Civil and Political right to which India is a signatory, as well as Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedom.

With a view to putting justice back on the rails, the Supreme Court issued a number of directions with regard to protection to be granted to witnesses in criminal trials and is monitoring the case in exercise of its writ jurisdiction under Article 32 of the Constitution of India by treating the petition as Public Interest Litigation. The matter being sub-judice, further comment thereupon would be inappropriate.

Although free and fair elections are considered to be a basic feature of the Indian Constitution, the Election Laws in the country did not require a disclosure of the assets and liabilities as well as the antecedents of the candidates at the elections. This enabled a large number of people with

extremely questionable antecedents to contest elections without their antecedents being publicised before the electorate. Attempts by the Election Commission to enforce a modicum of disclosure of antecedents of candidates fell through for want of legislative backing. This was again a no-win situation where the electorate had no remedy. Upon a petition moved before the Supreme Court, the Supreme Court decided that it was necessary to clear the Augean Stables and strengthen the hands of the Election Commission to demand disclosure of fuller details of candidates so that the electorate might exercise an informed right of franchise.

In **Union of India v. Association for Democratic Reforms**¹³ the Court was confronted with a situation where it recognised that the situation needed an improvement, but the improvement could come through only by way of an amendment to the law. As under Article 324 of the Constitution the ‘superintendence, direction and control’ of the ‘conduct of all elections’ to Parliament and to the Legislatures vests in the Election Commission, the phrase ‘conduct of all elections’ was interpreted to include all powers necessary for making provisions for conducting free and fair elections. Although it was not possible to give any direction for amending the Act or statutory rules, since that would be the exclusive privilege of Parliament, the Court was of the opinion that when the Act or rules are silent on a particular subject, and the authority implementing them has constitutional or statutory

¹³ AIR 2002 Supreme Court 2112

powers to implement them, then the Court can necessarily issue directions or orders on the subject to fill the vacuum or void till suitable legislation is enacted. Thus, by a mandamus the Supreme Court directed the Election Commission to call for such material information pertaining to candidates “as a necessary part of his nomination paper” which would ensure fair and free elections, particularly taking into account that a large number of voters are illiterate, uneducated and clueless about the antecedents of the candidates. The immediate fallout of the judgment was that all political parties in Parliament came together to hastily enact a law to amend the provisions of the Representatives of Peoples Act, 1951, which has, at least partially, if not fully, brought about the result desired by the Supreme Court.

Though social justice is the declared goal of our Constitution, we in India lack the requisite environment of social justice. Poverty, unemployment, lack of the basic necessities of life, illiteracy, wide disparity of incomes, and concentration of wealth in a few hands are some of the negative and retarding factors of social justice. Our society continues to be caste-oriented, fragmented and exploitive in nature. Not a day passes without a newspaper report on the ghastly treatment meted out to members of backward classes and communities. There is a yawning gap between social justice and the law. The progress of society and the happiness of people largely depends upon bridging this chasm. This can be achieved either by legislators making laws to conform to social justice or innovative judicial assays. We have enacted a

number of legislations intended for this effect, though they have failed to achieve the desired result. The weapon of public interest litigation forged by the Supreme Court is an extremely potent weapon, of which the poor, down trodden, victims of injustice can make effective use for redressing social injustice, enforcing public duties and protecting social interests.

New perspectives and vistas have opened up before judges, lawyers and State Law Agencies for discharging the task of national re-construction and development. New socio-economic rights ensuring freedom from indigence, ignorance and discrimination as well as the right to healthy environment, right to social security and right to protection from the financial, commercial, corporate or governmental oppression need to be fashioned. The role played and being played by the Supreme Court in fashioning these rights is consistent with what **Sir Alladi Krishnaswamy Aiyer** envisaged for it, way back in 1949.

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