



Critical appraisal of judicial creativity

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Abstract

In the case of *Obergefell v. Hodges*, the United States judiciary legalized same-sex marriage, which blatantly reflected judicial creativity. This judgment highlighted the notion of judicial creativity, referring to the judiciary's ability to interpret laws to satisfy the needs of an ever-changing society. In simpler terms, judicial creativity refers to the ability of judges to interpret the law and apply it in novel and innovative ways to fathom complex issues whose answers can't be deciphered in precedents or legislations. This landmark decision not only addressed the immediate issue of marriage equality but also set a precedent for future cases, showcasing the judiciary's role in adapting legal interpretations to contemporary social values. It underscored the importance of judicial innovation in ensuring that the law remains relevant and effective. In the paper below, we will decipher important instances of judicial creativity and its constitutional interpretation, illustrating how judicial creativity manifests in the justice system and exploring the implications of such innovative legal reasoning for future jurisprudence.

Keywords: Judicial creativity, indian constitution, judiciary, interpretation, fundamental rights

Introduction

“The only constant in life is change” starting with a quote cited by Heraclitus which underlines the constant evolution and change of society and legal jurisprudence which we encounter on a daily basis all around us. Numerous factors such as social, demographic, economic, technological are accountable for the transformation which emanates to an evolution in the legal world as its commonly dictated whether law governs the society or society governs the law, either way the path is subject to revolutions in every step. Such changes require modifications in the justice delivery system and here enters the imperative role of judicial creativity. In the following paper, we will examine significant examples of judicial creativity and its constitutional interpretation, demonstrating how judicial creativity operates within the justice system and considering the consequences of this innovative legal reasoning for future jurisprudence.

Important instances of judicial creativity in constitutional interpretation

The Indian Constitution being the supreme law of the land has enumerated in its Article 50 which states the separation of powers between the three organs of the power the legislative, executive and judiciary and the state shall take steps to separate judiciary from executive. By separation it entails the independence of three branches with a mechanism of checks and balances where the primary role of the judiciary is the application of interpretation techniques to come to a fair and equitable conclusion. But there have been certain instance in the Indian justice delivery system where the courts have interpreted the law and ‘made’ the law instead of ‘find’ law where the lines of separation of powers have blurred and an interdependent adjudication has occurred. These instances have played a cornerstone role in the germination of the evolved judicial creativity in India and some of the significant have been mentioned below-

A. Basic structure doctrine: The *Kesavananda Bharti v. State of Kerala*, is one of the rarest and its own kind of judgment benched by 13 judges largest in the history of Indian judiciary to device the doctrine of basic structure. It states that the Indian legislature has the amending power under Article 368 to amend the fundamental rights overruling the *Golaknath case* but certain limitations need to be kept in mind such as not violating or obstructing the doctrine of basic structure while drafting laws. This ruling prevented India from a crisis when Indira Gandhi attempted to modify the constitution in a way that would prevent the courts from questioning the basis of her election and ensure that her election could not be declared null and void. The case is the prime instance of judicial creativity and activism where the court acted as a supreme interpreter, protector and guardian of the predominance of the Indian constitution.

B. Right to privacy: Earlier right to privacy was not explicitly enumerated in the constitution but through judicial activism the judiciary provided recognition to the same through important judgements such as Justice K.S. Puttaswamy v. Union of India and *Govind v. State of MP* declaring it to be fundamental right as mentioned under Article 14, 19 and 21 under Part 3 of the Indian constitution. Imperative to note that the right to privacy does not only pertain to freedom from physical confinement but also encompasses the protection against emotional or mental encroachment on one's rights keeping in mind the crimes against women such as tapping telephones, personal information etc making it right more progressive and inclusive. Thus, again the landmark judgment marked by the modern outlook of interpretation taking in mind the evolving nature of societal dimensions exhibited own creativity of the judiciary.

C. Reservation in education: Judicial innovation has played a vital role in broadening the reach of education reservation policies and ensuring their conformity with the principles of social justice and fairness mentioned under the Directive Principles of State Policy (DPSP). In

1992, despite facing widespread opposition, the Supreme Court of India validated the constitutionality of the Mandal Commission's suggestion to reserve 27% of higher education institution seats for Other Backward Classes (OBCs). "In 2002, the Supreme Court of India endorsed the government's decision to reserve seats for SC/ST/OBC candidates in private educational institutions, including minority-run institutions, marking a departure from its previous position that private institutions were exempt from reservation policies" [1]. "To exclude affluent members of reserved categories from taking advantage of reservation policies, the Supreme Court of India introduced the "creamy layer" concept in 1993" [2]. "In 2018, the Supreme Court of India declared the reservation in promotion for SC/ST employees in public employment constitutional, reversing its previous stance that reservation in promotion was unconstitutional" [3].

D. Gender and sexual orientation: With the changing times, more inclusivity and acceptance of different genders and rights that were not earlier guaranteed to certain sections of people leading to marginalization and discrimination were further protected by the nuances of judicial creativity. "Some interpretations could include in the case of Navjet Singh Johar v Union of India, the court struck down Article 377 of the constitution and termed it unconstitutional and stated that right to life under Article 21 included right to sexual autonomy" [4]. Also noted in the case "NALSA v. UOI, court recognised the 'third gender' and held that they had the right to self-identification and protection under the law" [5]. "In 1997, the Vishakha v. State of Rajasthan which laid down the guidelines for preventing sexual harassment in the workplace and in the contemporary times the 2017 case stating the need to criminalise marital rape even though not recognised by the Indian law at the time" [6]. Thus, further judicial creativity and activism can be implemented in the sphere of protecting the rights of women in marriage which is considered as sacrament in India as well protecting their fundamental rights.

An appraisal of means by which judicial creativity is actualized

It is imperative to note that even though enacting legislation is the primary responsibility of the legislature, as seen in the above case laws there may be circumstances where existing laws being primitive and expendable may not be suitable to apply to find a relevant solution. The Indian parliament even if worked 365 days 24 hours would not be sufficient to deliver acts catering to the constant changing needs of the modern society. Thus, there are multiple ways or means by which judicial creativity is actualized in India and a further critical analysis of the same could be further drawn-

A. Interpretation of the constitution and international conventions

Judges have inherent or trained skill of showcasing their innovative creative skills when faced with an unestablished issue in the eyes of law. These judges have developed numerous principles for interpreting constitutional provisions, especially those related to fundamental rights. In recent times, the Supreme Court has been interpreting our fundamental rights by considering international conventions that have not yet been incorporated into our domestic laws. "Constitution being a dynamic and living document needs to be interpreted in different ways for effective application for

delivering justice and as seen in the case of A.D.M Jabalpur case infamously called the Habeus Corpus case, where during the Emergency, the Supreme Court exercised its authority to suspend civil liberties under Part III of the Constitution" [7]. Therefore, the interpretation that suspension of civil liberties during emergency would do wrong to the public, judicial creativity took charge of the steering wheel.

B. Public interest litigation

With the joint efforts of Justice VR Krishna Iyer and Justice Bhagwati in the judgment of Hussainara Khatoon v. State of Bihar which seeks to provide a platform for the people directly or not directly affected by an action to approach courts to seek redressal of their grievances. Thus the judiciary used its own set of creativity to make procedural changes to aid in uplifting the disadvantaged and marginalized sections of the society by the way of Public Interest Litigation. Since, then a good number of PIL or social interest litigation have initiated which is condemnable of the judiciary and its role in reducing inequalities in the society.

C. Article 32 & 226 (judicial review)

In simpler terms, judicial review is the mechanism by which judiciary examines the actions of the legislatures and executive and acts as a guardian of democracy in doing so. It ensures accountability and limited power of the legislature and certifies that the legislatures are not opposing the constitutional principles. "In the *Minerva Mills v. UOI*, court held judicial review as part of the basic structure of the constitution highlighting the acute importance of judicial activism in delivering justice" [8]. Article 32 which is also known as the heart and soul of the constitution provides five writs to the public to avail their fundamental right and under Article 226 one can approach the High Court for the same.

Conclusion

While analysing the significance of judicial creativity it is imperative to take under consideration the existence of a split view when it comes to the role of judiciary in availing their own creativity to reach a decision, where the positive approach demands legal principles to be applied to come to a conclusion in a grey area but the negatives point out the amount of liberty given to the judges to go beyond the allocated power which might become controversial. While delivering a lecture on 'Canons of Judicial Ethics', Chief Justice of India SH Kapadia cautioned fellow judges against judicial overreach. The Judiciary, he said, should refuse to act as a "super-legislature". It is imperative to strike a balance between judicial activism and judicial populism and excessivism where in the latter the judiciary transcends institutional capacity allotted to it by the constitution. This can be evidently seen in the case of *Olga Tellis v. Bombay Municipal Corporation* where the abstract idea of right to shelter as fundamental right was refuted when a notice for removal of the same were done by other authorities. The point of every fundamental right being part of Article 21 is fine when it comes to judgements but in reality this is not the case as till not people unable to avail right to speedy trial etc. In conclusion, judicial creativity and activism are important instruments and is an essential aspect of dynamics of constitutionality. However, it must function within the purview of judicial process and as it is truly stated, "judicial activism is the oxygen of the rule of law".

References

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