

INDIAN JOURNAL OF CONSTITUTIONAL STUDIES

Issue - May, 2017

Volume I Issue IV

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ISSN 2456 - 5008

Published bimonthly

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- - Note - -

This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

Publisher Details -

Bishikh Mohanty

E33, AWHO Colony Chandrasekharapur, Sailashree Vihar,

Khorda, Odisha, Pin - 751021

Telephone: +91 8106743973

Email: editor@ijcons.com

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- Acknowledgement-

Efforts from many quarters have gone into the successful publication of this Inaugural Issue of the Indian Journal of Constitutional Studies. We would like to express a deep sense of gratitude towards our blind peers who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributors for contributing extraordinary submissions to the issue which stood at par on the rigorous scrutiny.

THE JUDICIAL BENCH

JUDGEMENT AND THERE IDEOLOGY TOWARDS SOCIETY

THE AUTHOR

Digshikha Priyadarshani, student of Manipal University, Jaipur

The judicial bench is a place from where justice is delivered in the judgment. Judgment only contain the merits of the case, it based on the circumstances of the case, and analysis of existing laws and delivered in favor of one party which submitted its relevant evidences. Sometime a benefit of doubt is also given to the party like in the case of Salman Salim Khan v. State of Maharashtra, in this case the appellant has given the benefit of doubt and acquitted from charges again him. In such case court has delivered the judgment but not justice provided to the victims and their families. But it is not consider as an example of in justice because there is no evidence beyond reasonable doubt against the appellant. For the sake of justice one cannot be punished without prove of his crime or wrong. In Indian courts accused is convicted only when the charges has proved against him without any doubt.

India is a country governs by the rule of law based on the justice, equity and good conscience. Rule of law means equality assured to all its citizen and they are protected from the arbitrary action of the state which may lay to violation of their rights. Rule of law having its essence that exercise of power by state within the four corners of the constitution. Such power may be legislative or may be executive. But when power is given to someone then it also having force and some time it becomes coercion and laws has been misused by superior authority and society exploited. Therefore supremacy of law which is, constitution, is necessary, so that remedy can be given to the society. For such remedy interpreter of law is required which is free from the legislative as well as executive action. In India High Courts of the state and Supreme Court of India is there for the interpretation of law. Supreme Court is the final interpreter of law in India and its decision is binding on all courts in India. Laws made for the convenience of the people, for maintenance of peace and order in the society and for the social reformation time to time. Sometime existing laws are need to be reform and repealed. But if there is no legislative action then Supreme Court interprets the laws. There are so many instances where judicial benches of Supreme Courts and High Courts of India have taken the steps for the effective implementation of law and for keeping alive democracy in the country. Some of the instances are as follow Sajjan Singh Case, Machchi Singh case, Keshvanand Bharti case, Menka Gandhi case. Minerva Mills case, Indira Nehru Gandhi case, ADM Jabalpur case, Olga Tellis case, D.K. Basu case etc. in this judicial benches have made the stander of judicial review in India. In these cases there are so many jurisprudential theories are applied whether they are will theory or interest theory or social solidarity or functional theory. All these are affecting and it can be found in the judgments of the courts. In these cases court delivered the justice to the people of the state against the arbitrary action of the state authority. Not only in existing laws but also there are discovery of the courts in the field of social justice by the Courts. In the case of Berubari Union and Exchange of

Enclave, re¹ Supreme Court of India held that preamble is not part of constitution but it merely an introduction and for the basis of preamble no one can enforce it. After a long leap of this judgment Supreme Court on same issue that whether Preamble is part of constitution or not, in His Holliness Keshavanada Bharti v. State of Kerela² held that it is part of constitution and also doctrine of basic structure of constitution is also propounded. In this case court allowed the legislature to make such amendments which promote the basic feature of constitution but not curtail the constitution. Change and continuity is required for the progressive and democratic society. Art.368 of constitution which provides constitutional amendments it-self denote the change in constitution. The opening word of Art.368 'change' covers all amendments, repeal and replacing of old provision with new provisions. Such changes lead to a progressive society. Change with continuity is progress, changes without continuity can be anarchy and continuity without change can mean no progress. Change with continuity is prior requisites of a progressive society which make a harmonized developed nation. But such changes should not replace entire constitution with a new constitution. Power to amend constitution does not include replacement of old constitution with a new constitution. The amendment of constitution postulate only change in Constitution but not abrogated. The amendment postulate that old constitution survive without loss of its identity and original frame work. Amendment does mean to alter its original mechanism but only change which required for the promotion of the constitution. Amendment include all changes in constitution without touching its foundation and basic framework of constitution. In this case the largest bench of SC delivered the justice and also allow the amendment in constitution with the restrictions. In this case constitution is a ground norm from where all laws are come and take effect. In the case of Indira Nehru Gandhi v. Raj Narayan³ the question before the court was that whether the concept of basic structure applied to the ordinary legislation of parliament or the state legislature. Court held that the legislative power under Art.245 and 246 is within the Art.13 of Constitution and it does not destroy the basic feature. In the same case Allahbad High Court has keep alive the principle of rule of law. The theory of implied limitation of power of amendment was rejected in the case of Keshavanand Bharti, and due process of law is also not adopted in our constitution as the American Constitution. Reasonableness of legislative measure is also unknown to our constitution. This judgment delivered at the time when the ruling party and prime minister were involved in so many constitutional amendments and they were alleged to be in corruption charges. They were trying to make amendment in election process so for the basic structure bench constituting five Judges reserved the High Court Judgment. In A.K. Gopalan v. Union of India⁴ Supreme Court rejected the due process of law by limiting the power of legislature and also eliminating the indefinite due process. In our Constitution there are restrictions required for the justice and social welfare. It is same as the theory of social solidarity that no one lives in isolation and therefore restrictions are required. But such restrictions shall not affect the enjoyment of fundamental rights of individual even in the condition of National Emergency. Certain fundamental rights are absolute human rights which cannot be taken away in any condition like war, external aggression, and failure of

¹ AIR 1960 SC 845

² AIR 1973 SC 1461

³ AIR 1975 SC 2299

⁴ AIR 1950 SC 27

Constitutional machinery in the state etc. According to the functional theory of Roscoe Pound law is for the settlement of dispute and maximum number of satisfaction should be provided to the persons in the society. According to the social engineering theory of Roscoe Pound there are certain rights provided to the persons in the society. Such rights are Public rights, private right and social rights which includes right to privacy, life, healthy environment, morality in the society, personal dignity and so on. In the case of *ADM Jabalpur v. Shivkant Shukla*⁵ a question raised before the Supreme Court of India that Whether in the Presidential Order in the state suspending the fundamental rights including the Article 14, 19, 21 and 22 can a citizen invoke the power of High Court and Supreme Court under Article 226 and 32 respectively, to issue writ of habeas corpus? The constitution is rule of law and therefore any one can move to any court including all courts for the enforcement of fundamental rights, held in *Makhan Singh' case*⁶ and *Dr. Rammanohar Lohia v. State of Bihar*⁷. The object of Art. 359(1) is to be barred and not to move any court but this clause does not include power of Art. 226 and 32. It is also true to say the scope of Art. 32 is much wide then Art. 226. The object of the maker of Constitution was not that to be barred an individual to move to Supreme Court or High Court for the enforcement of fundamental rights in the Presidential Order in Art. 359(1). It not against any court nor it take away the power of the detenues to move to the Supreme Court and High Court for the enforcement of fundamental right. It remains unaltered. There are many pre- constitutional rights which are in existence as fundamental right. Before the Constitution there was personal liberty in the statutes of Common Law of torts, Indian Penal code and for the infringement of personal liberty and false imprisonment one can move to court and file suit for damages. It is further found that in Constitution there is rule of law and during the emergency there cannot be another rule of law which is counter and during the emergency nullity of enforcement of constitutional provision cannot be done. This judgment is perfect for the savior of fundamental rights during the emergency.

Fundamental rights are individual rights and individual rights are primarily included the freedom and meaningful life. Freedom is liberty to do anything without restriction. Every citizen in the Territory of India has freedom but in these freedoms there are some restrictions also called reasonable restriction. In the theory of Social Engineering there are some Jural Postulates which are some restriction in the enjoyment of Interest (rights). In the case of *Menka Gandhi v. Union of India*,⁸ fundamental rights are not distinct and mutually exclusive. If any law violates the personal liberty than it shall be tested with Art. 19 and 14 also. Art. 14 strikes against the arbitrary action of the state and founding faith of the Constitution. It indeed pillar of the Constitution which secure the foundation of the democratic republic. Freedom of speech and expression is a right which led the availability of other rights and if it violates other rights are automatically violated. Art. 14 right to equality is stand for both judicial and quasi-judicial administrative proceedings. In this case it is also found that Article 21 is source of many other rights. This judgment has value in all cases when the question of violation of freedom and liberty

⁵ AIR 1976 SC 1207

⁶ AIR 1964 SC 381

⁷ AIR 1966 SC 740

⁸ AIR 1978 SC 597

has been raised and in all such condition this case having substantive value. The seven judge bench delivered this judgment has shown the ideology of the judges that was individualistic and liberal mindset of bench which supports the individual liberty of an individual in a democratic setup. Recently in the case of *Shrya Singhal v. Union of India*⁹ Sec 66-A of the Information Technology challenged on the ground that it violative of Art.19 (1) (a) i.e. Right to freedom of speech and expression. The Honorable Supreme Court held this Section invalid on the same ground and also that the language of section is vague and uncertain. This judgment again promoted the individual liberty and freedom. But on other hand in the case of *Subramaniam Swamy v. Union of India*, SC again has given the validity to the criminalization and penalization of defamation on the ground of reasonable restriction on freedom. In the case of *M.S.M Sharma v. Sri Krishna Sinha and ors.*¹⁰ question was raised that does the freedom of expression which includes the freedom of press transcend over the privileges of the legislature under Art. 194 of the Constitution? The five judges bench held on the petition filed under Art. 32 of the Constitution for the violation of freedom of speech and expression. The court held that it is not consider as violation of fundamental rights because immunity has provided to the legislature under Art. 193(3) these power, privileges and immunities has been enjoyed from the time of British India and also in the British House of Commons at the time of commencement of constitution. If the petitioner has deprived from his personal liberty under Art. 21 by the immunities of legislative assembly than it is accordance with the procedure establish by law and cannot consider as a violation of fundamental rights. Every institution has its own conduct and procedure and if privileges are given to them then it will be within the four corner of the constitution.

India is a secular country who does have any religion. In the Constitution in Part III under Art. 25 there is freedom of conscience and right to freely profess practices and propagate religion subjected to public order, morality and health. In the case of *Bijoe Emmanuel and Ors. V. State of Kerala*, Supreme Court held the not to sing National Anthem during National Anthem in assembly is not disrespect towards National Anthem and it covered under Art. 25 of the Constitution. This judgment again reflect the experience and personal nature of judges same as the American school of Jurisprudence says that the judgment reflect the personal nature, past experience and attitude of judge. There is conflict in the personal laws like muslim law, hindu law. In Muslim law there are no maintenance provided to the wife after divorce. She has her absolute right only on dower. But most of the time dower is not sufficient for the survival of the Muslim wife and therefore she need to demand maintenance from her husband but he is not bound to pay or maintenance to wife. In *Mohammad Ahmad Khan v. Shah Bano Begum*,¹¹ Supreme Court held that the Muslim husband is bound to provide maintenance to his wife after divorce and iddat has observed. It is inequality to not to provide maintenance to Muslim women under Art 14 of the Constitution. In Muslim law there is no restriction to provide maintenance to wife after divorce but it is a discretionary power only given to the husband. Another problem in Sunni Muslims is Talak-ul-biddat (triple talak). In this kind of talak muslim husband pronounce

⁹ AIR 2015 SC

¹⁰ AIR 1959 SC 395

¹¹ AIR 1985 SC

talak thrice and talak becomes irrevocable and wife does not has iddat. In this form of talak no communication is required to wife. This shows great inequality to wife in the name of religion. In Muslim law talak is given by only husband wife is not given such power. It again inequality in personal law and violation of life with dignity. For this Uniform Civil Code, 1955 bill is pending in the parliament. After Shah Bano case a legislature came into force The Muslim Women (Protection on Divorce and Maintenance) Act, 1986. In Daniel Latif case Supreme Court interpreted Section 3 of the Act and scope of the term 'within the iddat' i.e. husband bound to provide maintenance to wife during iddat period as well as after iddat as he is the successor of her property. In both cases principle of equality and social justice applied. Supreme Court has power to judicial review and it can exercise its power under Art. 142 of the Constitution. Because of such judicial review Apex court delivered such judgment which make social justice and promote the humanitarian law in India.

In Hindu law father is guardian of his legitimate children but mother is guardian after father. The Honorable Supreme Court made novel interpretation of this clause as 'after father' means 'in absence of father' in the case of Gita Hariharan v. RBI. Not considering mother as guardian of her children is discrimination and violation of Art. 14 i.e. against the principle of natural justice. This section discriminate persons on the basis of sex which is unconstitutional and this interpretation widened the scope of the Hindu Adoption and Maintenance Act, 1956.

In the criminal law supreme case Supreme Court has several ruling regarding provision of law. In legalized death sentence as well as criminalization homosexuality and declare section 303 of Indian Penal Code, 1860. Section 303 provides only death punishment to the person who has been committed murder in the life imprisonment. Court held this section unconstitutional in case of Mithu Singh v. State of Punjab as it violates the power of court the judicial review, which is the basic feature if Constitution of India. On other Supreme Court validate capital punishment in case of Jagmohan Singh v. State of U.P.¹² in this rejected the argument that the death penalty is the violation of the "right to life" which is guaranteed under article 21 of the constitution of India. In another case Rajendra Prasad v. State of UP¹³, Justice Krishna Iyer has empathetically stressed that death penalty is violative of articles 14, 19 and 21.

But a year later in the landmark case of Bachan Singh v. State of Punjab¹⁴, by a majority of the Supreme Court overruled its earlier decision in Rajendra Prasad.

It expressed the view that death penalty, as an alternative punishment for murder is not unreasonable and hence not violative of articles 14, 19 and 21 of the Constitution of India, because the "public order" contemplated by clauses (2) to (4) of Article 19 is different from "law and order" and also enunciated the principle of awarding death penalty only in the 'rarest of rare cases'. This punishment are sanction in law and law is sovereign as according to the theory of Austin. In the theory of the Bentham maximum happiness lays in the maximum number so the duty of the state to provide maximum relax and opportunity

¹² (1973) 1 SCC 20

¹³ AIR 1979 SC 917

¹⁴ (1979) 3 SCC 727

to people is direct approach to this theory. In Olga Telle case Supreme Court provides livelihood to the person for a dignified life which is a part of Art. 21. In the case of Unni Krishnan v. State of Andhra Pradesh, 1993 SC, Supreme Court held right to education as fundamental right in right to life under Art. 21 of Constitution. In Vishkha v. State of Rajasthan Supreme Court order for establishment of committee for prevention of sexual harassment at work place and guidelines for prevention of sexual harassment at work place.

All these instances somehow related to the principle of equality, justice and good conscience and rule of law. In Indian Judgment social factor are always relevant and sometime judgment mold the laws or awaken the parliament or the legislature to make laws.
