
CRITICAL APPRAISAL OF JUDICIAL CREATIVITY

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ABSTRACT

The article investigates the idea of judicial creativity in Indian Jurisprudence from a critical viewpoint. The article examines the possible advantages and disadvantages of judicial activism by examining landmark cases and instances like Navtej Singh Johar, Sabrimala, and Triple Talaq. The article acknowledges the need for judicial creativity in addressing the ever-evolving social norms and upholding justice. However, it also sheds light on the downside of judicial creativity, i.e., judicial overreach, and the possible weakening of the rule of law and inconsistent decision-making. The article's conclusion emphasizes the necessity of a balanced strategy, wherein judicial creativity is used sparingly to preserve the values of justice and the rule of law.

Keywords: Judicial Creativity, Judicial Activism, Judicial Overreach, Rule of Law, and Constitutional Interpretation.

1. Introduction

The ability of the judges to interpret the law in a novel and creative way when confronted with instances that may not have apparent solutions or when the law may not sufficiently address a particular scenario is referred to as judicial creativity. It is the use of judicial discretion to close legal gaps or reinterpret existing statutes to uphold the requirements of justice.

Judicial creativity is seen as a positive attribute of judges, enabling them to adjust the law to shifting social, economic, and cultural circumstances and ensuring that justice is done in a particular case.

2. Recent Instances

As mentioned above, Judicial creativity is the ability of the judges to fill in the existing gaps of law by interpreting the rules in different circumstances according to societal norms and developments and, in some cases, changing them to suit the former.

It is pertinent to cite the recent examples of judicial creativity to critically analyze whether it brought necessary amendments and changes to the Union of States. In 2018, *Navtej Singh Johar* filed a writ petition before the Hon'ble Supreme Court of India, one of the prime examples of judicial creativity in fulfilling the needs of the evolving society. In the mentioned case, the Petitioner filed a writ petition challenging the constitutionality of Section 377 of the Indian Penal Code, 1860. Section 377 criminalizes unnatural offenses against any man, woman, or animal.¹ Still, Section 377 was challenged because it violated the Right to Privacy (Article 21 of the Indian Constitution), Equality (Article 14), and Protection from Discrimination (Article 15), and the Hon'ble Supreme Court also held the same views. The Court ruled that Section 377 would be constitutional if it did not criminalize consensual sexual acts between two persons of the same sex.²

The *Sabarimala* Case of 2019 is also a prime example of Judicial Creativity; where the now Chief Justice of India, Hon'ble Justice Mr. D.Y. Chandrachud, was one of the

¹ Indian Penal Code, 1860, § 377, Act No. 45, Acts of Parliament, 1860 (India).

² *Navtej Singh Johar v. The Union of India*, AIR 2018 SC 4321.

judges on the bench who gave this moral decision where women aged 10 to 50 years were restricted from entering the Sabarimala temple of Kerala.³ The Petitioner challenged this by arguing that such practices are against an individual's fundamental rights. The Petitioner argued that Article 25, which guarantees Freedom of conscience and free profession, practice, and propagation of religion, was violated. The Apex Court of India again held these views as valid. The court held that Articles 14 and 15 were also violated and ordered the temple to allow women to worship the deity accordingly. Once again, the judges played a vital role in ensuring justice. Also, in the landmark **Triple Talaq** case, the court held that the practice violates fundamental rights. Article 14 because Muslim women had no such option to exercise, Article 15 because it was discriminatory towards the woman, and Article 25 because the court saw a lack of sanctity of the Quran.⁴

The cases mentioned above are a few of the many instances in which judicial creativity is indeed conspicuous.

3. Analysis

Judicial creativity has been in many legal systems since time immemorial. It has also been used in many landmark cases, such as **Donoghue vs. Stevenson**, where judicial creativity introduced the concept of Negligence in the Law of Torts,⁵ and the **Kesavananda Bharati** case, where the idea of basic structure doctrine was introduced.⁶

To take and analyze the cases cited above, it is reasonably safer to say that judicial creativity has its plus and minus points. Focusing on the brighter side, flexibility is one of the advantages of judicial creativity, as it allows judges to handle new and developing legal concerns and adapt to ever-changing circumstances. As seen in the case of **Navtej Singh Johar**⁷, the judges considered the changing society, which was recognizing more genders. To create more equality, the Hon'ble judges made changes in the law, which are more adaptable to the present culture. It also promotes fairness by ensuring that the law is applied in a way that considers the particulars of each case; judicial creativity

³ Indian Young Lawyers Association v. The State of Kerala, (2019) 11 SCC 1.

⁴ Shayara Bano v. The Union of India, (2017) 9 SCC 1.

⁵ Donoghue v. Stevenson, SC (HL) 31.

⁶ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

⁷ *Supra* at 2.

can promote justice even more. Using a tight and rigid interpretation can lead to disaster, as it is foreseeable that society is now more dynamic than ever.

Legal advancement can be aided by judicial creativity by fostering an adaptive legal framework responsive to shifting social and political conditions, as judicial creativity in the past and the present has proven to address current and future legal issues.

However, focusing on the downside of judicial creativity is also imperative. The rule of law, which requires the law to be predictable, clear, unambiguous, and enforced consistently, can be compromised by judicial creativity. One example is the ***Flying Permit*** case, where the court considered a kite as an aircraft.⁸ It is a matter of common sense that a kite, irrespective of its size, cannot be regarded as an aircraft, and this is an erroneous decision passed by the Indian Courts. Judicial creativity can lead to accusations of judicial activism because people believe that in judicial activism, the judges are not reading the law impartially but are making decisions based on their own political and ideological views. Also, judges may come to different conclusions about the same issue, as seen in the ***Shayara Bano*** Case, where two out of 5 judges held Triple Talaq as a legal practice among Muslims.⁹ Because of this, judges may use judicial creativity to give judgments that are challenging to connect to the precedent, making it difficult to hold down the judges responsible for passing erroneous decisions in the past.

There are also previous instances where judicial creativity was crucial in ensuring justice, like in the case of ***Bhim Singh vs. The State of Jammu and Kashmir***, where a member of the Jammu and Kashmir legislative assembly was detained unlawfully by the police and the police also failed to produce him before the Magistrate which is the procedural rule. The Court concluded that it was an unlawful arrest and his fundamental rights were also violated, and the court gave him compensation to make things right.¹⁰

In ***Nilabati Behra vs. The State of Orissa***, the son of the Petitioner was taken by the police to inquire about a crime, but later on, the son of the Petitioner was found dead. It was evident that the executive body had something to do with it. The Hon'ble

⁸ Indian Aircraft Act, 1934, § 11, No. 22, Acts of the Parliament, 1934 (India).

⁹ *Supra* at 4.

¹⁰ *Bhim Singh v. The State of Jammu and Kashmir*, AIR 1986 SC 494.

Supreme Court believed there was a violation of Article 21 and held the police responsible accordingly.¹¹ There have been numerous instances where the Court has shown its creativity to ensure proper justice is given to the people.

4. Methods Used

It is also pertinent to mention that Article 32¹², the writ jurisdiction of the Supreme Court, and Article 226¹³ of the High Courts were invoked in most cases where the judiciary showcased its creativity, and one of the main reasons why one of the creators of the Constitution called it as the “the heart and soul” of the constitution.¹⁴

5. Conclusion

It is conspicuous that judicial creativity has significantly influenced how the law has evolved in India. Judges have been able to address people’s legal concerns and bring about change where the law was previously silent through landmark decisions and ground-breaking interpretations. Nevertheless, some negative points must be kept in mind by the judiciary.

To guarantee justice in each case, judges must strike a balance between their responsibility to interpret the law and an understanding of the larger social and political context in which they work.

¹¹ Nilabhati Behera v. The State of Orissa, 1993 AIR 1960.

¹² INDIA CONST. art. 32.

¹³ INDIA CONST. art. 226.

¹⁴ Revathi Krishnan, What is Article 32 which Ambedkar said was ‘heart’ and ‘soul’ of Constitution, The Print, <https://theprint.in/theprint-essential/what-is-article-32-which-ambedkar-said-was-heart-and-soul-of-constitution/546050/>.