
ARTICLE 15 IN LENS OF JUDICIARY: A STANDING PILLAR OF CREATIVE SOLUTIONS IN FORMATION OF MODERN INDIA

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ABSTRACT

It is widely accepted all over India, the role of Judiciary is vital and has shaped helped shaped the societies' moral and ethical standards when put alongside with the global counterparts. This article speaks on Judicial interpretation and its means of creatively balancing Article 15 of Part III of the Indian Constitution, without violating the fundamental rights of the citizens of India. This paper examines the legislative intent behind the formation of the Article 15 along with the history of its formation in brief. This paper gives a key analysis by going into the provision word by word of all the clauses enclosed within the provision itself. This paper brings out the Article 15 under the lens of Judiciary and how creatively the judicial decisions were made and interpretation given rise to the existing modern idea of Article 15. The paper then comprises of the author's critical analysis followed by expert views on current standing on Article 15.

1. Introduction

Judiciary in India is one of the three pillars established to maintain the dance of democracy in our country. The main role of judiciary is to interpret, which at an early stage was only meant to read the laws created by the legislative and to resolve disputes that occurred during implementation. Over time, this evolved into interpretation of laws made by the legislators, to read the intention and motive behind the creation of such law and to apply it with general public's interest in mind.¹ In other words of **Lord Montesquieu**, judiciary here takes a creative approach to practices judicial activism, as its role to function as an independent body among the pillars of democracy, as part of separation of powers. Its creative approach to enforce a particular judgement goes in the form of order passed, obiter-dicta and Ratio decidendi which are held binding in course of law. Judiciary with its necessary tools, actively works with the intention of lawmakers and for the public good. As **Lord Denning** observed the judiciary devices to creatively fill the gaps of legislations based on the primary source of law without altering its purpose.² It can be observed from **Justice Cardozo**, that though the creativity is absolute it cannot be at the discretion of the judges or his pleasure to create or form laws and stops only at the level of review and passing of judgements. In India, during the early stages it can be seen that Judicial creativity is used to protect the fundamental rights of the individuals. Like in the **Kesavananda Bharati case**³, it was held very creatively ensembled from various provision of the Constitution itself that the basic structure of law cannot be changed and the legislation has to make laws that violate the fundamental rights of the individuals. Also, further in another example of the **I.R. Coelho case**⁴, creatively turned tables when law under Schedule 9 is omitted from judicial review, it was held that the innate nature of law by very essence is not valid, as it violates the Fundamental rights of the individual.

A. Observing Judicial Creativity in Foreign Countries:

In countries like USA, though the constitution is considered "living" document, due to the cumbersome process of changing laws by legislation, the judicial review done or any creative judgement adhered to can be hitting a dead end, as the constitution itself serves as a barrier.⁵ In

¹ Cornelius J. Peck, Comments on Judicial Creativity, 69 IOWA L. REV. 1 (1983).

² Seaford Court Estates Ltd. v Asher, [1949] 2 KB 481.

³ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; AIR 1973 SC 1461

⁴ I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

⁵ John Harrison, Robert Bork, Judicial Creativity, and Judicial Subjectivity, 80 U.CHI. L. REV. DIALOGUE 205 (2013).

the EU nations were 'Pilot judgements' by the ECtHR, it doesn't take effect if the member nations do not adhere to it, this paves way for judicial creativity in the part of the Courts of the party states.⁶ In nations which use common law, such as Australia, the concept of judicial law-making arises and the role of legislations needs to be protected to uphold democracy.⁷

2. History of Article 15

In India during the pre-independence period, discrimination was seen everywhere especially on the basis of race, caste, religion, sex and place of birth.⁸ People from the upper caste used to prohibit people from lower castes to education and better employment opportunity. Opportunities were always given to those upper caste people and among themselves. Very often women can only be seen tied up to their kitchens and were given no place of authority be it a woman from upper caste or lower caste communities. People of majority treat the people of minority with disrespect and racism spread everywhere. It was the need of the hour that after independence even in reliance with **Article 14⁹ of Indian Constitution**, there was equality and equity to be drawn among the citizens of India. **Article 15¹⁰** is one of the most important fundamental rights with its negative connotation, draws a line to the state and other individuals that prohibits them to discriminate on the basis of race, caste, religion, sex and place of birth.

A. Legislative Intent for the formation of Article 15

The intention of lawmakers needs to be understood before the furtherance of analysis of Article 15. Here from the words of the Article and Indian History, it can be observed that the intention here is to protect the people from discrimination on various grounds by the government itself and there by **promoting equality**. It can be observed that there is an intention to **secure equity** among the citizens by protecting laws that works in special protection of women and children, and also, the socially and educationally backwards communities in India. It is used to uplift their stances in the society to live with dignity and good employment. This article has support

⁶ Ezgi Yildiz, Judicial Creativity in the Making, 8 Interdisc. J. HUM. Rts. L. 81 (2014-2015).

⁷ Ronald Sackville, Continuity and Judicial Creativity - Some Observations, 20 U.N.S.W.L.J. 145 (1997).

⁸ Why is Article 15 important for India?, India Today, Kajari Goswami, New Delhi, Jul 2, 2019 10:22 IST. <https://www.indiatoday.in/education-today/gk-current-affairs/story/why-is-article-15-important-for-india-1557401-2019-06-28>

⁹ INDIA CONST. art. 14

¹⁰ INDIA CONST. art. 15.

of many other provisions from The Constitution, but especially from the Article 14, Article 16, Article 19(1)(g) and Article 21, as well.

3. Analysis

A. Descriptive Analysis

Directly understanding Article 15 word to word in a descriptive manner we cumulate the following¹¹:

- The title starts with a negative intonation (here prohibiting the State from doing something) speaking on prohibition of discrimination any of the enlisted grounds – Race, caste, Religion, Sex or Place of Birth.
- Clause 1 prohibits the State from discriminating “only” on the specified grounds.
- Clause 2 states that the no citizen be subjected to “disability liability, restriction or condition” for the usage of public spaces, especially those wholly or partly maintained by the state.
- Clause 3 and 4 are exception to the above clauses exempting women, children and SEBC and SC/ST citizens from getting protection under special provisions made by the government, which might seem opposing the very essence of Article 15, but these clauses being part of Article 15 is present to uplift the disadvantaged citizens.
- Clauses 5 speaks on exemptions made for the SEBC, SC/ST citizens in special provisions for admissions made in educational institutions and employment opportunities.

Clause 4 and 5 also seek exemption from other fundamental rights such as the **Article 29(2)**¹² and **Article 19(1)(g)**¹³.

¹¹ Sandhya Prabhakaran , Article 15 of the Indian Constitution – No Discrimination, 4 (5) IJLMH Page 1058 - 1072 (2021), DOI: <https://doi.org/10.10000/IJLMH.112005>

¹² INDIA CONST. art. 29, cl. 2.

¹³ INDIA CONST. art. 19, § 1, cl. g.

B. Analysing Judicial Creativity with Case Laws

Judiciary has deduced the above plain worldly Article 15 in a creative manner with the growing nature of the Indian Society and this can be, in parts, explained by the case laws.

Clause 1

We can observe that it refers to citizens as individuals in matters of his rights, privileges and immunities given to him as a citizen of India.

- In Nain Sukh Das case¹⁴ the court invalidated the law that discriminated people on the **basis of religion** to have separate electorates.
- In A. Cracknell v. State of U.P.¹⁵, a law deprived proprietess from enjoying her property on the **basis of sex** and this was held invalid.
- In Sanghar v. State case¹⁶, held a law violative as it enforced people of certain community to report to police station, since this was **based on their race**.
- In a case¹⁷, a law penalised old offenders from outside Greater Bombay and exempted people from inside the area, this was held violative since it was discrimination in the **basis of Place of Birth**.

The above are the cases which were directions given on the basis of the direct implication of the Article 15(1). Looking into the creative ways judiciary deduced the same article as below:

- In D.P Joshi's case¹⁸, holds that law which discriminates on the basis of place of residence is not violative of Article 15(1), the reason of payment of capitation fee was based on residence and not place of birth. Similarly, reservation in medical colleges on the basis of place of residence was allowed.¹⁹

¹⁴ Naina Sukh Das v. State of UP, AIR 1953 SC 384.

¹⁵ A. Cracknell v. State of U.P., AIR 1952 All 746.

¹⁶ Sanghar Umar Ranmal v. State, AIR 1952 Sau 124.

¹⁷ Sk. Husein Shaik Mohammed, re, AIR 1951 Bom 285.

¹⁸ D.P. Joshi v. State of Madhya Pradesh, AIR 1955 SC 334.

¹⁹ Pradeep Jain v. Union of India, (1984)3 SCC 654.

Clause 2:

This doesn't allow discrimination of any citizen in their entry or access or liberty without any conditions applied to roam about equally as any other citizen would. This applies to all the public places especially one wholly or partly State funded and is dedicated for general use of public. Example, the court ordered action be taken in tea shops which used different tumblers for serving SC/STs citizens.²⁰

Interpretation of the word “only”:

The word “only” can be interpreted as when the law discriminates on the only or solely the basis of any of the above grounds, then it is a bad law. The impugned law should be based only on any one or more grounds as mentioned in article 15(1). Here, the courts need to look into the determining factor and not its purpose or motive.²¹

In **R.C Poudyal's Case**²², the court upheld reservation in state legislative assembly in favour of Sanghas, as it deemed it not be solely on the basis of religion. And therefore, did not violate Article 15(2).

In **Daniel Latifi's case**²³, it was held that article 15(1) applies only to individual citizens and not a class of citizens. Here since it is a personal law it was said these statutes are not violative of Article 15(2), as they are not “only” based on religion and there are several other factors around its formation.

Clause 3:

This clause is interpreted in a such a way that, it doesn't restrict by way of provision rights and privileges of women or children, but it protects them from being treated in a less favourable manner based on their gender. Thus, in cases where reservation for women employees in government jobs was held applicable under Article 15(3).²⁴ Also, different treatment of male and female staff was upheld by the courts of same age group²⁵ and at the same time invalidated

²⁰ Anumugam Servai v. State of T.N., (2011) 6 SCC 405,409.

²¹ VN Shukla's Constitution of India, 13th Edition, Mahendra Pal Singh, EBC Publications.

²² R.C. Poudyal v. UOI, 1994 Supp(1) SCC 324.

²³ Daniel Latifi v. UOI, (2001) 7 SCC 740, 749,766.

²⁴ Govt. of A.P. v. P.B. Vijayakumar, (1995) 4 SCC 520.

²⁵ Air India Cabin Crew Assn. v. Yeshawaswinee Merchant, (2003) 6 SCC 277.

provisions that prohibited women to work in liquor shops as it seemed to be discriminatory on the basis of sex.²⁶ For the very reason as to protect women's modesty, the court invalidated claim that women should also be held offenders for adultery in the Yusuf Abdul's case²⁷.

Clause 4:

In this clause, there are two things to be looked into: 1) Term "Backward Classes" and 2) Quantum of Reservations need to set.

There have been several cases explaining giving the possible classification of backwardness of a class of people. Some cases held that economic conditions should be the criteria of SEBCs²⁸, some other say it should be based on the caste of the class even if certain members of the class are well off²⁹, going against the same statement some judgments say classifications should not be solely made based upon caste.³⁰

In another case, the court had creatively made an interference of the same article 15(4) by holding that the article referred to the citizens who were socially and educationally backwards and not the areas that are socially and educationally backward and took into account hilly areas and Uttarakhand areas, rejected rural areas as they composed of heterogenous mixture of citizens not all are covered under SEBCs.³¹

When it came to the Quantum of reservation it has series of cases which were ordered and overruled, finally in the Mandal Commission case³², it was held that not more than 50 percent should be reserved and the order held in case Devadasan³³, of carrying forward unfilled quota was taken into account.

Clause 5:

This clause enables the view of equality in educational and Employment opportunities to the SEBCs, SC and STs citizens, here impact was made when the amendment was made in

²⁶ Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.

²⁷ Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321.

²⁸ R.Chitralekha v. State of Mysore, AIR 1964 SC 1823

²⁹ P. Rajendran v. State of madras, AIR 1968 SC 1012.

³⁰ State of A.P. v. Sagar, AIR 1968 SC 1379.

³¹ State of U.P. v, Pradip Tandon, (1975) 1 SCC 293.

³² 1985 Supp SCC 714.

³³ T. Devadasan v. UOI, AIR 1964 SC 179.

insertion of the clause and reservations were made accordingly. The Mandal Commission Report also held a different mechanism of “creamy layer” to make the reservations more in lines with equality to all.

C. Recent Creative Developments By The Judiciary

Judicial creativity in recent times can be observed in the famous case of Sabrimala³⁴, where it was held that women should not be denied entry to the temple and such denial is infact discrimination on the grounds of sex. The judiciary have included the discriminations against the transgenders in the ambits of Article 15.³⁵ Due to the Judicial Creativity in Article 15 several changes are made in legislative level as well, by the order of the court to increase the age of marriage among women from 18 years to 21 years.

D. Critical Analysis

There are several areas that need to be critically viewed upon, as follows:

- In Yusuf’s case, it was said the adultery as an offence would not hold women liable to protect their modesty, the reason so given in the case was that since women are getting married at a very early age. The question that needs to taken into account here is that to the current day and age where most women are looked as modern women, indulging in adultery shouldn’t be held liable and as act of offence, how far is equality followed in this particular case.
- Court’s reasoning in the Latifi’s case, of article 15(1) being applicable only to individuals is not convincing enough as an individual forms a member of the group and in the same capacity it can be argued that he has been placed in an disadvantaged position due to his religion as compared to any other person of a different religion.
- The inability to classify the Indian population into SEBCs still is a let-down, as in practical application of the current laws, we can find unjust enrichment of the reservation policies among the SC/STs where now in the current situation the so-called

³⁴ Indian Young Lawyers Association & Ors vs. The State of Kerala & Ors., Writ Petition (Civil) No 373 of 2006.

³⁵ Vaishnavi Sahoo, Tejaswini Panigrahi & Suvangi Ray, 'Discrimination of Transgenders', Violation of the Constitution of India, 3 INT’L J.L. MGMT. & HUMAN. 410 (2020).

“Upper Caste” is slowly falling down to the socially and educationally backward classes.

E. Expert Analysis

Experts opinion of Judicial creativity is exceptionally in support of the process, as it keeps the democracy in a country like India with its vast diversity and a Constitution as dynamic and a living document. C.J. Dipak Mishra in his talk, has said that is the with judicial creativity, that there is standing of democracy in India.³⁶

4. Conclusion

It can be concluded from the above analysis that judiciary being one of the three pillars of democracy has very optimistically held it stand in judicial activism which gives rise to judicial creativity in the process. Without the interference in its creative ways of interpretation, the constitution would hardly be a dynamic living document. The role judiciary plays in protecting the fundamental rights of the individuals against the State, is growing with it evolving Indian Society.

³⁶ When creativity dies, values of civilisation corrode: CJI Dipak Misra, JUSTICE DIPAK MISRA, 27 July, 2018 02:30 pm IST, <https://theprint.in/opinion/when-creativity-dies-values-of-civilisation-corrode-cji-dipak-misra/89334/>.

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