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Relevance Of Facts in Adjudicating Constitutionality of Statutes

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Abstract

The basic function of courts is the process by which Judges perform it *i.e.* judicial process. Courts sit upon the matters brought before it and decide them in confirmation with the statutes enacted by legislature. Process of adjudication cannot be quantified on some broad generalisations rather it can only be understood in its ends to achieve justice in letter and spirit. It is then the judges who in absence of recurrent legislation update law to suit contemporary morals, by means of interpretative exercise. Benjamin N.Cardozo in Nature of The Judicial Process says, existence of certain set of circumstances and facts make it possible for legislature to enact laws which enable constitutional mandate to be relevant for society in changing times and thereafter judiciary steps in to decide whether such legislation is really in furtherance of constitution or not. Among various considerations which go into the determination of constitutionality of statutes, facts also cover a substantial ground.

I. Judicial Process: Introducing the Concept

The function or basic purpose of courts or judicial system, as envisaged by the founders, is far easier to describe than the actual functioning of it and almost surely to the process by which Judges perform it *i.e.* judicial process. The purpose of judiciary is threefold firstly to resolve the disputes or conflicts which arises before it, secondly to act as a watchful guardian for citizens' rights by any arbitrary action of legislature and executive and thirdly to ensure that all auxiliaries of governance and their respective instruments are not only working in consonance with constitution but also within its ambit. One may follow from above that courts sit upon the matters brought before it and decide them in confirmation with the statutes enacted by legislature for the purpose which in turn is expected to perform the function of making laws for regulation of societal discourse and upholding law and order.

But then why is it so that despite of tonnes of manuscripts and laborious efforts to define the Judicial Process it continues to elude any definition and principles, which could be followed by judges steadfastly to reach a decision. There is no dearth of authorities to quote on the subject but what they all admit is that process of adjudication is not the dynamic process as understood in common parlance which can be quantified on some broad generalisations rather it can only be understood in its ends, to achieve justice in letter and spirit. Though the means can be understood in broader outline with help of insights of various legal luminaries but not defined.

Judicial Process can be said to be the mental calculations of a judge to arrive at a decision in a particular case. He may be partaking of historical considerations or may be inclined to consider the social utility of his decision, he may on the contrary be unaffected by any of the extra statutory consideration and adhere to it in all strictness to pronounce upon a case. These and various other considerations play upon the psyche of a judge while adjudicating and the fact that which consideration influences him, tilts his decision in one direction or the other are relevant for inquiry into judicial process. Benjamin Cardozo says:[1]

It may not be same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis.

Judges and judiciary especially in common law system has to perform much more (in

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process*, 11 (Yale University Press, U.K., 9th Indian reprint edn., 2011).

terms of volume) and far wider (in terms of interpretation) functions, than enumerated in first paragraph, in a democratic society. They are not to be a mute spectator of discrepancies in constitutional functioning rather they are duty bound to be proactive, they have been endowed with Writ jurisdiction (Supreme & High Court) which can be invoked suo moto as well. It is now an imperative for judiciary to function with certain foresightedness in delivering its decisions, especially upon constitutional issues, keeping in mind the immense faith reposed in it by people and constitution. But does this wide latitude of discretion available to them provide them with an immunity to flout the same constitution from which they derive their life source. Does their mandate stops at adjudication or can be construed to be legislation as well, can the rules developed by them in the process of adjudication termed as law and if yes to what an extent are they binding on legislature and people? These are several of the questions which are pertinent to an inquiry into the process of adjudication.

Judges often have to decide upon the constitutionality of statutes particularly the higher judiciary comprising of Supreme Court and High Court and to this end they employ same process or procedure which is applied when deciding a conflict that is they are swayed by same considerations as the latter process of resolving disputes.[2] Constitution empowers legislature to enact laws for functioning of several of its own provisions[3] and other subjects reserved for its regulation but the validity of such laws have to be considered by the judiciary and judges on the touchstone of constitutional mandate. They are accused of legislation, judicial over-reach or activism *etc*. But given the special nature of constitution as a document as distinct from statutes what is required of judges is diligence in maintaining the sanctity of the document. As put by J.Marshalls "We must never forget that it is constitution we are expounding".[4] Judges hence are repositories of immense power and responsibility which can be adduced from Blackstone's[5] choice of words to describe them as "living oracle of law" A description which would not sound too out of context for present purposes and which more or less mirrors our dilemma whether to acquiescence with judicial activism or grope for ways to defend the frontiers of separation of powers is:[6]

Whoever hath an absolute authority to interpret any written or spoken laws**,** it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them.

II. Different Considerations guiding Adjudication on Statutes

Constitutionality of Statutes

Statutes are the pronouncements of a policy by the legislature after deliberation. It may be assumed that these are 'due deliberations' which make way for a policy only after taking into factor each intricacy required for the process to be called due. Any statute when challenged in a court of law is assumed to be legal and constitutional showing respect to the will of an elected legislature and faith in 'dueness' of its deliberations evidencing the sanctity of process. Hence any challenge to the constitutionality of statute has to be proved with reasons by the contender *i.e.* the burden of proof lies upon the person to prove that there is/are any conflict with constitution in the said statute.

But this process is not always infallible which may give rise to difficulties in its imposition**,** Oliver Wendell Holmes describes the problem

[2] Oliver Wendell Holmes, "The Theory of Legal Interpretation" 12 *Harvard Law Review*, No 6, *available at:* www.jstor.org . (last visited on September 26, 2020). Holmes says, "Yet in fact we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means."

[3] Art.124 of Indian Constitution lays down for parliament to make laws for regulation of procedure for removal of judges .Similarly Art.3,4 &5 envisages laws by parliament to regulate Citizenship of Indians .There are several other instances for the same.

[4] Felix Frankfurter, "Some Reflections in Reading of Statutes", *McCulloch* v. *Maryland, 4* Wheat .407. 47 *Columbia Law Review*, No. 4 *available at:* www.jstor.org (last visited on August 22, 2019)

[5] *Supra* note 2 at 19

[6] *Supra* note 5 at 533.

by experience and in his explicitness of expression unique to him as:[7]

It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary.

If we understand that legislature though wise and pragmatic enough to envisage the problems they wish to rectify, are not endowed with powers of predicting future and fathoming the depths of human reactions' which, would help us to appreciate the job of judges who serve as missing links by interpretation. Judges perform the function of legislation, Cardozo says[8] "between the gaps" it has also been called as interstitial legislation. It is then the judges who in absence of recurrent legislation update law to suit contemporary morals, by means of interpretative exercise. Legislature formulates the policy to best of its abilities but can never guarantee its utility, success and applicability until it is in the society and functioning so the legislative exercise at best can be equated with a kind of guarded experimentation or necessitated experimentation, as most of the times laws come only to remedy a social malady not envisaging it. We cannot but agree with Mr. Justice Johnson who called[9] the science of government "the science of experiment". Often it is understood that statutes when adjudicated upon, the process has simply to deal with the matching of its premises with the constitution of the land but as explained above it involves intricacies of law and facts both which act as game changing principles in the decision.

Constitutionality of Constitution

Constitution as a document can be considered to be the ultimate source of authority which empowers or lend legitimacy to the functionaries of governance to govern, judiciary to adjudicate and legislature to legislate, it can be said to be the source statute for other statutes. Statutes are enacted for functionary and regulatory purpose whereas constitution provides them the principles which should be adhered to and goals they should aim at achieving by means of every statute. Hence as Cardozo[10] describes, "Statutes are designed to meet the fugitive exigencies of the hour". Whereas, constitution states or ought to state not rules for the passing hour but principles for an expanding future. Keeping in the mind the nature of constitution, can it be adjudicated upon? Does the judiciary have the power or mandate to do it? Or to rephrase the inquiry, how can one possibly adjudicate upon the constitutionality of the constitution and its provisions? This is where facts step in, the proposal is not that facts make the constitution irrelevant and vulnerable to judicial vicissitudes rather that the process of adjudication in general and deciding upon the validity of statutes in particular draws upon considerations[11] of History, Tradition, Sociology and Logic (philosophy) taking them as foundations whence upon judge build his hypothesis to reach a decision, these are referred to as canons of construction by J.Felix Frankfurter in his paper[12] on interpretation of statutes. These rules of construction are accessories of justification forwarded by judges in their decision, one cannot but stop and marvel to appreciate something that J.Oliver Wendell Holmes had said[13] judges first make their decisions and then come up with reasons to justify it.

Rules of construction are the tools which may or may not be employed by the judges to reach a decision they can be enumerated as Statutory Interpretation, emphasis is laid on the language of the statute and a strict interpretation is given to the words this process is also called as Legal Formalism.[14] English[15] courts have been an adherent of this

[7] *Supra* note 3 at *417*.
[8] *Supra* note 2 at 113.
[9] *Supra* note 5 at *528*.

[10] *Supra* note 2 at 83.
[11] *Supra* note 2.
[12] *Supra* note 5.
[13] Oliver Wendell Holmes, available at www.freelegaldictionary.com (last visited on March 26, 2020).
[14] *Ibid*
[15] As is evident by Lord Haldane's contention forwarded in front of House of Lords in *Viscount's*

approach; they follow the language and text of statutes in its letter to reach a decision. American and Indian courts on the contrary do not limit themselves to any narrow rules of construction and venture to other sources for reaching a decision.

Benjamin N.Cardozo in his epic known by the name of The Nature of The Judicial Process says, existence of certain set of circumstances and facts make it possible for legislature to enact laws which enable constitutional mandate to be relevant for society in changing times and thereafter judiciary steps in to decide whether such legislation is really in furtherance of constitution or not. For instance Article 14 of our constitution prohibits any discrimination, but keeping in mind the backwardness of certain sections of our society various progressive laws have been enacted which provides them favourable circumstances to pass over the millennia old exploitation, now the several laws made in this regard when challenged in court of law, judiciary pronounces upon them by interpreting constitution not as an end in itself but a means to an end of a forward looking and prosperous India inclusive of all sections of society.

Considerations while Adjudicating

It underlines various sources which a judge considers while reaching a decision and are not mandatory rather their weightage also varies circumstances of the case and facts. A judge can be said to discharge a duty of weighing all these considerations in scales of his experience and wisdom and then reach a decision, free from his personal prejudices and biases. Cardozo describes the ends of legislative interpretation by means of "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."[16]

History, Sociology, Tradition and Precedent are some other factors which employ their influence on decision of judges but seen closely they can be easily equated with facts. Any historical event or evolutionary chronology [17] of development of law are simply facts, historical facts which have shaped law or its application as transformed with time and are relevant for deciding upon the constitutionality of statutes. In his book Common Law, Oliver Holmes traces how the legal doctrine of Mens Rea for criminal law developed and has become an indispensable inquiry for any or every criminal case now if for instance there is a statute which excludes Mens Rea as a requirement for a specific crime as in rape of minors then why would the court consider it constitutional is because it is conditioned by other fact that no consent can be attributed to children of tender age which is in turn again a fact socially accepted and psychologically recognised. Similarly few communities have customs unique to them, this custom may or may not be in conflict of legal precepts of an outsider but any action which takes place would be considered in light of endemic practices, this can be particularly observed in trade practices peculiar to a certain trade. Sociology as an influencing factor can be observed in the justification of judges in their decision trying to serve welfare of society by extrapolating the language of statutes to protect the vulnerability of weaker sections of society by means of interpretation. These vulnerabilities which judges are trying to protect are contemporary facts of societal conditions in which certain sections are exploited by other sections. Hence it can be safely assumed that facts do play a part in adjudication and especially when adjudicating upon the constitutionality of statutes but how and to what extent would follow in later part of paper.

Mr. Justice Cardozo deemed inherent in the problem of construction, making[18] "a choice between uncertainties. We must be content to choose the lesser."

Rhonda's Claim , [1922] 2 A. C. 339, 383. See *Supra* note 5.

[16] *Supra* note 5

[17] Oliver Wendell Holmes, Jr., The Common Law, December, 2000.Scanned and proofread by Stuart E. Thiel, Chicago, (January 2000) *available at*: www.jstor.org (last accessed on 26.09.2013) .

[18] Felix Frankfurter, "Some Reflections in Reading of Statutes" 47 *Columbia Law Review*, 548, No. 4 *available at:* www.jstor.org (last visited on August 22, 2019)

III. Facts as a factor in Adjudicating upon Constitutionality of Statutes

Facts as reason for existence of a legislation/ statute

Legislative process which churns out statutes is generally viewed as the originator of the law, which cannot be true considering the fact that societal exigencies are the reason why legislature sits upon to formulate the policy. There can be instances where law has been introduced based on the foresight of problems that could crop up due to changed circumstances of society but majorly legislature responds and reacts to societal needs by enacting laws for the remedy or regulation of the same. J.Holmes said,[19] "The statutes are the outcome of a thousand years of history… … They form a system with echoes of different moments, none of which is entitled to prevail over the other."

Above point can be illustrated, we see reservation policies and untouchability prohibiting laws in India, affirmative action and anti- racial laws in US, anti-apartheid laws in South Africa and aborigines protection laws in Australia. These laws all have basic common premises of extending protection to their minorities and provide them with some kind of legal security then why do they vary in content, populations they cater to, different ways of extending safety and security. Reason being, the endemic nature of laws *i.e.* laws are product of local environment the conditions, facts, circumstances and consequent remedies which are unique to every setting of community/population. Consequently in USA where there was discrimination based on colour and race there are laws which remedy that mentality by means of affirmative action's as opposed to India where discrimination is based on complex system of caste within the same religion which needs a different policy and action plan , reservation is just a welfare measure in the direction which seeks to bring all sections of society at par at least economically and in the process eliminate all reasons of discrimination in long haul. Similarly Australian Population though mainly consists of Caucasian race but there are natives who are called as aborigines who are given certain rights to protect their way of life an analogy can be drawn for tribal's in India and Red Indian communities in US. South Africa unfortunately known across world for discrimination based on colour of skin segregated whites and blacks which needs its own policies to be dealt with.

The above examples shows that laws are not only the means by which society is regulated additionally they are also product of that society. There is a cause and effect relationship between these two variables as prominent as religion and practices of people in a country. Hindus consider Cow as sacred and thus it is offending for them to kill or consume cow meat. Mohameddans consider pig as unclean and cursed animal so they find it appalling to consume pork. Laws are no different than religious or social affiliations of people of a country, some countries across the world are ruled based on Sharia law they have imbibed their religion as their law. Nevertheless with increasing globalisation it can be seen and appreciated that laws across countries are becoming uniform in tune with accepted Human Rights Declarations and indeed it is a heartening precedent otherwise there are still people and communities across India who consider Sati as a pious practice, they abhor prohibition on Child marriages, Dowry and Bonded Labour System.

Extent of facts in deciding constitutionality

Among various considerations which go into the determination of constitutionality of statutes, facts also cover a substantial ground. Facts can be of different forms there can be legal facts which inform the courts of some inherent legal defect in the statute or its incompatibility with constitution this defect may be apparent in its functioning or application or also of area of application. The unconstitutionality of statute can also be challenged based on the fact that the said statute is in conflict with the custom of the local populace or their belief. This can again be contested on impending social welfare needs/national security interests/environmental pressures *etc*. All these factors could be understood better by means of examples but what first needs to be appreciated is why is it that facts have to be considered at all. Is this not the domain of constitution alone and even

[19] *Ibid* at,533.

if facts are used to qualify the decisions by judges what makes it so controversial:[20]

Facts are not legal jargon which cannot be appreciated by the common people rather people who are directly related to the case can be said to be better acquainted with the facts of case hence when a decision is based on facts, a judge does not have any better qualification to appreciate them compared to a layman. Hence when any opinion is formed by the judge which is not same as that of that layman who knows the fact and is a disinterested party makes him uneasy to let go of the claim as he can question the judge's decision especially when the judge's decision is based on the same facts as privy to him and no evidence available for judges to peruse. In such scenario how it is that judge's decision would be different or rather more qualified than of a layman. To explain the contention let us consider the example of famous case of *Lochner* v. *New York*, [21] the present case was about a prohibition imposed by a statute on the hours a baker can work in order to protect his health and well being, a statutory measure undertaken by New York's council to protect the ameliorating health standards of working population. Court by a majority had declared the said act unconstitutional as it contravened the freedom of contract as provided by Fourteenth Amendment of Constitution of US. The court said[22] that such legislation had no real or substantial relation to any police purpose. Obviously, the underlying question on which the case turns is one of fact, namely, whether, having regard to the workman's physical equipment and the facts of industrial life, this legislation has the described relation- a question of fact on which there seems to be no reason for believing that judges are capable of expressing expert opinions in the absence of evidence.

Hence in order to free courts of such questionable decisions it should be deemed appropriate that courts base their decisions on [23] "information and not assumption". This information should be evidence of such facts or opinions of experts that make it fit to be relied upon. Supreme Court has reiterated time and again that courts should refrain from sitting upon the decisions of the experts.[24]

Brandeis Briefs

In *Lochner* v. *New York*,[25] US Supreme Court dismissed any claim of New York's municipal corporation that restricting hours of work for the bakers of New York would help meliorate their health conditions. Court held the impugned statute unconstitutional as it contravened Fourteenth Amendment to constitution which gave freedom of contract and work to people. In 1907 two women of Oregon State hired Louis De Brandeis as their lawyer for demanding a restrictive cap upon working hours for women. The lawyer along with the ladies conducted a survey collecting details from the women working and not working regarding their health and presented it to the court for forming an opinion. Court came to the decision in favour of the ladies and ever since the presentation of empirical evidence and social facts to court are called as Brandeis Brief. *Muller v. Oregon* [26] is the historic case which have turned the tide for usage of empirical evidence in the courts supporting the legal contentions but as had been observed this enthusiasm is not shared by all the jurisdictions rather it can be said that continental courts of Europe are not too keen in this respect.[27]

J.Holmes said [28] that legislature can do whatever it sees fit unless a law it enacts is justified by any rational interpretation of, or not violates an express prohibition of the constitution. The legislature wholly potent in its sphere to exercise its power still holds out to judiciary its power of review which was conceived only due to the changing nature of

[20] Henry Wolf Biklé, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action" 38 Harvard Law Review, No. 1, *6- 27*. (Nov., 1924), *available* at: www.jstor.org (last visited on 7 January, 2019).
[21] I98 U. S. 45 (1905), See *Supra* note 21
[22] *Supra* note 22 at, 8.

[23] *Ibid*
[24] *Dr. Basavaiah* v. *Dr. H.L.Ramesh & Ors*; 2010(7) SCJ 151.
[25] *Supra* Note 22.
[26] 208 US 412, 52 L Ed 551, 28 S Ct 324
[27] Niels Petersen, Avoiding the Common Law Fallacy, 11 *ICON* 294-318 (2013).
[28] *Tyson Brothers United Theatre Ticket Offices* v. *Banton*

societal needs for which a law must be catering to.

Constitutional Instances

Art.370 of Indian Constitution[29] provided for special administrative provisions and concessions made in case of State of Jammu and Kashmir. Does in normal working a state in Indian Federation would be allowed to enjoy separate criminal code (Ranbir Code), wide autonomy in governing the affairs of state and deciding upon matters in the manner state legislature deems fit irrespective of the central laws. No other state enjoys such autonomy despite the fact that there have been late entrants[30] into our union and much later than J&K. This special status and privileges is owing to the historical facts of assimilation of J&K into India in 1947 to 1950. This Article is just an acknowledgement of the special reference of J&K submission into Indian Union. Henceforth Art.370-371(I) and fifth and sixth schedule not only enumerates the special provisions for different states who are to be administered differently owing to their cultural, social and geographical background it is also to be viewed as appreciation of facts.

In part three of our constitution dealing with fundamental rights certain restrictions has been imposed whose application is contingent on circumstances of facts. Art. 19(1); which deals with the six rights of freedom of speech and expression, assembling without arms, association, movement, residing in any part of country and of trade & profession also have corresponding restrictions on them given by Art.19 (2) through 19(6). These restrictions imposed are to be determined as against the backdrop of facts which exist at the time and are they impending in nature to an extent that they require imposition of restrictions or not. In normal scenario there cannot be restriction on speech and expression but in times of disturbance government may by ordinances impose such a restriction under Art.352, 356 *etc.*(emergency provisions). Otherwise in peaceful times, Again it is a subjective matter for courts to decide upon challenge that whether any restriction imposed falls within the ambit of restrictions mentioned in the constitution or not. For instance, freedom of speech can be curtailed if a person is misusing his speech and expression to defame someone else, or if he is hurting religious sentiments of a community, if he by means of his speech incites hatred or encourages someone else to commit an offence also if his speech acts to the prejudice of security and integrity of India or towards any friendly state he cannot seek redress against any action of state which curtails his such speech and expression. Instances of such restrictions are the recent Muzaffarnagar riots in Uttar Pradesh[31] where several leaders of different factions have been charged with inciting violence by means of provocative speeches. Earlier also in 2009 BJP leader Varun Gandhi [32] was arrested and charged with delivering hate speeches and inciting common people against government. The exigencies which make clamping down of speech in order to safeguard larger interests is examined by courts on a case by case basis to appreciate the facts and circumstances of case there is no wholesale imposition of restrictions as opposed to rights. This makes facts relevant for each inquiry.

Similarly restrictions on other rights[33] in part three are reasonable restrictions which are imposed only in consonance with the factual background.

Statutes

AFSPA (Armed Forces Special Powers Act) 1958, this act empowers army to take over the maintenance of law and order of specified territory which is threatened by violence, unrest and terrorism. India has enacted this law and extended its operation to J&K and North Eastern states. There are several dissensions on the issue of its application and termed as draconian. But challenges against it have not

[29] Full Details available at: www.lawmin.nic.in (30.09.2013)

[30] State of Sikkim was added to Indian Union by means of 35th Amendment in 1975.

[31] www.timesofindia.indiatimes.com/topic/Hate-speech-case (last visited on August 22, 2017)

[32] www.indiatoday.intoday.in/story/varun-gandhi-exonerated-in-hate-speechcase/1/269154.html (last visited on March 12, 2016)

[33] Art. 25 & 26 of constitution dealing with freedom to religion starts with subjective nature of these rights *i.e.*, "Subject to" Indian constitution available at: www.lawmin.nic.in/coi/coiason29july08.pdf(30.09.2013)

found support with Supreme Court who has upheld its validity and applicability in face of the impending situation existing in such states. Can one envisage the application of AFSPA as means of law enforcement in Delhi or for that matter in any peaceful state not infested with violence such as Haryana, Punjab *etc.* This would not be supported or backed by any of the courts and why is it so, only because factually it is a ridiculous proposition.

Cases Decided

There are instances which go on to signify that Indian Judiciary is not averse to taking into consideration social facts or empirical evidence for deciding upon a case, in the landmark judgement of *Indra Sawhney v Union of India* [34] also known as Mandal Commission Case court while laying down the historic reservation policy for Other Backward Castes on grounds of their social, educational and economical status relied heavily on Mandal Commission Report for the same. In its decision on the case court has appreciated and praised the work of the commission and while taking it into consideration seconded its diligence.[35]

One important reason as to why the Central Government could not accept the recommendations of Kaka Kalelkar Commission was that it had not worked out objective tests and criteria for the proper classification of socially and educationally backward classes. In several petitions filed against reservation orders issued by some State Governments, the Supreme Court and various High Courts have also emphasised the imperative need for an empirical approach to the defining of socially and educationally backwardness or identification of Other Backward Classes.

The Commission has constantly kept the above requirements in view in planning the scope of its activities. It was to serve this very purpose that the Commission made special efforts to associate the leading Sociologists, Research Organisations and Specialised Agencies of the country with every important facet of its activity. Instead of relying on one or two established techniques of enquiry, we tried to caste our net far and wide so as to collect facts and get feed-back from as large an area as possible.

In *Olga Tellis v Bombay Municipal Corporation*, [36] court relied upon the social facts and studies submitted by the petitioner pavement dwellers supporting their claim of infringement of their right to life by eviction, as it will deprive them of their livelihood which is covered within the ambit of Art.21(Right to Life). The said reports included [37] Report of the Expert Group of Programmes for the Alleviation of Poverty (Planning Commission of India January 1982). The above case is also known as Pavement Dwellers Case as court restored the rights of pavement dwellers to retain their shanties and kiosks u/Art 21 of constitution.

IV. Strategies in Dealing with Empirical Evidence

Another instances where Indian courts have accepted their shortcoming in analysing technical reports as presented by lawyers in various cases to support their claim of different nature like that of environmental concerns, genetically modified crops, nuclear fallout etc. Supreme Court in *A.P. Pollution Control Board v M.V. Nayudu*[38] where court while expressing its inability said "in adjudicating upon the correctness of the technological and scientific opinion presented to the courts or in regard to the efficacy of the technology proposed to be adopted by the industry."

The court in the present case appointed a National Environmental Appellate Authority to report on the issue after taking into consideration the competing claims of Industry owners who alleged that Castor Oil production does not pollute or alternatively is not the cause for detioration of water supply to twin cities of Hyderabad and Secunderabad.

Similarly Centrally Empowered Committee (CEC) was created through an order in case of

[34] AIR 1993 SC 477, 1992 Supp 2 SCR 454
[35] www.indiankanoon.org/doc/1363234/

[36] (1985) 3 SCC 545
[37] T.K. Naveen, "Use of Social Science evidence in Constitutional Courts: concerns for Judicial Process in India" 48 *Journal of Indian Law Institute* (2006).
[38] 1999 (2) SCC 718

T.N. Godavarman Thirumulpad v Union of India[39]. The aim of the committee was[40] "a committee for all the forest areas in the whole of India with power to give direction hear objection and take decision so that there is no need to approach this court from time to time."

The committee has decided many questions regarding Forest Rights for Tribal's, encroachment of forest land and pollution of forest belts by mining or other commercialised operations.

But what should be the extent and applicability of expert opinion and recommendations on courts especially in deciding the cases on their basis remain an avenue to be discussed, debated and decided by further engagement.

V. Conclusion

Facts become imminent to gauge the laws as applied to society and its applicability is facilitating its cause or not. Cardozo has lucidly put:[41]

Few rules in our time are so well established that they may not be called upon to justify their existence as means adapted to an end. If they do not function they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are expatriated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.

Hence facts are the mirror which reflects that what is relevant for us now, not what was relevant when it came into force and help trim the outgrowths and keep the useful while rejecting redundant and replete. The several options explored by the courts can prove to be antithesis to the conception of its role as for instance the expert engaged in giving opinion could not be expected to be free from inclinations or biases in his field and may represent that biasedness consciously or unconsciously in his/her report and thereby mislead the court. What is the guarantee of unprejudiced evaluation by the expert when we often do not hesitate attributing fallibility to our judiciary and judicial officers bound by oath to exercise the same in discharging of their official duties?

This and such other questions would continue to haunt our perception about use of empirical evidence until we develop a mechanism which balances expert and judicial opinion. This remains unsaid that people involved in such decision making has to discharge their duties with incumbent responsibilities in mind free of bias. The discussion thus can be concluded that facts does play a significant role in deciding upon the statute's constitutionality but it cannot be summed up in just this rather it necessitates a further inquiry of how and by whom.

[39] 2002 (5) SCALE 6.
[40] *Supra* note 38.
[41] *Supra* note 2 at 98.