

● UNFOLDING PROPOSITIONS OF JUDICIAL PROCESS IN CONTEMPORARY UNIVERSE



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Abstract

Since inception, when we turn to a civilized society, state emphasizes on the free and fair judicial process. In the absence of adequate and appropriate judicial process, we may not be able to achieve the goal of social welfare in the society. It is functionality of the organs of that state which reflects and enumerates about the nature and structure of the nation. In this Article, author has reflected upon unfolding propositions of judicial process in the nation like India. Numerous factors are responsible for judicial process or judiciary as it seems today. Either it is doctrine of separation of power or liberalization of judicial process these factors play a key role in molding the different stakeholder of judiciary, legislation, and executive. Some influential elements of judicial process like judicial review, judicial activism, precedents and many more have taken the judiciary to higher flight. In order to regulate, govern and shape the society, judicial process has left indelible mark in the history of judiciary.

Keywords- Law, Dynamism, Independent Judiciary

Introduction to Judicial Process

In the first place, initially getting justice has always been matter of discomfort among the masses. Judicial delay system is generally impacted by socio, economic and political elements at various phases. In order to provide justice, for its convenience, Authorities who were responsible to deliver the same, made codification of principles, norms and conduct which lead to discipline in the society in a uniform way. But priorly, there was no sense of codification of the norms and principle that's why everything was determined and adjudicated on the ground of equity and good conscience. If we talk about prior to Independence era, Britishers were responsible to create the judicial structure in the country but as far as laws are concerned which are the base of justice delivery system had never been introduced in a liberated way. At that point of time, only adversarial judicial process was in prevalent rather than inquisitorial judicial process. Reason behind this was to have a common law which was judge made law. All the disputes were entertained and adjudicated based on natural justice, equity and good conscience. In the common law judicial process, judges had nothing before them while adjudicating a matter. No inclination towards the rules, norms and statutes was one of the advantageous things in the history of judicial process and hence judge's role was like a neutral referee. Judges used to decide the cases on the basis of principles adopted in priorly decided cases. In brief, precedents were the key factors for illuminating the light of justice. Now, after independence, the frequency of enactments of statutes have

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remarkably been expended just for the reason of dynamic changes within the society. We are now moving towards the civil law judicial process which talk about the substantive and procedural law made by legislators. The advantageous part of civil law judicial process is codification of the law. Now, whenever judges adjudicate the matter, they need to look into the applicable, relevant law as per the fact and issues of the case. The basic idea behind the civil law is to figure out the truth apart from fairly adjudication. Concrete presence of the substantive and procedural law compels the judicial process to being strict to the law. In the present and modern judicial process, idea is to achieve the goal of social justice either we get this social justice through codified law or through the verdict of court based on equity and good conscience i.e. judge made law. This recognizes that main goal of judicial process is to achieve the goal of welfare of the society.

Concept of "Law"

We have widened the horizon of understanding the concept of "law". Numerous eminent jurists have elaborated the term law in diversified ways. Austin says that law is a command of sovereign¹. Bentham talks about the law as a tool of public utility. According to him, the basic goal of law is to provide the maximum happiness to maximum people². Similarly, Roscoe Pound talk about the social engineering³. The ultimate purpose of law is to serve the people of country. Law and society are considered as interdependent. We can't separate these two from each other. Those who study society say that law is for the society and society is not meant for law. Laws have to be changed, amended and modified as per the convenience of the society, not vice versa. One thing has to be acknowledged that it is not necessary that every time, law is to be molded, changed, amended or modified at convenience of the society. Some time, we have seen that stringent laws were introduced in the past to regulate the conduct and shaping the society. In the past, we have observed that judiciary has played a role to adjudicate the matter through referring enactments and statutes. Apart from it judges made law has also been recognized in due process of justice. Eventually, we have widened the scope of source of law which includes law made by parliament. Secondly, law made by judges through precedents. In this contemporary world, more specifically in India, Judiciary's role has become more widened. Judiciary has stated performing the role of legislators apart from normal role of adjudication. Now, many things rely on the discretionary power of courts. Initially, role of legislators was to create law for the betterment and upliftment of the society. Society is also responsible to dictate the legislature in order to get the laws which are in the interest of the society.

Judicial Dynamism

Role of judiciary in the contemporary world is dynamic that's why whole system of judicial process is also known as judicial dynamism which is in contravention of judicial restraint. Judicial dynamism not merely provides liberty to address the concern of the society which are not limited to the redressal and judicial pronouncement. In fact,

¹JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, (Law & Justice Publishing co. pvt. Ltd.2022)

²J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, (Clarendon Press, Oxford 1789).

³POUND, ROSCOE, "AN INTRODUCTION TO THE PHILOSOPHY OF LAW, (Revised Edition, Yale University Press 1982),



present judicial process encourages the system to act beyond the designated power and jurisdictions which is generally reflected through social ordering, judicial review and judicial activism. Doctrine of separation of power encourages the system to act within the designated limits and periphery. If any of the organs go beyond the designated function and jurisdictions it leads to imbalance and grave repercussion. Judiciary is one of the organs of the state which exceptionally encroaches in to the periphery of the other organ unlike executive and legislature. Interference and intervention by judiciary in the executive and legislative is indispensable in order to have a check and balance. Comparatively, executive and legislature have less interference in the functioning of judiciary which may be considered a healthy sign of democratic country. In due course of judicial process, judiciary has evolved with new dimension of functionality of judges as a stakeholder of judiciary. Judges have more function than usual. In fact, we can say that not only aggrieved party is the subject matter to the court. Those persons who are not directly aggrieved from the wrong committed by third party may also institute the legal proceedings. In brief, locus standi relaxation has widened the functionality of judicial process. Public interest litigation has become more accepted and more welcomed subject matter of the judiciary, more specifically by apex court. In Indian judiciary, Justice P. N. Bhagwati has played a prominent role in encouraging the Public Interest Litigation which serves the purpose of social justice and social welfare since we have observed that within our society⁴. There are lot of diversifications due to which in lack of resources, some people may not have an access to judicial system. In order to overcome this problem, public interest litigation serves the goal of equal access to justice. There are numerous instances where a single letter has also been taken in to account⁵. Generally, an aggrieved person has a right to institute the legal proceeding against the culprit however in the present scenario regarding judicial process has drastically changed. Subordinate courts are dedicated and directed by the judicial pronouncement of apex court. Either Supreme Court or High Court's decision has a power to dictate the inferior or subordinate courts. Precedents are most prominent component of judicial process which encourages high court to come up with new principles, norms, doctrines and guidelines and through which they may address the diversified issues of the society. Generally, precedent is based on *stare decisis* which means that like cases should be treated alike. In those cases where matter has similar facts and issues have already been decided by the apex court, then in such situation, subordinate courts are not required to take exertion and spent much time to decide the legal issues which are already addressed by the apex court.

Filling of Legislative Vacuums by Precedents

Now, administration of justice has more crucial role apart from adjudication. Judicial process has taken responsibility of filling the gaps where issues have never been entertained or addressed through legislation. Judiciary is now acting like a legislator by providing new principle, guidelines with a purpose to address the issues prevalent in the society. In new evolving judicial process, the study of judicial pronouncements has been

⁴S.P. Gupta v. President of India and Ors. AIR 1982 SC 149; M.C. Mehta And Anr v. Union of India & Ors AIR 1987 SC 1086; Bandhua Mukti Morcha v. Union of India & Others AIR 1984 SC 802; Maneka Gandhi v. Union of India AIR 1978 SC 597

⁵Bandhua Mukti Morcha v. Union of India & Others AIR 1984 SC 802

divided into two components, one is ratio decidendi and second is obiter dictum. Both of these judicial pronouncement components play a very significant role in better understanding of decisions taken by competent court. Any decision taken by court must be accompanied by the ratio, reason or logic. In the absence of ratio decidendi it leads to arbitrariness. For free and fair decision, ratio decidendi principle needs to be followed by the apex court or by subordinate courts religiously. This is one of the ways to satisfy the client as a stakeholder of judicial process. Another component of judicial pronouncement is obiter dictum which is the weak part of decision. It doesn't have an authoritative value. It is nothing but just a suggestion or opinion of judges regarding the matter decided by the judges. It may not be authoritatively applied since it is very personal comment or opinion of the judges. Obiter dictum may not be questioned since it has persuasive value in itself. If public prosecutor gives the reference of obiter dictum, it plays an influential role over the judge since it influences the choice of the judges while delivering any kind of judicial pronouncement. On the basis of authoritativeness, we may determine the judicial pronouncement as a precedent. Precedent is such a tool through which we may save the energy and time of the court.

Independence of Judiciary

In India, judiciary is overburdened due to backlog of pending cases. Despite of all adversities, the merits of judicial process have never been compromised. In order to strengthen the judiciary, we have to have an independence of judiciary without which we may not be able to address the concerns of different stakeholder of the society. As far as Independence of judiciary is concerned, it is not yet defined in the constitution of India but different provisions of constitution encourage the judiciary to be independent. Sometimes, question arises whether we want to provide independence either to the judiciary or to the judges. In the absence of independence of judges, the repercussion may be reflected in the judicial process, that's why either judiciary as an institution or judges as individuals must have independence. The supreme law of the land i.e. Constitution of India talk about the fix tenure of the judges⁶. Further, parliament is under obligation not to discuss the conduct of the judges who are holding the office⁷. Another example of independence of judiciary is enunciation of clear-cut power and jurisdiction of supreme court in the constitution⁸. If we take the reference of part IV of the Constitution, it talks about the obligation of state to have separation of judiciary from executive⁹. Fix salaries¹⁰ and allowances of judges are the indication that they are not going to be deviated from the obligation imposed on them by the virtue of holding their offices. Either we talk about supreme court or high court, both of them shall be considered the court of record as per the constitution of India¹¹. It has further articulated that being an independent judiciary, the court has the power to punish accused for contempt of court¹². All such provisions mentioned in the constitution give a sense of

⁶Art. 124 & 217 of the Constitution of India

⁷Art. 211 of the Constitution of India

⁸Art. 32 of the Constitution of India

⁹Art. 50 of the Constitution of India

¹⁰Art. 125 & 221 of the Constitution of India

¹¹Art. 129 & 215 of the Constitution of India

¹²Ibid.



independence to the judiciary. Though not in a straight way but other way round, India judiciary is the one which is responsible to strengthen the democratic nature of the country. This is one of the institutions which play a role of guardian of the supreme law of the land i.e. the Constitution. Judiciary is also responsible to safeguard the fundamental rights of citizens. The principle of Independence of judiciary has been laid down in various international Human Right instruments like Universal Declaration of Human Right¹³, International Covenant on Civil and Political Rights¹⁴ and many more. Indian judiciary may not have a clean chit that it is free from political influences. Despite of separation of execution and judiciary, there are still some instances where there is encroachment of executive in the periphery of judiciary. History has observed and witnessed that during 1973 to 1983, there were some conflicts between political parties and judiciary. In 1973, some senior judges of supreme court were superseded. Reason being, those judges did not sacrifice the independence of judiciary and upheld the decision against the will of ruling power. Resultantly, there was an appointment of chief justice of Supreme court as he delivered the judgement in the favor of government in three important constitutional cases. The Senior judges paid heavy price as they delivered the judgement against government during emergency that's why they were superseded by junior judges. Furthermore, the appointment of judges or transfer of

¹³According to Art. 10, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

¹⁴According to Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

judges has also been a burning topic of discussion. During 1975, around 16 judges of High Court were transferred from one to other High Court¹⁵. In the history of judiciary, three prominent judicial pronouncements emerged with reference to appointment and transfer of judges. These three cases were also known as Judges transfer cases. In *S.P Gupta v. Union Of India*¹⁶, court unanimously agreed with the meaning of the word "consultation" as determined in *Union of India v. Sakalchand Himatlal Sheth*¹⁷, by doing so, judiciary substantially narrowed down and reduced its own power in appointing judges and gave the control to executive. In this case Art. 217 (1), Constitution of India was interpreted and held that consultation doesn't mean "concurrence". Then subsequently, in another case Judge named as Second Judge Transfer Case¹⁸, In 1993, Nine Judge Bench overruled the decision given in S.P Gupta's case and judiciary took back the power which they rendered in the previous judgement to President. It was held that President is bound to act in accordance with the opinion of CJI. Furthermore, it was stated that chief justice of India should have primacy and appointment of chief justice should be based on seniority. It was decided that CJI must consult two seniors most judges and then any recommendation can be given, if only there is consensus among them. Interpretation of the word "consultation" was done in such a way that meant "concurrence". Due to such judgement, the role of President in appointment of judges in higher judiciary was restricted. After all, In the year of 1998, the third Judges Case¹⁹ was entertained by 9 judges' bench of supreme court. Supreme Court held that if any decision has been given by CJI without proper consultation then it is not binding. It was emphasized that at least 4 seniors most judges should be consulted at the time of appointment of judges in higher judiciary. Due to the decision of second judges Transfer Case, appointment of judges in Supreme Court and high court is fairly free from executive control. In the context of independence of judiciary, both decision of Second judges' case and third judges' case are praiseworthy. After rigorous exercise, by judiciary, one more case come in the picture which is known as "Fourth Judges Case"²⁰. By the virtue of National Judicial Appointment Commission Act, 2014, NAJC was established. The idea behind the commission was to form and facilitate the collegium through which the name of candidate for appointment of judges in the supreme court and High Court

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

¹⁵Srinjoy Das, "48 Yrs After Emergency, Transfer Of 24 HC Judges in One Go Marks Power Shift from Executive to Judiciary: Justice Bibek Chaudhuri on Transfer to Patna" available at <https://www.livelaw.in>

¹⁶AIR1982 SC 149

¹⁷AIR 1977 SC 2328

¹⁸Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268

¹⁹In re Special Reference 1 of 1998

²⁰Supreme Court Advocates-on-record Association & Anr. v. Union of India (2016) 5 SCC 1



may be recommended to the president. In this case, five judges bench held that establishment of commission is unconstitutional. Composition of the commission was such that by ratio of 4:1, the majority of judges held that the Act was violative of basic structure of independence of judiciary. The court held that NJAC Act goes in to the contravention of precedent set in *Keshvanandan Bharti*²¹ and *Minerva Mill*²² case. Justice Chelameswar who dissented said that "NJAC could have acted as check on wholesome trade off within the collegium and incestuous accommodations between Judicial & Executive branches."

Activism in Judicial Process

In nutshell, we can say that separation of power is needed to have an independency of judiciary but still we must require to have check and balance over different organs. In the past decade, there has been some dynamic changes in judicial process. Present judicial process is such that it gives more opportunity to be at the door of the court irrespective of socio, economic and political constraint. In fact, judiciary is now more inclined towards shaping the structure of the society as an institution. Past judicial pronouncement reflects the dynamic change in the society. For instance, in the Islamic Law, talaq-e-biddat remained prevalent for immemorable time but just because of sensitivity or awareness in people towards their rights have compelled them to force the court to held it as unconstitutional, as it violate the basic right of equality under Art 14 of the constitution²³. There are numerous instances where the cost has initiated to safeguard the right of citizens of the country. With the emergence of information technology & globalization, many rights have evolved by the judiciary. Judiciary has done an interpretation of the constitution to safeguard the interest of the society. Since inception, there were not many rights to be evolved. It is just a matter of thinking of betterment and upliftment of each and every member of the society. Every judgement of higher judiciary is a fine example of step taken towards the betterment of the society. Judiciary is evolving with the time. For instance, the provision of reservation of SC/ST was encouraged but over the period, this requirement of the society become graver by simple reservation, they were unable to reach the last person. In order to address the people, who are still deprived from their rights and need upliftment, In the year of 2024, new policy of sub classification of SC/ST with reserved category has also been considered by the apex court²⁴. 7 judges bench overruled the previous decision²⁵ which came in the year of 2005. Such kind of judgement reflects judiciary's dynamism. Not only the society, in fact judicial process has also been influenced by different factors prevalent in the domain. The independence of judiciary is that much extended that judiciary has the right to review any matter pertaining to executive, legislative and judiciary. Judiciary may have a review of any action taken by executive, seem to be questionable, with regard to constitutionality. Similarly, legislature may also be the subject matter of review by judiciary if there is question on constitutionality and questions on the process

²¹Keshvanandan Bharti v. State of Kerala AIR 1973 SC 1461

²²Minerva Mills Ltd. & Ors v. Union of India AIR 1980 SC 1789

²³Shayara Bano v Union of India (2017) 9 SCC 1

²⁴State of Punjab v Davinder Singh 2024 INSC 562

²⁵E.V. Chinniah v. State Of Andhra Pradesh (2005) 1 SCC 394

followed by the legislature in due course of making a law. Lastly, any matter decided by the judicial process may also be considered as a matter of judicial Review. This much independence of judiciary or in judicial process can hardly be seen anywhere in the world. Another perspective of judiciary is social control that's why we use to say that judicial process is an instrument to social ordering. Through judicial process, shaping of the society may be done in an authoritative manner. Since inception, either it is law or judiciary playing a tremendous role of guiding and shaping the society. "Law" is in itself a very wider term. Anything framed or drafted by legislature would be considered as a law but now we have more wider perspective towards the law which includes interpretation of statutes by the judiciary and precedents including obiter dicta. In the present scenario, sometime directions and guidelines are being delivered by the judiciary by taking suo moto cognizance on any matter like environment, sustainable development etc. In the history of judiciary, this institution has served the society by dealing with different matter of social concern like Bigamy²⁶, Bonded labour²⁷, child labour²⁸, dowry death²⁹, female feticide³⁰, Harassment of woman at working place³¹, Immoral trafficking³², Rape³³, Maintenance³⁴ and many more. Judicial Activism is one of the terminologies appropriated in judicial process. As we know that the basic function of judiciary is to adjudicate the matter, but as much independence has been given to judiciary, judiciary has become more proactive. Higher judiciary has more to do other than adjudication. In fact, Judicial Activism has become necessary for progressive society. This is one way through which we are protecting and expanding individual rights. Every organ of the state has its own duties and obligation to perform however check and balances over the organs are highly needed. That's why judiciary is one of the organs which is encroaching and intervene in the function of executive and legislature. For instance, executive is bound to provide best of facilities to the citizens but many a times in due process of execution and implementation, they infringe and violate the fundamental rights of the people. For instance, we need express high ways, in order to execute the plans, many rights are get violated. Executors acquire a land and don't provide sufficient and appropriate sum of amount as a compensation. In order to safeguard the rights of people or farmers from whom land has been taken, judiciary is responsible one who has to take some steps in order to provide and protect the fundamental rights of specific section of society. In the nutshell, we can say that judiciary has changed its face drastically and performed admirably. In the upcoming time, judiciary shall play a prominent role in shaping and regulating the society. Apart from it, judiciary is a one of the organs who is responsible to keep other different organs in the order. There is dire need to provide and facilitate the judiciary with more

²⁶Lily Thomas v. Union of India AIR 2000 SC 1650

²⁷Bandhua Mukti Morcha v. Union of India & Others AIR 1984 SC 802

²⁸M.C.Mehta v. State of T.N. AIR 1997 SC 699

²⁹Raja Lal Singh v. State of Jharkhand AIR 2007 SC 2154

³⁰Centre For Enquiry into Health and Allied Themes (CEHAT) v. Union of India AIR 2003 SC 3309

³¹Vishaka & Ors v. State of Rajasthan & Ors AIR 1997 SC 3011

³²State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain AIR 2008 SC 155

³³State of M.P. v. Babulal AIR 2008 SC 582

³⁴Mohd. Ahmed Khan v. Shah Bano AIR 1985 SC 945



independence. Even in the past, it has evidently shown that judiciary has played a tremendous role in providing socio, economic and political justice to the masses. Eventually, no state may have the harmony in the society till the time we don't get successful in achieving the goal of social welfare.

Epilogue

In order to maintain the stability, consistency & legitimacy, Larger Bench Rule plays a very significant role. There are numerous instances of breach of larger bench rule through which we may get a reflection of indiscipline in the judiciary. Despite of all adversities, there is a prevalence of Larger Bench Rule. It is such a rule which encourages the non-arbitrariness; however, problem arises where the small bench gives a verdict in contravention to the well settled precedent set out by the larger bench. Overruling of *Romesh Thapper's*³⁵ judgement in *Kanubhai*³⁶ & *PN. Kumar*³⁷ by smaller bench illustrates ignorance of constitutional principles and values. As per the judgement in *Kanubhai*, two Judges held that Supreme Court is under obligation to send the petition to the High court first. Such kind of indiscipline or breach of Larger Bench Rule in the judiciary has also disturbed the principle of stare decisis. Indian judiciary has seen many developments over the period. Gradually, judiciary has emerged with new thought, principles and norms. Even in United State of America, in one of the pronouncements, court held that "negro" is the property of his master³⁸. Later on, that slavery was pronounced and considered as de- humanizing by sharing the concern of human dignity³⁹. This is one of the examples of evolution of human rights through judicial dynamism. Modern Indian judiciary is facing many more challenges in due course of judicial process. Rendering the speedy, free, fair and effective justice is one of the challenges which we are facing. Reason behind justice delay is very clear. The infrastructure of judiciary has not been strengthened in the past years. Alternative dispute resolution has not been accepted by the society due to orthodox approach towards this. The way, there is an increase in the number of populations, it is not in right proposition to number of judges deputed for addressing to judicial works. Despite of all efforts by judiciary, access to justice to needy and downtrodden is still outside the ambit of judicial system. Even though, in the past many years, there is boom in instituting the legal proceedings in civil cases that indicates the faith, belief, trust & integrity in the institution of judicial system. Finally, in order to strengthen the judicial system, there is a need of collective efforts from executive, legislature and judiciary irrespective of presence and functionality of separation of power.

³⁵Romesh Thappar v. The State of Madras AIR1950 SC 124

³⁶Kanubhai Brahmabhatt v. State of Gujarat 1989 Supp (2) SCC 310

³⁷PN Kumar v. Municipal Corporation of Delhi(1987) 4 SCC 609

³⁸Dred Scott v. Sandford 15 L Ed 691 (1857)

³⁹Brown v. Board of Education 347 US 483: 98 L Ed 873 (1954)

