



"JUDGES RESPONSIBILITY IS TO INTERPRET AND NOT TO MAKE LAWS" : CRITICAL ANALYSIS ALONG WITH THE CASE LAWS

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INTRODUCTION

For the longest time it has been the received opinion that judges filled in the gaps left by rules by using their discretion. The courts are not only for the dispute settlement. From the inception, it has been seen that the courts have been an 'interstitial' law maker. The Courts responsibility has been much more increased now, it is obligated to solve problem in the nebulous areas. It has now become the responsibility of courts to apply existing law in a form of more conducive to the independence of the judiciary. Law being dynamic in nature welcomes new social policies which are not always consistent with the prevalent legislation. The judges are called for social engineering which might obstruct the way of legislature and executive. Judges should act in the view of social demand for active judicial role which he is required to fulfil. Law as a creative response must be applied to meet the particular fact. While judging apart from relying upon text only judges should apply own perception of constitutional ideas. It is advisable to fulfil the lacuna or gap the judges are allowed to interpret any enactment in the context of changing social needs and values in order to achieve social goal or public good. As social norms and values change, law too has to be reinterpreted and recast regularly to make it consistent with the current social order.

Judges work is not only to interpret the constitution but also to articulate the constitutional norms to serve public reform in the area wherein pressing need is felt. It is contended that the law must be responsive to serve the needs of changing social order. Judicial Activism emphasizes that the judges are free to mould its ideal path in order to promote justice in a particular situation. Courts today cannot remain passive with the negative attitude, merely striking down a law or preventing something being done rather it has developed new attitude is to initiate positive affirmative actions. An activist court is not fully equipped to cope with the details and intricacies of the legislative subject. It can only be allowed to advise and focus attention on the state polity on the problem and shake it from slumber, goading it to awaken, march and reach the goal. But at times the courts compulsorily need to apply brakes to its self-motion somewhere which is described judicially as self-restraint.

'JUDICIS EST JUS DICERE, NON-DARE'

The well-known maxim 'judicis est jus dicere, non-dare' pithily expounds the duty of the Court. It is to decide what the law is and apply it; not to make it. This read with the Doctrine of Separation of Powers has bound the Courts hands in imposing various kinds of punishments and all that it is left with is to impose fines. In order to avoid compelling the Courts to go out of the statute and interpret and therefore define the law, which is essentially the task of the legislature, it is advised that the legislature amends the various penal statutes in a way so as to bring in various forms of punishments for the corporations as well, thereby maintaining the separation of powers regime and hence the rule of law.



This maxim was applied by hon'ble J. Srikrishna, in the case **The Assistant Commissioner, Assessment-II, Bangalore and Others v/s M/s. Velliappa Textiles Ltd. and Others**¹ He stated that "If the legislature willfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engraving on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principles of justice and equity. To do so "would be entrenching upon the preserves of legislature"². The primary functions of a court of law being Jus Dicere and Not Jus Dare."

REALIST APPROACH

The realist movement in United States represents the latest branch of sociological jurisprudence which concentrates on decisions of law courts. The realist contented that law has emanated from judges, therefore law is what courts do or not what they say, for those judges are the law makers. However, realist school differs from sociological school as unlike the latter, they are not much concerned about the ends of law but their main attention is on a scientific observation of law and its actual functioning. It is for this reason that some authorities have called realist school as the "left wing of the functional school". The contention of realist is that judicial decisions are not based on abstract formal law but the human aspect of the judge and the lawyer also has an impact on court's decisions. Some quarters feel that

realist movement in United States should not be treated as new independent school of jurisprudence but only a new methodology to be adopted by sociological school.

REALISM IN INDIAN CONTEXT

The legal philosophy of realist school has not been accepted in the sub-continent for the obvious reason that the texture of Indian social life is different from that of the American lifestyle. The recent trends in the public interest litigation which **Professor Upendra Baxi** prefers to call as "social action litigation" has, however widened the scope of judicial activism to a great extent but the judges have to formulate their decisions within the limits of constitutional framework of law by using their interpretative skill. This, in other words, means that the judges in India cannot ignore the existing legislative statutes and enactments. They are, however, free to overrule the previous decisions on the ground of inconsistency, incompatibility, vagueness, change of conditions etc. assigning reasons for their deviation from the earlier ruling. Thus, the Indian legal system though endows the judges with extensively judicial discretion, does not make them omnipotent in matter of formulation of law. The constitution of India itself provide ample scope for the judges to take into consideration the hard realities of socio economic and cultural life of the Indian people while dispensing social and economic justice to them.

¹*The Assistant Commissioner, Assessment-II, Bangalore and Others v/s M/s. Velliappa Textiles Ltd. and Others*

[JT 2003(suppl. 2) SC 99] ; (2003)11 SCC 405

² At p 65 in *Prem Nath L Ganesh vs. Prem Nath, L. Ram Nath*, AIR 1963 Punj. 62.



In *S. P. Gupta v. President of India*³ the court observed that:

"... law does not operate in a vacuum. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest, it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice."

In conclusion, it may be reiterated that though Indian jurisprudence does not formally subscribe to the realist's legal philosophy, it does not lay great stress on the functional aspects of law and relates law to the realist law to realities of social life. Again, it refuses to accept the realist's view that judge made law is only "real" law and other laws are worthless, but at the same time it does not completely ignore the role of judges and the lawyers in shaping the law. Thus, it would be correct to say that the Indian legal system has developed on the pattern of sociological. The power to review and doctrine of overruling its earlier decisions has enabled the supreme court to effectuate the socio-economic contents of constitutional mandate though the process of judicial interpretation and use of its inherent powers. Thus, the apex court in Bengal community

case⁴ overruled its earlier decision in *Dwarkadas v. Sholapur spinning & weaving co.*⁵ and observed that "the court is bound to obey the constitution rather than any decision of the court, if the decision is shown to have been mistaken". Justifying its stand, the court further remarked where a constitutional decision affects the lives and property of public and where the court finds that its earlier decision is manifestly wrong and injurious to public interest; it should not hesitate to overrule the same.

However, the courts do not always follow the precedent blindly and do not always consider themselves bound by the given principles. The court does evolve new principles. However, the courts do always have to follow within the limits of the constitution, and they cannot exceed the constitutional limits. "When new societal conditions and factual situations demand the Judges to speak, they, without professing the tradition of judicial lock-jaw, must speak out."

Also, in *M.C. Mehta v. Union of India*⁶ (Shriram - Oleum Gas) the court said that with the development and fast changing society the law cannot remain static and that the law has to develop its own new principles. The above decision reflects that the courts do make law, they frame new principles; interpret the statutes and the constitution with the changing times.

In *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*⁷, the court said that the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould

³ *S. P. Gupta v. President of India* AIR 1982 SC 149

⁴ *Bengal Immunity Co. Ltd v. State Of Bihar & Ors* 1955 (2) SCR 602

⁵ *Dwarkadas v. Sholapur spinning & weaving co* 1954 AIR 119

⁶ *M.C. Mehta v. Union of India* 1987 AIR 1086

⁷ *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee* 1995 SCC (5) 457



the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. The society demands active judicial roles which formerly were considered exceptional but now a routine.

In *S. P. Gupta v. President of India*⁸ the court observed: The interpretation of every statutory provision must keep pace with changing concepts and values, and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast-changing society which is undergoing rapid social and economic transformation.

"The courts must not shy away from discharging their constitutional obligation to protect and enforce human rights of the citizens and while acting within the bounds of law must always rise to the occasion as 'guardians of the constitution', criticism of judicial activism notwithstanding".

It has been accepted that judges filled the gaps left by rulers, by using their discretion. Austin accepted the utility of legislation by judges. He says:

"I cannot understand how any person who had considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator."

The realists also emphasized the paramount of the judge's discretion. They argued that judges did make law. The focus of realism was on decision-making. They argued that

legal concepts and rules were often indeterminate and rarely as neutral as they were presented to be. Adjudication can rarely be seen as a mechanical logical deduction from general premises. In some cases, there remains a gap between the general propositions, or the statute couched in general terms and the result of particular cases. The realist argued that 'public policy' considerations play a major role in the determination of cases.

THEORIES ON "DO THE JUDGES MAKE THE LAW OR DECLARE THE LAW"

There are two contrary theories regarding the question as to whether the judges declare the existing law or make the law i.e.-

- THEORY THAT JUDGES DECLARE THE LAW OR DECLARATORY THEORY

The first theory is the declaratory theory, as propounded by Hale and Blackstone and supported by Dr. Carten. According to this theory no new law is created by the judge. Courts of justice do not 'make' law their duty is to 'ascertain' and declare what the law is. Judges only discover the existing laws, the particular principle that governs individual cases. Through their interpretation they give a new shape to this existing law.

Hale enunciates 'Declaratory theory' of presidents and contents that whilst Parliament alone legislates, in the strict sense the judges only expound the law and the decisions are the best evidence of what law is. A necessary result of this theory is that the effect of the decision is retrospective for it does not only declare what the law is but what it always has been. Nevertheless, as Maine has pointed out once the judgment has been

⁸ *S. P. Gupta v. President of India* AIR 1982 SC 149



declared and reported, we start with the new train of thought and frequently admit that the law has been modified.

According to Lord Esher, "There is in fact no such thing as judgment law for the judge to not make the law, though they frequently have to apply the existing law to the circumstances as to which it has not previously been authoritatively laid down that such law is applicable". Declaratory theory is based on the fiction that the English law is an existing something which is only declared by the judges. This theory is known as the traditional orthodox theory of judicial precedent.

- THEORY THAT JUDGES MAKE THE LAW OR LEGISLATIVE THEORY

The second theory is that judges do not declare law but make law in the sense of manufacturing or creating entirely new law.

Bentham and Austin have attacked the traditional view as a "childish fiction" and have declared that judges are in fact lawmakers and fulfill a function very similar to that of the legislator.

Prof. Gray also supports this law-making theory and says that judges alone are the makers of the law. He discredits the declaratory theory of judiciary law. Unquestionably there is much to be said for this point of view: nevertheless, it is misleading to compare the function of the judge with that of the legislator. Judges are without question lawmakers but their power of law making is not unrestricted; it is strictly limited, for example they cannot overrule a statute where the statute clearly lays down the law, further the judge's legislative power is restricted to the facts of the case before him.

Sir John Salmond, a strong supporter of this

view says that he is evidently troubled in mind as to the true position of precedent. He further says that both in law and equity declaratory theory must be totally rejected.

JUDICIAL PRONOUNCEMENTS

*1. Dr Ashwini Kumar v. Union of India*⁹

In this case it was observed that law-making within certain limits is a legitimate element of a judge's role, if not inevitable. A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation. This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions. Such interpretation is called judge made law but not legislation.

Aileen Kavanagh, in explaining the aforesaid position, had observed:

"... If there has not been a case in point and the judge has to decide on the basis of legal provisions which may be indeterminate on the issue, then the Judge cannot decide the case without making new law... This is because parliament has formulated the Act in broad terms which inevitably require elaboration by the courts in order to apply it to the circumstances of each new case. Second, even in cases where judges apply existing law, they cannot avoid facing the question of whether to change and improve it..."

⁹ *Dr Ashwini Kumar v. Union of India* (2019) 2 SCC 636 para 24



Interpretation has an applicative and creative aspect. "

2. In ***Union of India v. Deoki Nandan Agarwal***¹⁰

A three -Judge Bench of this court observed: "*It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous the court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the word used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set a naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities"*

3. In ***Vemareddy Kumaraswamy Reddy v. State of A. P***¹¹ the court observed that

"15.... The judges should not proclaim that they are playing the role of a lawmaker merely for an exhibition of judicial valour. They

have to remember that there is a line though thin which separates adjudication from legislation. That line should not be crossed or erased"

4. In this context we may fruitfully refer to the authority in ***Suresh Seth v Indore Municipal Corpn***¹². Wherein it has been held that the court cannot issue any discretion to the legislature to make any particular kind of enactment because under the constitutional scheme parliament and Legislative assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation.

5. In ***Supreme Court Employees Welfare Assn. v. Union of India***¹³(1989) 4 SCC 187 it has been ruled that

"51. No court can direct the legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which has been empowered to do under the delegated legislation authority."

CONCLUSION

"JUDGES ARE THE DISCOVERERS OF THE LAW NOT THE CREATORS OF THE LAW"

The Judge's role is not to make law but to uphold the laws which are made by the parliament. Each law which is made by the parliament must be clearly defined and

¹⁰ *Union Of India v. Deoki Nandan Agarwal* AIR 1992 SC 96 para 14

¹¹ *Vemareddy Kumaraswamy Reddy v. State Of A.P* (2006) 2 SCC 670(SCC p. 675, para 15)

¹² *Suresh Seth v Indore Municipal Corpn* (2005) 13 SCC 287

¹³ *Supreme Court Employees Welfare Assn. v. Union Of India* (1989) 4 SCC 187(SCC p. 219, para 51)



applied by the judges in accordance with the cases.

The above-mentioned theories (i.e., Declaratory theory and Legislative theory) indicate that Judge's do indeed create law. The theories about making the law by the judges are not exclusive of each other but they are rather complementary, and it will be seen that neither the purely declaratory theory nor the purely legislative theory represents the whole truth. Judges develop law but cannot said to be legislate. The common law is not 'made' but has 'grown'.

However, when we have move to the real-life situation in terms of the case law, we found that it is not always possible to declare law. Therefore, there is a need for a midway to define the judge's role. In the end it would be right by saying that judges used to declare law by making it while discovering it within the domain of legal world. There are various laws which are judge made like the contract and tort law and many other important developments like the development of negligence as a tort. Though later statues were passed on these subjects too and parliament attempted to include the common law in statutory law but still the original principles created by judges are followed.

Thus, based on the above discussion, it is now clear that the judges declare the law and the question of their making law can be defended by saying that their invention is merely discovery of law within the existing precedents and principles. A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation. This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then, he does not legislate a law

while interpreting such provisions. Such interpretation is called judge made law but not legislation. It is the responsibility of the courts to apply existing law in a form of more conducive to the independence of the judiciary. The power of the court is restricted, and it is not permitted to the court to ordinarily encroach into the legislative and executive domain. There is a broad separation of powers in the constitution, and it will not be proper for one organ of the state to encroach into domain of another organ.
