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An Inspection of Judicial Legislation: A Comparative Analysis

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ABSTRACT

This article elucidates Judicial legislation, and its purpose and classifies it in the Indian context into Interpretation and Intervention. It traces the origins of judge-made law in India from the common law system and deals with the provisions of the Indian Constitution on Judicial law. Further, it distinguishes various types of judicial law-making by different constitutional courts discusses various issues around Judicial legislation, and considers different arguments on this. Then from a comparative aspect, the author reviews the U.S.A's functioning and analyses the different working approaches to Judicial legislation and the idea of separation of powers. Finally, the author concludes by evaluating the legitimacy of Judicial Legislation, and different approaches to balance judicial legislation with other institutions of the state.

Keywords: *Judicial legislation, Judge made law, Article 142.*

I. INTRODUCTION

"There was a time when it was thought almost indecent to suggest that judges make law - they only declare it….we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach this task and how should they approach it"[3]

In many Constitutional Democracies, the role of the Judiciary is to adjudicate claims or rather apply the law which is prescribed by the legislature. In India, our courts have increasingly been indulging in "judicial legislation" and taking the load that is meant for the elected representatives. Judicial legislation or Judge made law is nothing but law declared by the judiciary, this is also known as "judicial law", "Judge-made law" or "Judicial Policymaking". Now, this declaration can be classified into two, One, when judges meet with new and unexpected conditions of society, interpretation becomes essential. This body of jurisprudence has been built by the judges and with the aid of lawyers. Its purpose is to develop and have a purposive interpretation of the written law to adapt to new circumstances. In the words of Justice Antonin Scalia, "this how judges occasionally 'updated' the American Constitution in days of

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[3] Lord Reid, "The Judge as Law Maker," JSPT Law, 12, 22-23, (1972).

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old before non-originalism became widely accepted as legitimate: ... they did it in the good old-fashioned way: they lied about it[4]. Another aspect of the judicial process involves intervention or express law-making through precedents. Here judges seek to make law, this can be because of a myriad of reasons when there is a lacuna in present law to effectively deal with the problem.

II. INDIA AND THE JUDGE MADE LAW

India has adopted the principles of common law, during British rule substantive law was prepared as a way for judges should decide those cases where there is no express provision in the law. Judges applied the principles of justice, equity, and, good conscience there. The Regulating Act, of 1873 provided guidance to the judges to apply rules of natural justice, and the same trend continued till the commencement of the Constitution[5].

In the Indian Constitution, the scope for the Judge-made law or judicial law can be seen under Article 13, where laws in force include the law passed by the legislature or "other competent authority". Here it is inclusive of the judiciary and even considers the wide power of the Court under Articles 32, 226, and 227. Further, in Articles 141 and 144, it is quite clear that the Constitution has bestowed the power on the courts to legislate wisely[6] It may be noted that the words used in Article 141 are "law declared", the words used in Article 145(5) are "judgment" and "opinion". It may therefore be inferred that the framers of our Constitution themselves recognized a dichotomy between the decisions on law and the judgment flowing from it[7]

Initially, the Supreme Court of India adopted a traditional and cautious approach especially when it comes to Judicial Legislation and Judicial review. Later on, the struggle for supremacy is very well known,[8] and post the evolution of the Basic Structure doctrine[9] and ADM Jabalpur decision[10] the Court remolded and modeled it as an activist judiciary. Judicial legislation mostly depends on the court's and Judge's outlook. Conservative or traditional Courts and Judges tend to limit themselves and draw a line while legislating or interpreting in the name of separation of powers. But the activist judges believe that Judge-made law aims at evolution and not

[4] Jeffrey Goldsworthy, Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence, Cambridge University Press, 115,126-127, (2009).
[5] James R. Richardson, Judicial Law Making: Intent of Legislature vs. Literal Interpretation, 39 KY. L.J. 79 (1950).
[6] G.B Reddy and Pavan Kasturi, A Comprehensive Analysis on Judicial Legislation in India, SCC Online, March 4th 2020, https://www.scconline.com/blog/post/2022/03/04/a-comprehensive-analysis-on-judicial-legislation-in-india/, (Last Accessed: Aug 2nd 2022).
[7] Mohit Sharma, Judicial Legislation: Whats' The Lakshman Rekha!, Livelaw, 10 Dec 2016 https://www.livelaw.in/judicial-legislation-whats-lakshman-rekha/, (Last accessed 4 Aug 2022).
[8] T.R. Andhyarujina, Kesavananda Bharati Case - The untold story of struggle for supremacy by Supreme Court and Parliament, Universal Law Publishing, (2011).
[9] AIR 1973 SC 1461.
[10] AIR 1976 SC 1207.

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revolution and that is why it has come to be widely accepted.[11] In some cases, acceptance can be even seen from the legislators when they borrow reforms from precedents[12]. But judicial legislation need not be an innovative role of an activist Judge, it is the function of the Judge to uphold the Constitution, and it is for him to infuse life into the enacted law[13].

Intervention Cases Example: Sexual harassment at workplace Guidelines[14]; Introducing police reforms[15]; directions on Acid sale in India[16]; Guideline on Honour Killings[17]; Guidelines on Witness protection scheme[18] and many more interventions can be seen during COVID-19.

Interpretation Cases Example: Landmark Judgements like establishing Collegium and interpreting Consultation as concurrence[19]; Introducing doctrine of prospective overruling[20]; Legalizing passive euthanasia[21]; waving statutory period for divorce[22]; Placing limitations on President rule[23] and many more.

III. JUDICIAL LAW-MAKING IN DIFFERENT CONSTITUTIONAL COURTS

1. Positive Legislation: As Hans Kelsen points out, judges unmake laws when performing review function and calls them negative legislators. Hence, in some nations, the question arises when a law is repealed whether the previously existing law subsists or not. It needs a positive affirmation from the court to prevail. For example, Article 140(6) of the Austrian Federal Constitutional Act according to which a previous law will once again become operative if the revoking law is itself repealed by the Constitutional Court unless the Constitutional Court decides otherwise.

2. Law-making Proposals: Some Constitutional courts like Russia[24], Paraguay,[25] and Mongolia[26] have strikingly different judicial law-making. They engage in the pre-

[11] M.N Venkatachaliah, Constitutional Adjudication and Judicial Legislation scope, SCI: Constitutional Day Celebrations, (2016). https://main.sci.gov.in/pdf/speeches/speeches_2014. (Last Accessed: Aug 2nd 2022).
[12] A. Raghunadh Reddy, Legal Reforms Through Judicial Law-Making: A Critical Appraisal from Roman Law to Common Law.
[13] Kurian Joseph, Judicial Legislation, (2016) 2 SCC J-18.
[14] Vishaka v. State of Rajasthan, (1997) 6 SCC 241.
[15] Vineet Narain v. Union of India, (1998) 1 SCC 226.
[16] Laxmi v. Union of India, (2014) 4 SCC 427.
[17] Shakti Vahani v. Union of India, (2018) 7 SCC 192.
[18] Mahender Chawla v. Union of India, (2019) 14 SCC 615.
[19] Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.
[20] AIR 1967 SC 1643.
[21] Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454.
[22] Devinder Singh Narula v. Meenakshi Nangia, (2012) 8 SCC 580.
[23] S.R Bommai v. Union of India, (1994) 3 SCC 1.
[24] Article 104, The Russian Constitution.
[25] Article 203, The Paraguay Constitution.
[26] Article 68, The Mongolian Constitution.

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enactment phase of legislation as a body that designs and initiates laws[27].

3. Mandated Legislation: The Constitution of Ecuador[28] empowers the Constitutional Court to not only declare the unconstitutionality of legislation but also place a time limit to enact laws when such time lapses, the Court shall provisionally issue the rule or enforce the observance by the law.

IV. ISSUES AROUND JUDICIAL LAW-MAKING

Do judges make laws? The Blackstonian doctrine of the " declaratory " function of the courts, holds that the duty of the court is not to " pronounce a new law but to maintain and expound the old one," The other opposite view says that judges do make laws and this is the creative theory of adjudication. Bentham and Gray asserted that "judges produce law just as much as legislators do, and they even make it more decisively and authoritatively than legislators since statutes are construed by the courts and such construction determines the true meaning of the enactment more significantly than its original text".[29]

When is judicial law-making inappropriate? Judicial Law does not make the court higher than the Legislature, when the former encroaches upon the wisdom of the latter, it defeats its legitimacy. Hence, it's the judge's role to find a delicate balance by not violating the separation of powers principle. judicial overreach results in democratic debilitation. Societies that leave all of their political issues to the judiciary miss the excitement of democracy and its process[30]. Further, it is not appropriate to invent legal doctrine that can distort or change accepted legal rules and principles.

Should Judicial legislation be welcomed because of its desired results? When Judges are left with such great undefined power then the system of checks and balances in the Constitution and the logic of the supremacy of the Constitution is dismantled. The inaction of the legislature is tempting for the judiciary to legislate and win public acceptance and acclaim but it can be detrimental to the constitutional framework. When courts legislate, they create perverse incentives for political actors who find litigation cheaper and easier and engage their attention to the courts rather than the democratic process.

Can Judicial Legislation gain complete Democratic Legitimacy? Judges to constitutional courts

[27] Tom Ginsburg and Zachary Elkins, Ancillary Powers of Constitutional Courts' 87 Texas L Rev 1432, 1444-45. (2009).
[28] Article 436(10).
[29] John Chipman Gray, Nature and Sources Of The Law, 93 Beacon Press, Boston, (1963).
[30] M.N Venkatachaliah, Constitutional Adjudication And Judicial Legislationscope, SCI: Constitutional Day Celebrations, (2016) https://main.sci.gov.in/pdf/speeches/speeches_2014. (Last Accessed: Aug 2nd 2022).

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are never elected by the people unlike Legislators and are not subject to any kind of accountability towards the electorate or Parliament. A rare example is the Bolivian Constitutional Court where they are elected[31]. Therefore, Courts cannot claim democratic legitimacy as a parliament[32].

Can Complete codification prevent the judiciary from legislating? Proponents of Separation of powers and codification of the law, express a view that complete codification of all conceivable issues would divorce legislature and judiciary. Then will *"reason, science, and conscience"* be eliminated from the law, judicial law-making will be gone and all the law will be on the shelf available, clear, and an open book to the layman and lawyer alike[33]. But this is rare and in a way impossible as it is not possible to predict all problems and codify them. Further, judicial law comes into play even at the time of inaction on the part of lawmakers.

Is the Judiciary Competent to Legislate? According to T.R. Andhyarujina,[34] the Judiciary is least competent as Courts lack the facilities to gather detailed data or to make probing inquiries; Courts have to rely on their knowledge or research which is bound to be selective and subjective; They have no means for effectively supervising and implementing the aftermath of their orders, schemes, and mandates; Courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases; Courts have also no method to reverse their orders if they are found unworkable or require modification.

What if the Court Legislates a law that in itself is Unconstitutional? Assuming without conceding for a while that Constitutional courts receive democratic legitimacy as they are legislating to protect constitutional Ideals. But when courts themselves commit the error of creating an Unconstitutional law, then it can be subsequently rectified by the legislature. But what if as in the case of India where they have created an unamendable principle of Basic Structure? If not now, then in the future there is a chance of conflict between the prime organs of the state and a tussle for supremacy.

V. SEPARATION OF POWERS VIS-À-VIS JUDICIAL LEGISLATION: COMPARATIVE ANALYSIS

Before we proceed, it would be appropriate to explain the selection of the U.S.A. for the studies.

[31] Article 198.
[32] James R. Richardson, Judicial Law Making: Intent of Legislature vs. Literal Interpretation, 39 KY. L.J. 79 (1950).
[33] Ibid.
[34] T R Andhyarujina, Judicial activism and constitutional democracy in India, (N.M. Tripathi Private Ltd, 1992).

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The Concept of Judicial Legislation essentially stems from Judicial Review and was transplanted to India from the U.S.A. Furthermore, It has been the main source of influence on Western constitutionalism. Hence, in my opinion, it is important to analyze different present-day approaches toward these principles.

The political theory that the legislature, executive, and judiciary should be separate was first propounded by Montesquieu. In its modified form it reappeared in many constitutions maintaining checks and balances for a healthy democracy, but in many countries, these branches coordinate because of the overlapping functions and such watertight separation cannot exist.

But can the Separation of Powers reconcile with Judicial Law-making? Courts performing Judicial review and striking down the legitimacy of the enactments (negative legislation) can never be considered as violating the separation of powers. But when Courts perform Positive legislation, it is essentially interfering with the domain of the legislature. When this power of the courts is not under control, then chances that the court which usually tends to uphold the law through interpretative techniques will run down laws as unconstitutional and substitute new laws which are good according to their wisdom. Ultimately Jeopardising the Separation of powers Lakshmana Rekha is playing with the democracy thus means jeopardizing themselves.

(A) India:

In India, the Judicial law-making function was called into question in *P. Ramachandra Rao* v. the *State of Karnataka*[35] Here the 7-judge Bench of the SC was considering the judgments of Common Cause case (I) and Raj Deo Sharma (I) and (II), where the Court prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closely followed by an order acquitting or discharging the accused[36]. The court held that this is Judicial legislation and against the express provisions of Law and binding precedents.

Judicial legislation was always welcomed in India and can be seen as a synchronization of Institutions without paralyzing the Constitutional principles. But was frowned upon when courts display Judicial adventurism and legislated according to their whims and fancies. For example, in Subhash Kashinath Mahajan's[37] case, the court annulled Section 18 of the SC/ST Atrocities Act, 1989. And added additional safeguards and approved anticipatory bail to the accused against the mandate of the legislature. However, it was later amended by the legislature and

[35] (2002) 4 SCC 578.
[36] Ibid
[37] (2018) 6 SCC 454.

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recalled by the courts. Similarly, shutting down liquor vend near highways[38], Restriction of sale of BS4 Vehicles, Rajesh Sharma's case[39] where the court prescribed guidelines for misuse of 498A IPC, and Playing the National Anthem in theatres, etc., are some of the cases of Judicial legislation which can be termed as adventurism.

(B) U.S.A:

The Framers of the US Constitution envisioned a limited role for the federal courts by making clear that law-making is reserved for the people and their representatives. The principle of "Separation of Powers" is not specifically included in the Constitution. But when we look at Each vesting clause like Articles 1,2 and 3, they denote a specific functioning of the institution. But, in practice, in American constitutional history, all the organs of the state mingle with each other. The President interferes with Congress through his veto power and the Supreme Court through the exercise of his power to appoint judges. Congress interferes with the powers of the President and Judges. Also, the judiciary on other organs through the exercise of its power of judicial review. Interestingly Supreme Court has made more amendments to the American Constitution than Congress itself[40]. Since Marbury v. Madison, such judicial review has been recognized as a judicial "duty" and this is the source of Judge-made law. The examples of judge-made law in the USA are legion. For example, judicial creativeness in cases like the Pentagon Papers[41] where the court defended the First Amendment right of a free press against prior restraint by the government. Another case is Prince v. Commonwealth[42] where the court granted primacy to First Amendment rights and opened up the 14th Amendment, holding that " freedoms need breathing space to survive". An Enormous law-making process was involved when the Supreme Court acted to import another of the rights in the first eight amendments into the Fourteenth Amendment through the due process clause[43]. These examples can go on like abolition of the death penalty[44], abortion[45], or same-sex marriage[46]. There are even cases of Judicial Overreach, For example, in Washington v. Glucksberg[47], the constitutionally guaranteed right to physician-assisted suicide came up. Even though voters rejected the ballot initiative and were against assisted suicide, litigation was pursued. In the eleven-judge en banc

[38] State of T.N. v. K. Balu, (2017) 2 SCC 281.
[39] 2017 SCC 821.
[40] Vinita Choudhury, Separation of Powers: A Comparative Study of India, Vol 1, NLIU Law Review,99, 107-108, (2010).
[41] New York Times Co. v. United States, 403 U.S. 713 (1971).
[42] 321 U.S. 158.
[43] Jack G. Day, Why Judges Must Make Law, 26 Case W. Rsrv. L. Rev. 563 (1976).
[44] Furman v. Georgia (408 U.S. 238).
[45] Roe v. Wade, 410 U.S. 113 (1973).
[46] Obergefell v. Hodges, 576 U.S. 644 (2015)
[47] 7521 U.S. 702 (1997).

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panel of the Ninth Circuit, eight judges held that due process liberty interest in controlling the time and manner of one's death and recognized the 'right to die". However, this was overruled by the Supreme Court. This example indicates the threat that subsists around Judicial Legislation.

VI. CONCLUSION

Overall, each system has its unique constitutional history and characteristics that can be distinguished. However, a common factor that cannot be denied is the positive impact that the Judge made the law create. The critics claim the concept violates the separation of powers and is thus in disagreement with the Constitution. But it cannot be argued that it violates the spirit of the Constitution in any way. Judge-made law compensates for the inaction of the state and keeps checks on them. But, a problem that can be agreed upon is instances of unregulated or unruly Judicial Legislation. Given the rich culture of these Democracies and active Judicial review tradition, it is not possible to legislate and curtail the Court's powers in legislating.

A Uniform Answer for Determining the Limits of the Judicial Law-making Role. However, some guidelines can be offered. When a court is being asked to invalidate legislation, it must be conscious that it is being asked to override the will of one or more elected Parliaments; The courts can be bolder in engaging and molding the common law or interpreting legislation. As Parliament can legislate to overturn the decision and introduce a new rule or principle; Change brought by judicial creativity must fit into the accepted body of accepted rules and principles.

Hence, adopting conventions where a judge should be consciously sensitive to a creative duty, and its limitations but also fulfill the constitutional duty with restraint. "While the exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our exercise of power is the self-imposed discipline of judicial restrain[48]

Principled judicial activism can be a self-imposed tool or convention that the court can follow to not yield to the temptation of exercising legislative or executive powers. Also, a proper understanding of Originalism limits interpretative ventures. This can avoid Judicial subjectivity, personal preferences, and Judicially created tests that usurp the functioning of other organs. Further, the legislators have to put in place the major architectural framework of interpretative techniques that relies on the Constitution's text, structure, and history as constraining forces. Without such constraints, judges are nothing more than politicians in robes[49].

[48] Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364.
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