Page 1099 - 1114 **DOI:** *https://doij.org/10.10000/IJLMH.113154*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 3

2022

Judicial Legislation and Contemporary Challenges

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ABSTRACT

The judicial legislation is a temptation, often finds it difficult to avoid. The thin line which separates adjudication from legislation should not be crossed or erased, for the sake of that temporary temptation. The courts must avoid the danger of determining the meaning of a provision based on their preconceived notion of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. The courts are not entitled to usurp the legislative functions under the disguise of interpretation, whereas the separation of powers is sacrosanct in a modern democracy. There are various occasions, where the Public Interest Litigation domain was used to enter into the legislative domain as well. It is apart from the fact that the judicial decisions were invited to the facts where the legislative vacuum existed. Though the precedent is not the law of the land and it does not have the sanctity of statute, over the period in India, precedent became more authentic than the statute itself. Though the judicial legislation, in modern times cannot be ruled out completely, it does have its inherent limitations as well. The judicial legislation may be used as a special medicine where the disease is acute, as an emergency measure, but that shall not be the order of the day, rather the daily menu. Some of the said inherent limitations are discussed in the given article.

I. THE PIL AND ITS BENEFICIAL CONTEXTS

The jurisprudential history of Public Interest Litigation (PIL), especially in the field of environmental law jurisprudence is always in the limelight due to a range of, often dynamic, postcolonial interpretations of judicial activism. PIL developed as an aftermath of the realist school of jurisprudence is often perceived as a 'progress' in the jurisprudential chronicle. The ensuing juridical activism is often interpreted as the judiciary's struggle with political chaos, something hostile to constitutional democracy. Judicial activism is perceived as the controlling factor of the chaotic forces of political authority, to the benefit of the people. In the jurisprudential sphere, this process is often hailed as a judicial attempt with democratic acts of

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administration in restraining the chaotic forces.

To a great extent, this is true as well. The polity in India went through a difficult situation right from the time of T.N.Sheshan effect. In 1990 he became Chief Election Commissioner and started cleansing the election process. The enforcement of the election rules and procedures became strict and the rigging of election booths was controlled to a great extent, though not completely eliminated. The voter's identity card was issued and the same was made mandatory for voting. This process was also made subject to judicial scrutiny and could survive. The political class en-mass objected to the said revolutionary changes, but with the pro-active judicial intervention, the changes were sustained. This led to another situation, where none of the parties could bag majority seats in India. The next three decades saw the minority governments continuously ruling India, where they were not having the necessary mandate in the parliament and were vulnerable to the small parties supporting them for the survival of the government. This was once termed as "coalition compulsion" by none other than the Prime Minister[3]. During these decades of political instability and uncertainty, the judiciary emerged as a great controlling factor in the Nation. The vacuum of governance was visible in many spheres. The judiciary vide its judicial activism tried to fill up those vacuums to a great extent. The fact that the first pages of the national and other vernacular newspapers were mostly filled up with the judicial decision, instead of legislative and executive decisions. Along with the same, the chaos in the legislative bodies became a matter of persistent laughingstock.

In this background, many of the quintessential administrative and political decision makings were steered by the judiciary, which included the protection of democracy, environmental jurisprudence, fighting against the corruption, tax reforms, judicial/legal reforms, protection of women and children, legislative vacuum and many more similar areas. This is the beneficial aspect of jurisprudence involving Public Interest Litigation. This has helped the judiciary to develop some of the fine-tuned legal principles of judicial decision making. The contribution of the judiciary to making legal principles in the realm of environmental protection is worth mentioning here. Public trust doctrine[4], polluter pays principle[5], the doctrine of sustainable development[6], precautionary principle[7], the doctrine of inter-generational equity[8] and doctrine

[3] Financial Express, New Delhi | Updated: Jan 3 2014, 20:55 pm hrs, https://www.financialexpress.com/archive/manmohan-singh-in-speech-praises-upa-on-economic-growth-hits-out-at-narendra-modi/1214987/ (Accessed on 28/03/2022),
Hindustan Times, Feb 17, 2011, 01:13 AM IST, https://www.hindustantimes.com/delhi/some-compromises-have-to-be-made-in-a-coalition/story-wLdxwKOWrSbj17JDh9k89M.html (Accessed on 28/03/2022)

[4] M.C.Mehta Vs.Kamalnath, (1997) 1 SCC 388

[5] Vellore Citizen Welfare Forum Vs. UOI, (1996) 5 SCC 647; (AIR 1996 SC 2715)

[6] Doon Valley case, Rural Litigation and Entitlement Kendra Vs. State of UP (AIR 1985 SC 652)

[7] Endosulfan case, Remya P vs The State Of Kerala; Writ Petition (C) No 213 of 2011in Supreme Court of India.

[8] State of Tamilnadu Vs. Hind Stone, AIR 1981 SC 711

of absolute liability[9] are the legal principles evolved in environmental jurisprudence. These principles were reiterated and applied in many subsequent cases. When the same is considered beneficially, it gives enormous pride in the system. Judicial activism has evolved over the decades to drive the nation into a better tomorrow. Along with such beneficial judgments, Public Interest Litigation became a popular and famous tool in the modern jurisprudential chronicle.

II. THE JUDICIAL LEGISLATIONS

There are various occasions, where the Public Interest Litigation domain was used to enter into the legislative domain as well. It is apart from the fact that the judicial decisions were invited to the facts where the legislative vacuum existed. In such areas of conflicts, where the proper statutory domain was not existing the judicial decision making prevailed. Rather it sometimes added to the statute either in the name of guidelines or in the name of declarations, that the judicial legislation became the order of the day. It received the stamp of 'law of the land' under the title of precedent supported by Article 141. Though the precedent is not the law of the land and it does not have the sanctity of statute, over the period in India, precedent became more authentic than the statute itself. It became a reality that the statutes were subjected to criticism and amendments by discussion in the open forum, the precedents are considered as holy cow, not subjected to open discussions or criticisms. This gives rise to the limitations the judicial legislations do possess in the democratic and welfare state of modern times.

III. THE BARRIERS TO JUDICIAL LEGISLATION

The judicial legislation, in modern times, can not be ruled out completely. Though the doctrine of separation of powers as propounded by French political philosopher Montesquieu in De l'esprit des lois (1748; The Spirit of Laws)[10] has come of ages and the modern democracies have their foundation in the said doctrine, the said separation does not constitute watertight compartments of rigid separations. In a practical sense, the said rigid separation of powers can be counterproductive. But that does not mean that the separate organs can usurp the powers of the other organs, without any accountability, checks and balances.

The judicial legislation does have its inherent limitations. The judicial legislation may be used as a special medicine where the disease is acute, as an emergency measure, but that shall not be the order of the day, rather the daily menu. Some of the said inherent limitations are as

[9] Union Carbide Corporation Vs.Union of India, (1991) 4 SCC 584

[10] Britannica, The Editors of Encyclopaedia. "separation of powers". Encyclopedia Britannica, 10 Apr. 2020, https://www.britannica.com/topic/separation-of-powers. Accessed 28 March 2022.

given below.

(A) The vulnerability of the judiciary to participate in public discourses and debates

Legislative lawmaking is a political process and every lawmaking essentially goes through that process. When it comes to judicial law-making, the judges or the members of the judiciary are not permitted to participate in those political discourses. In almost all issues, the judge becomes functus officio, after the delivery of the judgment. It is considered unethical for a judge to come in public and defend the judgment of the public, either through speeches or through opinions. Once the judgment is delivered, there is no role left to the judge to re-evaluate it. The judiciary lacks the tools and means to create public opinion in favour of the judgment. The judicial system is out of the political process. That necessarily is to remain so also. Otherwise, the sanctity of the judiciary itself will be jeopardized. Whereas, in the case of the legislative process, the legislative leaders are the part and parcel of the political process, who holds enough tools and means to interact with the public at large and are free to garner public support through their political manoeuvrings. This inherent limitation on the part of the judiciary needs to be understood in its right perspective, before venturing into judicial lawmaking. The law may be good. But every law may create some dissent also, as the law is intended to regulate public conduct. There may be people who are made disadvantageous through the said law. This needs to be overcome by larger benefits that the society collectively derives from such law. And there is a need to convince the society at large about the common benefit the said law is providing, and in the absence of the same, even the best of the best law may be overthrown by the public. Such public opinions are gathered together through the political process and the judiciary is ill-equipped in this realm.

(B) The dearth of popular support

The judicial law-making process does not involve necessary public participation in the form of public discourses or discussions. When the matter is pending before the court of law, the matter is considered sub-judice and the popular discussions and opinions are discouraged or considered unethical because they may cause some element of unconscious prejudice in the minds of the judge. Many a time, it is criticized in the name of 'media trial'. Hence the said barrier though is with the right intention stands as a barrier in the judicial legislation process. The said restraint against the public discourses concerning the matters sub-judice is valid when the issues are inter-partes and the decisions are binding only to the parties to the suit. Whereas when it comes to judicial lawmaking, the law binds the whole world and the affected parties are the whole population, along with the future generations. Their opinions and aspirations are

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given a total negation in the judicial process and they are shunted out, unlike the legislative process, where the freedom of speech and expression is guaranteed to every citizen. The freedom of criticism and dissent is an essential part of modern democracies.

As the public is shunted out of the decision-making process, judicial lawmaking inherently lacks the necessary popular support in its efforts to judicial lawmaking. Some of the processes may be accepted by the public due to the beneficial context in which it stands, especially when it is to control the political class from its hegemony. But that may not work out when the public opinion is divided sharply on any subject, and the judiciary is ill-equipped to drive the public opinion into a unified mould through public discourse.

(C) The exclusion of the affected parties from the decision-making process.

As discussed above, the judicial law-making process does not involve the affected parties in the decision making. It is impossible for the judicial structure to hear every member of the society, before deciding on a public issue. Whereas the legislative process starts with the ballot and every member participates in the process. The consensus evolves and the said consensus is reflected in the legislative process while the law is made. Hence, even though the individual is having a dissent or difference of opinion, he is satisfied that his opinion also was considered. Whereas in the judicial law-making process, the given opportunity is lost, and the decisions are taken by hearing only some selected parties. This is another inherent limitation of the judicial law-making process. The law, when it is declared and executed is binding to the world at large and cannot be implemented selectively. Hence the judicially declared law may be deficient in popular sanctity and the same is another limitation of the process.

(D) The inability of the public to express their dissent

If any section of the people, even a single person dissent from the given legislative draft, he is at liberty to express in public and also to hold any demonstration or discourse peacefully. To assemble peacefully is a fundamental right, so also to express freely[11].

But, when it comes to judicial law-making, none of the above-given processes or opportunities to dissent survives. The drafts are not published in advance, the objections are not invited, and the opposition or the members of the public at large has no scope of making their opinion or expressing them to the decision-making authority. In case, anybody expresses their dissent against the given judgment and expresses their opinion, it may invite contempt of court proceedings. The concept of opposition does not exist in the judicial structure or system. This is another inherent lacuna in judicial law-making.

[11] INDIA CONST., Art.19, cl.(1), sub cl.(b) & sub cl.(c) .

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(E) The risk of contempt of court

The contempt of court act[12] creates an atmosphere of fear in the minds of the citizens to criticize the judicial law, if found to be erroneous. The judicial decisions are beyond the scope of public scrutiny and the scope of opposition. Even if the public at large are not agreeing with the given law, they have no avenue to challenge it. Even the appellate jurisdiction is open to the public. Only the original parties to the litigation have the right to appeal a judicial decision. Hence it becomes the prerogative of one or two active litigants and the judicial authority to lay down the law of the land, without any consent from the affected citizens and that conclusively binds the world at large. As long as The Contempt of Court Act looms as a sword of Damocles upon the citizens, nobody will dare to risk criticizing the judicial lawmaking even in their wildest dreams. The liberty of thought, expression, faith and belief[13], so also, the freedom of speech and expression as guaranteed by the constitution[14] becomes practically impossible, when it comes to the criticism of the judicial authorities. Whereas in the case of legislative bodies enacting any statute, any amount of criticism is possible in the public domain by political opposition, media or the public at large.

(F) Lack of multi-stage scrutiny

When the legislative process of lawmaking takes place, the draft is prepared and given to the legislative members in advance. The same is included in the legislative agenda and it is discussed threadbare in the assembly/ parliament as the case may be. Many a time the said draft bill is referred to the standing committee of the legislature for detailed study and discussions. In this process, the people of the state have all the right to respond to the given draft and point out their dissent, if applicable. The media, also known as the fourth estate, discusses the draft bill in detail and educates the public in advance. These are part and parcel of the legislative process. The opposition does not leave any stone unturned to put the government in the dock. The draft Bill is read three times according to the rules of the legislative body and then alone it is put to vote. In the case of a bicameral legislature, the bill needs to be approved by the other house also, undergoing the same process. The government becomes answerable and accountable to 'we the people', per the constitutional morality. All the apprehensions about the draft bill need to be answered by the government and the legislative members before the public at large making it a law. The media can directly ask questions to the political leaders. Apart from that, if the Bill has been passed by the legislative body, it still needs to be approved by

[12] Contempt of Courts Act, 1971 (70 of 1971), Act Number: 70, Act ID: 197170.
[13] INDIA CONST., Preamble
[14] INDIA CONST., Art.19, cl.(1), sub cl.(a), in part III

the President/Governor as the case may be. Constitutionally, it is done on the advice of the government in office. But at times the personal opinion of the President/ Governor is also significant. Apart from that, in the case of state law, the governor is at liberty to reserve the given bill for the consent of the President of India. Both the president and Governor enjoy the pocket veto also, by keeping the bill in abeyance perennially. The other option is to return the bill for reconsideration. This systematic process of legislative law-making gives ample opportunity for the citizens to be more conversant with the system and they find it more accommodative. The systemic checks and balances make the law more finetuned and error-free. The public acceptance will be highly positive. But the judicial law-making lacks these systemic checks and balances and it adds to its inherent limitation in making the law.

(G)The exclusion of judicial review

The judicial review is another remedy and sometimes a weapon in the hands of the aggrieved citizens in case of violation of any right. Even the legislative body is not permitted to violate the rights of the citizens and in some cases that of any person. If a law made by the Parliament or the Legislative Assembly is unjust, the people hold the right to revolt against it. 'Lex injustia non est lex[15] is an age-old maxim. An unjust law is not a law at all. But it can be challenged in the democracy in the legal ways provided, which means, either judicially or politically. But unfortunately, when the judiciary enters into the executive or legislative domain, no such revolt is possible. The Supreme Court of India by a nine-judge bench had decided that the judiciary is not a state[16], and hence no challenge/ judicial review to the legislative or executive actions at the hands of the judiciary under the banner of Public Interest Litigation is possible. The political revolt through the ballot is also not possible, as the judiciary is not accountable to the public at large either through the ballot or otherwise.

Though for challenging the law, there is no applicability of limitation or even res judicata. But, when it comes to judicial legislation, both the limitation and res-judicata become unduly applicable and it binds even all the future generations perpetually. The legislative law can be amended, but not the judicial legislation. Apart from that, most importantly, the political decision making can be subjected to open criticism and is protected under the fundamental rights[17]. Whereas the judicial decision making is within the absolute immunity and the said immunity is protected statutorily[18]. Then the only way out is to revolt/ civil disobedience

[15]S.S.Peloubet, A Collection of Legal Maxims in Law and Equity, George S. Diossy, New York, 1880, Page 149, Line No.1217.
[16] Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1
[17] INDIA CONST., Art.19, cl.(1), Part-III
[18] The Contempt of Courts Act, 1971

against it. The people left with no remedy for their rights being infringed may resort to extra-constitutional remedies, including revolts which may even lead to a civil war. The pressure cooker situation under the threat of contempt of court against such venting of public anger can take the nation into an unfortunate situation of turmoil or even civil war in extreme cases. The verdicts of Jellikkettu, Sabarimala and in the matter of the SC/ST Atrocities Act[19] all have seen such revolts. Such a context gives rise to the important doctrine of separation of powers. The judiciary, it seems, is ill-equipped to deal with the political context on the ground and the political leaders alone have the expertise to do so.

It shall be remembered that 'let you be off at any height, the law is above you'[20], which in essence means that 'The law must not be violated even by the King'. But it came to a situation where the judgments under the Public Interest Litigation are above constitutional law and thus can even infringe fundamental rights. Rather, as far as the judgments of the Supreme Court of India are concerned, it claims the protection of the Crown in theocratic governance that 'The King can do no wrong'[21] . In dark ages it was considered that the Roman Pope was infallible and such infinite infallibility was subsequently challenged with the beacon of renaissance, enlightenment and consequent reformations. Such infallibility had even been ushered into the legal maxims, like 'Roma locuta est, causa finita est'[22]. Star chambers were thus discarded and made way for equitable jurisdictions.

(H)The application of limitation for the challenge on the constitutional validity

In the case of any statute, enacted by the legislative body, the allegation of violation of fundamental rights or other constitutional provisions can be raised at any subsequent point in time. There is no limitation whatsoever in the case of challenging the constitutional validity of an enactment. Even the pre-independence era law is expressly provided under Article 12 to be subject to judicial review. Hence there is no limitation in the case of a challenge to the law of the land. As the law binds the future generations, the future generation also holds a right to challenge a law, when it appears that the same infringes their rights, either fundamental or constitutional.

But in the case of judicial legislation, there is a statutory barrier of limitation to seek review of the said judgment/precedent/ stare decisis. Even the future generation, who were not even born at the time of the given judgment is bound by it, and the law determines that the challenge of

19 Supra

[20] 'Lex non a rege est violanda'

[21] 'Rex non potest pecare'

[22] "Rome has spoken, the case is closed", Farlex Dictionary of Idioms. 2015. Farlex, Inc 1 Apr. 2022 https://idioms.thefreedictionary.com/Roma+locuta+est%2c+causa+finita+est

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the said judgment and seeking the review/appeal should have been within the period of limitation. This proposition was reiterated by a 9-judge bench of the Supreme Court in National Lawyers' Campaign for Judicial Transparency and Reforms and Ors. Vs.Union of India and Anr[23]. Though the 6-year-old as a petitioner in the said petitioner sought the waiver of limitation to seek review of the judgment on the ground that, when the judgment was delivered the child was not even born and could not seek review of the said judgment within the limitation prescribed by law was not considered by the Supreme Court. The order of dismissal reads, "There is an inordinate delay of 9071 days in filing the instant petition, for which no satisfactory explanation has been offered by the petitioners." The review petition was accordingly dismissed. Hence, the judicial law-making process has this inherent hindrance to challenging the same and seeking judicial review, even if it violates some of the given constitutional or fundamental rights.

(I) Violation of fundamental rights by the judiciary cannot be claimed

The fundamental rights are as given in part III of the constitution of India. Most of the rights are claimed against the state by the citizens, though some of the rights are in rem, claimed by every person. Hence the state, as defined in Article 12 of the constitution is restrained from violating the fundamental rights of its citizens. Article 32 and 226 jointly and severally assure judicial remedy in case of violation of fundamental rights of any person. Apart from these constitutional assurances, there are various occasions, the judiciary also adjudicated upon it and reiterated the remedies to the violation of fundamental rights. A.K.Gopalan[24] case, I.C.Golakhnath[25] case, privy purse case[26], bank nationalization case[27], newsprint case[28], Keshavananda Bharathi [29]case, Maneka Gandhi case[30] and Waman Rao case[31] are some of the leading judgments in reassuring the fundamental rights and the remedies associated with its infringement. In all these cases the determination was concerning the violation of fundamental rights by the executive or by the parliament. But, if the judiciary is the agency, which is violating the fundamental right of the persons, does the aggrieved person holds any judicial

[23] Supreme Court of India, Review Petition (Civil) (Diary No. 29668/2018) in Writ Petition (CIVIL) NO. 1303/1987 decided on October 17, 2019. https://main.sci.gov.in/case-status accessed on 17 March, 2021.
[24] A. K. Gopalan v. State of Madras, AIR 1950 SC 27
[25] I.C. Golaknath v. the State of Punjab, AIR 1967 SC 1643 (1967) 2 S.C.R. 762, 819.
[26] Madhav Rao Scindhia v. Union of India, (1971) 3 S.C.R. 9
[27] Rustom Cavasjee Cooper vs Union of India, (1970) AIR 564, 1970 SCR (3) 530
[28] Bennett Coleman & Co. & Ors vs Union Of India & Ors, 1973 AIR 106, 1973 SCR (2) 757, 1972 SCC (2)788
[29] His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and Another, 1973 (4) SCC 225ff., AIR 1973 SC 1461.
[30] Maneka Gandhi v. Union of India, AIR 1978 SC 597
[31] Waman Rao v Union of India, 1981 2 SCC 362

remedy is a pertinent question. This question came for determination in a case[32] before a nine-judge bench of the Supreme Court and it was held that "We have already held that the impugned order cannot be said to affect the fundamental rights of the petitioners and that though it is not inter- partes in the sense that it affects strangers to the proceedings, it has been passed by the High Court concerning a matter pending before it for its adjudication and as such, like other judicial orders passed by the High Court in proceedings pending before it, the correctness of the impugned order can be challenged only by appeal and not by writ proceedings." It further reads, "If questions about the jurisdiction of superior courts of plenary jurisdiction to pass orders like the impugned order are allowed to be canvassed in writ proceedings under Art. 32, logically, it would be difficult to make a valid distinction between the orders passed by the High Courts inter-partes, and those which are not inter- partes in the sense that they bind strangers to the proceedings. Therefore, in our opinion, having regard to the fact that the impugned order has been passed by a superior Court of Record in the exercise of its inherent powers, the question about the existence of the said jurisdiction as well as the validity or propriety of the order cannot be raised in writ proceedings taken out by the petitioners for the issue of a writ of certiorari under Art."

It never intends to claim that the judicial orders will not violate fundamental rights. It is not a proposition that the judicial orders are not supposed to violate fundamental rights as well. The binding ratio is that the violation of the fundamental right if at all happens at the hands of the higher judiciary, cannot be said to have been violated. Hence, in a nutshell, even if the judicial law-making process violates the fundamental rights of a person, he being an aggrieved party has no right to claim that his fundamental right has been violated. Rather he is destined to suffer in silence. This proposition was reiterated by the Supreme Court in the Rupa Ashok Hurra case[33] by a 5-judge bench. It was held that "It is pointed out above that Article 32 can be invoked only to enforce the fundamental rights conferred in Part III and it is a settled position in law that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III."

(J) Judiciary is not a state and hence the remedy is absent against it

Article 12 and 32 jointly give the right to the citizens against the state from infringing the fundamental rights bestowed by Part-III of the Constitution. The definition of the state is wide in sense and this definition itself was subjected to judicial scrutiny many times. The Ajay Hasia

[32] Naresh Shridhar Mirajkar And Ors vs The State Of Maharashtra And Anr, 1967 AIR, 1 1966 SCR (3) 744
[33] Rupa Ashok Hurra vs. Ashok Hurra and Anr. (2002), AIR 2002 SCC 388

case[34], the AirPort Authority case[35] and the Rajasthan Electricity Board[36] cases are some of the leading decisions of the Supreme Court of India, defining state. And the state as defined in Article 12 of the constitution is estopped from violating the fundamental rights as envisaged in part III of the constitution. In case of any such violation the procedure to seek remedy, so the forum is also included in the same part, as Article-32. Both Articles, 12 and 32 are part of the fundamental rights themselves, which have been given higher levels of sanctity. But the question further arises that, whether the judiciary is a state or not, falling under the definition as given in Article 12. The remedy, procedure and forum as provided in Article 32 of the constitution for the person aggrieved are available only if the violator is stated, in certain cases. Hence this question gains more significance. If the judiciary does not fall within the definition of the state, the judicial lawmaking gets an inherent immunity to be challenged under the claim that the fundamental rights are violated by the said judgment or the law as laid down by the given judgment.

In Rupa Ashok Hurra case[37] by a 5-judge bench, it was held that "It may further be noted that the superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution." When this question was conclusively determined by the Supreme Court, the possibility of challenging the judicial law, if violated the fundamental right is permanently shut before the citizens of the nation. Though the said law violates the fundamental right, there is no law, procedure or forum left for the citizens to challenge it and seek remedy.

(K) Inherent limitations for repeal or amendments and lack of procedures

In case of any enactment by the legislature, there is a laid down procedure to seek an amendment to the statute even after a prolonged time. The time elapsed is not a consideration at all. The whole issue is considered on contemporary merits, nothing else. The will of the people prevails through their elected representatives. Every 5 years, if not earlier through the dissolution of the house, the people's representatives are subjected to re-election and that allows the public at large constituted by the citizens an opportunity to execute their political will. Hence, if any enactment is against the public opinion, it is reflected in the electoral process and the said enactment is reversed either through amendment or repeal. There are numerous instances of the same and the 42nd and 44th amendments of the constitutions are the classic examples of the said 'will of the people'.

[34] Ajay Hasia Etc vs Khalid Mujib Sehravardi & Ors. Etc,: 1981 AIR 487, 1981 SCR (2) 79
[35] Ramana Dayaram Shetty vs The International Airport Authority of India, 1979 AIR 1628, 1979 SCR (3)1014
[36] Rajasthan State Electricity ... vs Mohan Lal & Ors, 1967 AIR 1857, 1967 SCR (3) 377
[37] Rupa Ashok Hurra vs. Ashok Hurra and Anr. (2002), AIR 2002 SCC 388

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In contrast, when it comes to judicial law-making, there is no proper procedure for amending the same, or repealing the law, even if the public sentiments are against it. Every legislature is essentially a body existing for lawmaking and it involves certain laid down procedures for the same. Even the amendments and repealing of any statute run through the same procedure and reach their logical conclusion. But in the case of the judicial legislation, it is totally in dark, how to amend the law or repeal the same. Neither the review is possible, nor any writ petition will lie against the judgment of the higher courts. Then in that context, the essential dynamism of the law is lost and it enters into undue rigidity, without any practical solutions.

(L) Judicial decisions become binding upon the persons, who were not parties to the litigation

Order XXVIIA of the Code of Civil Procedure also brings out the procedure of raising a substantial question of law, challenging any statutory instrument, before a civil court. Apart from this, the Code of Civil Procedure vide its amendment in 1974[38] had inserted Rules 8 and 8A into Order-I to facilitate class litigation and representative litigation either in the public interest of the class of people or to address the issues of deprived or aggrieved persons. It reads as follows:

One person may sue or defend on behalf of all in the same interest

"8. One person may sue or defend on behalf of all in same interest.

Where there are numerous persons having the same interest in one suit,-

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement,

[38] Subs. By Act 104 of 1976, sec.52 for rules 8 & 8A, w.e.f. 01/02/1977

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compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation-

To determine whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the person on whom behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

When the public issues are decided by the court through the mode of Public Interest Litigation, it is quintessential to issue notice to the public at large in terms of Order-I, Rule-8(ii) of the Code of Civil Procedure, 1908, since the prayers sought for in the given Writ Petition involve the interest of the public at large, though such a procedure is seldom observed in PILs where the interest of the public at large are invariably involved. The reasoning is that the Civil Procedure Code does not apply to the High Court or Supreme Court proceedings. But, after all, the law needs to be interpreted and implemented in its spirit and justice, equity and good consciousness shall prevail over the narrow tunnels of interpretations. Even when the said given provision is not included in the higher court's procedure, the same is not excluded also. There is no harm in issuing an order to that effect, under the writ jurisdiction itself or taking appropriate measures to amend the rules of procedure to include such provisions in the statute. As of date, the public notice is generally excluded.

(M) Power of court to permit a person or body of persons to present an opinion or to take part in the proceedings

Order-I, Rule-8A[39] of the Code of Civil Procedure, 1908 allows the public to participate in ongoing litigation. It reads as follows:

"8A. Power of court to permit a person or body of persons to present opinion or to take part in the proceedings.

While trying a suit, the Court may, if satisfied that a person or body of persons is interested in

[39] Inserted by Act 104 of 1976, sec.52, w.e.f. 01/02/1977

any question of law which is directly and substantially in issue in the suit and that the public interest must allow that person or body of persons to present his or its opinion on that question of law, permit that person or body of persons to present such opinion and to take part in the proceedings of the suit as the Court may specify."

Under the above provisions of the Code of Civil Procedure, the civil court has the exclusive jurisdiction to adjudicate the public issues and the issues like public interest. Even though the civil court's remedy to the establishment and restoration of infringement of rights of a class of people is available and even representative suits are statutorily recognised, the constitutional courts, namely, the Supreme Court of India and The High Courts continued to entertain and adjudicate the PIL under its writ jurisdiction to address such issues, ignoring the alternative remedy or procedure impediment. The courts in such cases never raised the question, of why such alternative remedy or statutory procedure was not resorted to, before invoking the equitable jurisdiction of the Higher Courts. The trouble or the injustice in the above context was amplified, when the Hon'ble High Court of Karnataka decided that, Rule 8 procedure applies only to suits and not to writ procedures[40] .

The said provisions are for wider consultation and to allow the members of the public citizens to represent themselves before the court and participate in the lawmaking. As long as the said notice under the civil procedure code is not issued to the public at large, it is not possible for the public at large to know about the nature of the litigation and also to come out with objections or suggestions in the given domain. Public discourses are essential to garner public opinion. Those discourses and formulation of public opinion shall be informed and not based upon any rumours or gossip. This will be possible, only if the public notice is issued and the public at large is allowed to file affidavits in the given case. That alone will provide standing sanctity to the law in the modern democratic setup.

(N) Application of Res-judicata and Estoppel in impugning a statute

There is no estoppel or resjudicata against statute or law. A judgment of a court of competent jurisdiction, even when rendered in absence of principles of natural justice and consonance with the constitutional or statutory provisions is final and binding on the parties, as resjudicata. But it does not bind any, who is not a party. The doctrine of resjudicata applies only to the parties to the litigation, not others. If the judgment in a Public Interest Litigation had meant the enunciation of a new principle, where none existed, that principle alone constitutes a precedent in terms of Article 141. The concepts of resjudicata and stare decises are alien to the legislative actions. If a

[40] S.P.Gururaja Vs. Executive Member, Karnataka Industrial Areas Development Board, AIR 1998 Kant 223, ILR 1998 KAR 1212, 1998 (3) KarLJ 223.

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statute violates fundamental rights or even constitutional rights, it is rendered void ab-initio; it was stillborn; never existed in the eye of law and it is liable to be impugned whenever and wherever it is sought to be placed reliance upon or enforced. The question of any condonation of delay can never arise, where a statute is a nullity, where it was stillborn, never ever existed. But unfortunately, when the judicial legislation comes into place, the jurisprudential principles of estoppel and resjudicata come into play and the aggrieved parties are prevented from seeking the remedies before any forum through any of the appropriate procedures. Neither the forum nor the procedure is available to the person aggrieved and hence the remedy in case of violation of fundamental or constitutional rights becomes only illusionary.

IV. SOCIO-POLITICAL PROCESS OF LAW-MAKING

The political process of a sovereign democratic republic is a complex one and the evolution of law is not moulded overnight with changes in the letters of statutory interpretation. Every political process and decision making is a pain taking one and it happens to flow the rivers of sweat and at times even some element of blood to achieve that. The faith of the large population in one nation and its law is evolved through generations of education, myths, beliefs, habits, customs, discourses, education, experiences, economic and social roller-coasters, pieces of literature, epics, stories, leaderships, forces, administration, media, geographical factors, rivers, climate, weather, natural calamities and many more enumerable factors conjoined together upon a single symbol or flag. The law is not made in parliament or legislatures just at the whims and fancies of the legislative members sitting and joining together. The legislature is continuously and constantly answerable to the people at large. Every legislative and executive action is taken by the political executive with accountability to the people at large. Especially in the era of numerous media platforms, this accountability has become more instant and dynamic. Specifically, in the era of social media with the emergence of the instant messaging system, accountability has become more and more dynamic and instantaneous. Hence any such executive or legislative action at the hands of the executive or legislative is subject to strict public scrutiny and criticism. The freedom of speech and expression gives amble space in the political spheres for such criticism and healthy debate and deliberations in the public domain. Even the best of the best such actions can invite opposition and criticism in the public domain from various pressure or interest groups. There cannot exist any decision making at the hands of the state machinery to satisfy every subject where the socio-religious and eco-political interests are diverse in nature and many times mutually exclusive and divergent. Hence to contain such opposition interests and their viewpoints the democratic system envisages an established permanent opposition so that the said disgruntlement against the state action does

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not result in anti-national activities. But the judicial structure is different and cannot afford to have such criticism or opposition to its decisions. Hence the judiciary must restrain itself from deciding and determining public issues which have socio-religious and politico-economic consequences. Judicial determinations have strength as long as it has public support, not otherwise. If the public at large does not bestow their faith in judicial pronouncements none of the forces will be able to implement or execute them. That is the problem which the judiciary faces when it ventures to determine the public issues, especially without generating mandatory political opinion. The judiciary is ill-equipped to handle public issues, whether it is religious, economic, social, political or customary issues. Generating and sustaining public opinion is a painful effort which may even take a time frame and struggle spanning generations. If the judiciary under the banner of judicial activism ventures into changing the customs or religious practices, just because it could champion upon the executive and legislature in transplanting them, it is grossly misjudging the power of the people, the sovereign.

V. CONCLUSION

Though the judicial legislation cannot be excluded completely in the modern context, they need to be used only sparingly with utmost caution. And it is most important that the appropriate legislature take note of the said judgment immediately and enact a law, codifying the proclamation of the legal principle at the hands of the judiciary. The system needs to function in equilibrium with each other in the best interest of the nation, its people and the coming generations.

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