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UNDERSTANDING THE LEGISLATIVE ROLE OF THE JUDICIARY IN INDIA

AUTHORED BY - CHINNU PRASANNAN & SEENATH P S

ABSTRACT

A judge has to fill up the gaps. This process is known as Judicial Legislations. The judge fills the gap in our administrative structure. Here, the judge participates in the drafting of laws. Making laws is an essential and fundamental component of the judicial system. The judge infuses life into the legislative branch's lifeless skeleton, ensuring that the legislation is sufficient to fulfil society's demands. Their focus lies in restoring the essence, authenticity, and coherence of legal regulations. The realists argued that legal reasoning was not always required and that there may be a variety of reasons why the judge reached his conclusion. The interpretation of legislation thus has become the perfection of judges. When a judge pronounces a verdict, it is not just because of the statute, but also because of the judge's desire to determine what the legislature's purpose was. The judge interprets the statute with a view of what he sees as the legislature's purpose.

UNDERSTANDING THE LEGISLATIVE ROLE OF THE JUDICIARY IN INDIA

First time Justice Cardozo has recognized the creative role of judges in his famous book “The Nature of Judicial Process”. Like a law passed by the government, decisions made by the higher judiciary are binding on all persons. Therefore, judges write laws in addition to administering justice. Sometimes they interpret the law as they see fit to modify it for the sake of justice and inadvertently create a new version of it. For Cardozo, the mechanism in these cases, sociology should be used to describe liberty, but with the reservation that A component of one or more of the other strategies can be used.¹ In his book “The Nature of the Judicial Process” He stated that, the judge in shaping the rules of law must heed the *mores* of his day. It is one-sided and therefore

¹ Sparsh Dinkar Mishra, Role And Approach Of The Judge In The Interpretation Of Statutes, Legal Service India E-Journal, (last accessed on MAR. 07, 2023, 9.57 AM), <https://www.legalserviceindia.com/legal/article-7597-role-and-approach-of-the-judge-in-the-interpretation-of-statutes.html>

false in so far as it implies that the *mores* of the day automatically shape rules which, full grown and ready-made, are handed to the judge. Scholars of distinction have argued for a more subjective standard. "We all agree," says Professor Gray, "that many cases should be decided by the courts on notions of right and wrong, and, of course, everyone will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community--which ought he to follow--his own notions, or the notions of the community? I believe that he should follow his own notions." Some relations in life impose a duty to act in accordance with the customary morality and nothing more. In those the customary morality must be the standard for the judge.² Many of the gaps have been filled in the development of the common law by borrowing from other systems. Whole titles in our jurisprudence have been taken from the law of Rome. Their conclusions must, indeed, be subject to constant testing and retesting, revision and readjustment; but if they act with conscience and intelligence, they Ought to attain in their conclusions a fair average of truth and wisdom. The recognition of this power and duty to shape the law in conformity with the customary morality is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."³

THE TOOLS AND TECHNIQUES OF JUDICIAL CREATIVITY

The Indian Constitution allows the judiciary to establish and introduce rules. Has the judiciary chosen the principles, ideas, and standards for constitutional interpretation appropriately? Is it accurate to say that the Indian judiciary has successfully interpreted the rules in line with several standards or notions that it has created? In order to address these issues, the judiciary must be creative. Given that India is going through a period of transformation, it is crucial to use judicial creativity in moderation while handling some delicate matters. This creative ability must have a limit. There are a few things to think about when it comes to judicial creativity:

² Benjamin N. Cardozo, *The Nature of The Judicial Process* 98-141, MPP House, (Reprint Ed.2022).

³ Benjamin N. Cardozo, *The Nature of The Judicial Process* 98-141, MPP House, (Reprint Ed.2022).

- Creativity must be based on principles.
- It should be according to the changing demands of society
- Law to be created for betterment of people
- Creativity should be in open space having a broad horizon
- To help in wider interpretation of Constitution with special reference to fundamental rights.
- Innovation of minimum rationality
- Creativity needed to harmonize the law
- Iron out the creases in the judicial process
- To fill in the gaps in the legislation
- Expanded Scope of Articles⁴

The basic tools for creativity are constitutional remedies in the form of writs under Articles⁵ of the Constitution by way of writ petitions. Another new concept is PIL which a person can file in the court of law whereby the judge to interprets the fundamental rights for the betterment of people and thus a new law takes birth. This is judicial creativity. They can also be understood as the tools and techniques of judicial creativity. Articles⁶ enable the Supreme Court to formulate legal doctrines to meet the ends of justice. This is also a tool of judicial creativity. The only limitation therein is reason, restraint and injustice. The court has evolved tools and techniques of compensatory jurisprudence and granted various safeguards and reliefs innovating favourable principles.

Changing demands of the society

Law is a social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his "Judicial Process," life is not a logic but experience. In the **case**,⁷ The Supreme Court has observed that it was not bound by its earlier judgments and possessed the freedom to overrule its judgments when it thought fit to do so to keep pace with the needs of changing times. The famous Shah Bano **case**⁸ is an example of the tools and techniques of judicial creativity and precedent, in which it is interpreted that every

⁴ INDIA CONST. art. 14, 19,20 & 21.

⁵ INDIA CONST. art. 32 & 226.

⁶ INDIA CONST. art. 141 & 142

⁷ Bengal Immunity Company Limited v. State of Bihar, (AIR 1955 SC 661).

⁸ Mohd. Ahmad Khan V. Shah Bano Begum AIR 1985 SC 945.

woman has right to live with human dignity, irrespective of her caste. In the **case**,⁹ The Apex Court held that every Child/citizen has a right to free education until he completes the age of 14 years. This right flows from Article.¹⁰ This is a good example of the judicial creativity.

This creation of right to education is another example of judicial creativity. Here the fundamental right as envisaged in article¹¹ has been interpreted widely that includes in itself that right to education can be drawn out from the right to life. Thus, under the new article¹² of the Indian Constitution the right to education to children between 6 and 14 years of age has become a fundamental right.

For the wider Interpretation of Constitution

In the **case**,¹³ the Apex Court laid down the principle that the court normally would lean in favour of environmental protection in view of the Creative interpretation made by the Supreme Court in finding a right of environmental in chiding right be clear water, air rater under Article¹⁴ of the Constitution. In expanding the ambit of right to life & personal liberty, the court has evolved tools and techniques of compensatory jurisprudence, implemented international conventions & treaties, and issued directions for environ-mental justice. Law must keep pace with society to retain its relevance, therefore, judicial creativity is necessary for meeting with the ends of justice.

Balancing technique

In Lalit Narayan Mishra Institute of Economic Development and Social Change, in the **case**¹⁵ the Apex Court has adopted balancing technique in holding that the provisions of the Constitution, particularly the provisions relating to the fundamental rights, should not be construed in a pedantic manner, but should be construed in a manner that would enable the citizens to enjoy the rights in the fullest measure. In the **case**,¹⁶ it was held that on a careful consideration of the legal and historical aspects of the directive principles and the fundamental rights, there appears to be complete unanimity of judicial opinion of the various decisions of the Supreme Court on the point that although the directive principles are not enforceable yet the Court should make a real attempt

⁹ Unni Krishnan & others v. State of A.P. (1973) 1 SCC 645.

¹⁰ INDIA CONST. art. 21.

¹¹ INDIA CONST. art. 21.

¹² INDIA CONST. art. 21A.

¹³ Bombay Dyeing Co. Ltd. V. Bombay Action Group & Ors., AIR 2006 SC 1489.

¹⁴ INDIA CONST. art. 21.

¹⁵ Patna v. State of Bihar, AIR 1988 S C 1136.

¹⁶ State of T.N. v. L. Abu Kavur Bai, AIR 1984 SC 326.

at harmonising and reconciling the directive principles and the fundamental rights. Reading fundamental rights in the Directive Principles is a technique of judicial creativity. For example, right to education was a directive principle which has been given the status of a fundamental right. Not only article¹⁷ but other articles that have been interpreted creatively are the articles¹⁸

PIL, A tool for judicial creativity

Other tools used for judicial creativity are articles¹⁹ of the Indian Constitution that allow the person to move the Supreme Court and the high court respectively in case of violation of their fundamental rights. The concept of locus standi is now modified by the concept of PIL, i.e, public interest litigation. This is an excellent example of judicial creativity and tools and techniques used for achieving it. In the **case**,²⁰ the Apex Court has cautioned that there are some of the dangers in public interest litigation which the Court has to be careful to avoid. It is also necessary for the Court to bear in mind that there is a vital distinction between locus standi and justifiability and it is not every default on the part of the State or a public authority that is Justiciable. The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution. It is a fascinating exercise for the Court to deal with public interest litigation because it is a new jurisprudence which the Court is evolving a jurisprudence which demands judicial statesmanship and high creative ability.

Creation of Right to Speedy Trial

The entitlement of the accused to speedy trial has been repeatedly emphasized by the Supreme Court. Although it is not specifically enumerated in article²¹ as a fundamental right, yet the SC recognizes it to be within the spectrum of article²² In the **case**,²³ the Court while dealing with the cases of under-trials, who had suffered long incarceration held that a procedure which keeps such large number of people behind bars without trial so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article.²⁴ The Court laid stress upon the need for enactment of law to ensure reasonable, just and fair procedure which has

¹⁷ INDIA CONST. art. 21.

¹⁸ INDIA CONST. art. 14 & 19.

¹⁹ INDIA CONST. art. 32 & 226.

²⁰ BALCO Employees Union (Regd.) v. Union of India, AIR 2002 SC 350.

²¹ INDIA CONST. art. 21.

²² INDIA CONST. art. 21.

²³ Hussainara Khatoun v. Home Secretary, State of Bihar, (AIR 1979 SC 1360).

²⁴ INDIA CONST. art. 21.

creative connotation after the **case**²⁵ in the matter of criminal trials.

The creative role is played by the judge. Here he acts as a creative artist whereby he is able to make new laws as per requirement of the time and society. In the **case**,²⁶ the Supreme Court has rightly observed that each case coming before the judge has its own peculiarities requiring application of fresh mind and skill. The judge has constantly to be a creative artist. His work, therefore, requires constant thinking and display of talent and creativity.

In the **case**,²⁷ the court has held that time has come for the judicial interpretation to play far more active, creative and purposeful role in deciding what is according to law.

Maneka Gandhi's case

Creativity in Maneka Gandhi's **case**,²⁸ is clearly visible when the Supreme Court took the view that Article²⁹ affords protection not only against executive action but also against legislation and any law which deprives a person of his life or personal liberty would be invalid unless it prescribes a procedure for such deprivation which is reasonable, fair and just. The concept of reasonableness, it was held, runs through the entire fabric of the Constitution and it is not enough for the law merely to provide some semblance of a procedure but the procedure, for depriving a person of his life or personal liberty must be reasonable, fair and just.

EPISTOLARY JURISDICTION

Era of epistolary jurisdiction is emerging Epistolary jurisdiction allows access to justice to the poor and the weaker section of the society. The court entertains a letter as writ petition ignoring all procedural norms and technicalities. The epistolary jurisdiction is a new strategy adopted by the judiciary for protection of the human rights of the vulnerable sections of the society. In the **case**,³⁰ one Journalist of Bombay claimed relief against demolition of hutments of pavement dwellers by the Municipal Corporation of Bombay His letter to the Supreme Court was treated as writ petition and the court granted interim relief to pavement dwellers. In the **case**,³¹ the epistolary

²⁵ Maneka Gandhi's case, (1978) 1 SCC 248.

²⁶ All India Judges' Association v. Union of India, AIR 1993 SC 2493.

²⁷ Delhi Transport Corporation v. D. T. C. Mazdoor Congress, AIR 1991 SC 101.

²⁸ Maneka Gandhi v. Union of India, AIR 1978 S C 597.

²⁹ INDIA CONST. art. 21.

³⁰ Olga Tellis v. Bombay Municipal Corporation, 1985 SCC (3) 545.

³¹ Sunil Batra v. Delhi Administration (1978) 4 SCC 409.

power had been invoked when a prisoner Sunil Batra had written a letter from Tihar Jail, Delhi to the Supreme Court informing about the torture in prison. A letter of two Law Professors of Delhi University informing the Supreme Court about inhuman and degrading conditions under which inmates of the protective home at Agra were living was treated as writ petition. In the case,³² Hussainara Khatoon's case reiterates the right of every accused person who is unable to engage a lawyer due to poverty, indigence, etc. will have the right to have free legal services provided to him by the State for obtaining bail as well as for defence at the time of the trial. The court added a further protection to this right by holding that if free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article.³³

Criticisms and self-restraint principle

This new jurisprudence in the form of judicial activism has no doubt, contributed in a great measure to the well-being of the society. People, in general, now firmly believe that if any institution or authority acts in a manner, not permitted by the Constitution, the judiciary will step in to set right the wrong. However, judiciary has to work within the parameters laid down by the Constitution without affecting the basic structures of any of the government's organs. Reconciliation of the permanent value embodied in the Constitution with the transitional and changing requirements of society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the Constitution is the supreme document the mechanism under which laws must be made and governance of the country carried on, the judiciary must play its activist role. No constitutional value propounded by the judiciary should run counter to any explicitly stated constitutional obligations or rights in the name of doing justice and taking shelter under institutional self-righteousness. The judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State.

CRITICISMS ON JUDICIAL CREATIVITY

The judge faces criticism akin to saying that a fifty-page document is less relevant than a postcard! Only extreme instances of egregious injustice should be eligible for epistolary jurisdiction. The judiciary's valuable time should only be used by those with legitimate public

³² Hussainara Khatoon & Ors vs Home Secretary, 1979 AIR 1369.

³³ INDIA CONST. art. 21.

causes of sufficient importance. The Supreme Court did not hesitate to assume direct legislative function in the **case of** ³⁴ In this case, the Supreme Court has virtually enacted a piece of legislation on the ground that there is a vacuum in the legislative field of sexual harassment of working women. There is a paragraph similar to the statement of objects and reasons. There is a definition clause and there are 12 points similar to 12 sections. The Supreme Court laid down some guidelines and norms which are directed to be treated as law. It is submitted that these guidelines cannot be treated as laying down a precedent under Article,³⁵ but this should be treated as unauthorized ad hoc legislation by the judiciary. Interpreting certain provisions of the existing law and laying down certain principles in the form of the precedent is what is envisaged under Article³⁶ and not ad hoc legislation by the judiciary when there is vacuum in the field. Vishaka is an example of judicial trespass in legislative domain. The role of judiciary in the protection of human rights is certainly commendable. However, in the quest for socio-economic justice the judiciary seems to overstep the limits of its judicial function and trespass into the areas assigned to the executive and the legislature. Judicial creativity, which refers to the ability of judges to interpret and apply laws in innovative ways to address novel legal issues, has both advantages and limitations. Some limitations of judicial creativity can be summarised as:

- **Lack of democratic accountability:** Since judges are not public servants, they are not directly answerable to the people. This implies that they may make choices that are contrary to the wishes of the majority.
- **Risk of inconsistency:** Judges' subjective interpretations of the law might lead to conflicting legal rulings, which can be a result of judicial innovation.
- **Uncertainty and unpredictability:** Because judicial innovation permits judges to deviate from long-standing legal precedents and principles, it can breed ambiguity and unpredictability in the legal system. Judges have to strike a compromise between the necessity for legal innovation and the requirements of uniformity, predictability, and impartiality.
- **Potential for bias:** The personal prejudices and viewpoints of judges can also have an impact on judicial inventiveness, perhaps resulting in conclusions that lack objectivity and impartiality.

³⁴ Vishaka v. State of Rajasthan.(1997 (6) SCC 241).

³⁵ INDIA CONST.art. 141.

³⁶ INDIA CONST.art. 141.

- **Role of the legislature:** It is possible to argue that judicial innovation intrudes onto the legislature's purview, which is to enact and alter laws.
- **Limited knowledge and expertise:** It's possible that judges lack the same degree of experience and training as legislators or subject matter experts. This may hinder their capacity to make wise choices and have unforeseen repercussions.
- **Judicial restraint:** Judges should exercise caution in abusing their power and should only apply the legal interpretation that is required to conclude the case at hand. Applying current laws to the particular facts of the situation is preferable than making new laws or policy decisions. Judges who make decisions with excessive creativity run the risk of undermining the legal system's predictability and stability and infringing on the legislative branch's authority.
- **The need to respect the separation of powers:** The legislative, executive, and judicial branches make up the three branches of government. Even while the court is crucial to the legal system's interpretation, it shouldn't override the other departments' authority. Judges ought to base their rulings, for instance, on the principles of the law rather than their own personal convictions or preferences.
- **The need to respect legal precedent:** The foundation of the legal system is the idea of stare decisis, which holds that lower courts within the same jurisdiction have binding authority over lower courts. This contributes to the law's predictability and uniformity. Judges are free to interpret the law creatively, but they must have a good cause before they disregard or overturn established legal precedent.

CONCLUSION

The Legislature's constitutionally granted authority to enact laws. The judiciary's job is to apply the law to the interpretation, decision-making, and adjudication of conflicts. The supreme courts have the constitutional authority to determine whether the legislation is just or not, and if not, how it should be construed. The Court's principal role is interpretation. Legislative intent should guide how the law is construed. Judges' duties as interpreters may give way to those of enacting laws and ensuring the rule of law is upheld. This is Judicial activism. Legal concepts that are formed by judicial precedents as opposed to statutes are known as judge-made laws. A judge may interpret the law to establish new legislation. Stare decisis, or upholding the ruling, is the foundation upon which laws created by judges are built. Judges promise to uphold the laws and the constitution during their oath of office. Thus, when doing his job, he should keep this in mind.