# LAW FINDING AND LAW MAKING : THE ROLE OF JUDICIARY IN A DEMOCRACY

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*One of the most hotly debated propositions in contemporary jurisprudence is whether the job of a Judge is only to find, interpret and apply the law or go beyond the realm of legal plenitude to make or create law. Time was when Blackstone and Hall believed in the classical formalist doctrine of Common Law that Judges do not make law. They are in Blackstone's words, the depositories of the laws, the living oracles who must decide in all cases of doubt. (See Roger Cotterrell, The Politics of Jurisprudence 2nd Edn. 2003 at PP.24-25) The Judge interprets and applies the but does not create it.*

*Francis Bacon wrote that Judges ought to remember that their office is Judicare and not jus dare! i.e., to interpret law and not to make law or give law. Montesquieu argued thta the Judges of the nation are only the mouths that pronounce the words of law. (See Rajeev Dhavan, Judges and the Judicial Power, 1985, at P.42). On the other hand there is a school of thought which believes thta Judges should make and create law though within a narrow compass.*

*It will be profitable to know the contrasting views on the subject.*

Lord *Denning* said that when a defect appears in an Act or a statute, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of the Parliament. A Judge must not alter the material of which an act is woven, but he can and should iron out of the creases. [See *Seaford v. Asher*, (1949) All ER 155. A few years later Lord *Denning* again took the same posture and said that we do not now in this Court stick to the letter of a Statute. We go by its true intent. We fill in the gaps [*Ministry of Housing v. Sharp*, (1920) QB at 264].

These observations are related to the Statutory Law. But they apply with equal force to common law also. It may be pointed out that Lord *Devlin* has expressed the view that judicial creativity is permissible in the common law but not in relation to Statutory Law [See. The Judge (1979)]. Lord *Devlin* admitted that "Judges, I have accepted, have responsibility for the Common Law, but in my opinion they have none for the Statutory Law; their duty is simply to interpret and apply it and not to abstract". (*Devlin*, Judges and Law makers (1976) 39 MLR 1, at p.13).

*Ronald Dworkin* States :

The Law is the Law. It is not what the judges think it is, but what it really is. Their job is to apply it, not to change it to fit their own ethics or politics. (*Ronald Dworkin*, Law's Empire, Indian Reprint 2002, P.114)

Justice *Marshall* observed :

The Constitution of the United States of America is what the Supreme Court says it is. [*Marburry v. Madision*, 5 US 137] (here I have meant by Constitution as Law)

While Lord *Denning* said :

"We sit here to find out the intention of the Parliament…. to carry it out, and we do

this better by filling the gaps and making sense of the enactment than by opening it upto destructive analysis. *Viscount Simonds* another Law Lord, sharply disagreeing with what *Denning* L.J. said, it appears to me to be a naked usurpation of the legislative function under thin guise of interpretation and it is less justifiable when it is guess work with what material the Legislature, would, if it had discovered the gap have filled it in. If the gap is disclosed the remedy lies in an amending Act" [See *Seeford Court Estates Ltd. v. Asher*, (1949) 2 All ER 155. Referring to this case in *Magor and St. Mellons RDC v. Newport Corp.*, (1950) 2 All ER 1226 at 1236].

The theory that the Judges merely find the law and apply it is based on many reasons. Parliament is the sole law maker; decisions of the Judges cannot make a law properly so called in the Austinian sense. It is said that what is often mistaken as law-making is nothing but application of existing law to circumstances to which it had not been previously applied. Common law is not Judge-made law but custom of the realm. Common law consists of the usages and customary rules of society liable to be changed and altered by the Acts of Parliament. The declaratory theory is consistent with the doctrine of separation of powers. To say that a Judge lays down a new principle when a case of first impression comes before him it is to concede that Judges make law with retrospective effect with all its accompanying evils. One of the cardinal principles of Justice is that the law which is enacted by the Parliament or judicially legislated must be prospective in operation. Judges themselves by and large have often disclaimed the power to lay down a new principle on the ground that it is the job of the Parliament. In *Knuller's* case, the House of Lords held that decision in *Shaw v. Director of Public Prosecutor* (1961) 2 All ER 446, is in no way to be taken as supporting the doctrine that the Courts have an inherent power either to create new offences or to widen the existing offences so as to make punishable conduct not hitherto subject to punishment (*Shaw's* case cited above). The Aristotalian syllogistic form of reasoning supports the orthodox declaratory theory. This form of reasoning is the most common of legal reasoning and its sole purpose is to demonstrate the logic of a proposition (See, *Harris* in *Lloyd's,* Introduction to Jurisprudence 7th Ed. 2001. P.1408).

In the context of statutory interpretation, the words have to be given the most ordinary meaning, unless the context otherwise requires. The lower Courts are bound by the doctrine of *Stare decisis*, and hence do not have the power to make law. The judicial creativity can take place at the appellate level. Most cases do not go to the Superior Courts. According to the principles of *ratio decidendi*, Judges have to confine their propositions of law to the materials of the facts of the cases before them. Any statement of law or proposition laid down by the Judges which are not germane to the decision of the case are mere *obiter dicta*. The function of a Judge is the disinterested application of known law. There is also a doctrine that judicial activism is permissible in relation to common law. As respects statutory law, there is a presumption that Parliament has said all it wanted to say on the subject. The Judge simply interprets and applies the law. *Ronald Dworkin* argues that even in hard cases (*i.e.*, cases to which no rule is immediately applicable and on the outcome of which lawyers disagree that there is a right answer). There is always a right answer which entitles one party to the decision on principle. The right decision is one that "fits" (coheres) with the institutional history of law. (See, *Ronald Dworkin's* Law's Empire 2002. P.230).

*Dworkin* compares a Judge like a story teller. He must think of himself not as giving voice to his own moral or political convictions but "as an author in the chain of common law. He must think of previous

decisions as part of a long story he must interpret and continue in order to make the story as good as can be. Decisions that look like policy decisions are actually decisions about existing rights of individuals. These rights are derived from enacted law and from principles or dimensions of morality. The latter are part of the great network of Law" (See, *Dworkin* Law's Empire. 2002 P.229).

During the 60's, the Indian Judiciary had adopted a formalist posture greatly influenced by the common law doctrine that Judges do not make law.

Justice *Hidayatullah* says that the Judge's role is legal and not moral. Moral guidance from Judges is entirely uncalled for and Judges must not give sermons.

Although he concedes in the conclusion that the Judges lay down in a small measure (Justice *Hidayatullah*. A Judge's Miscellany 1972 p-71). He further states that where ordinary law is involved the Judge need neither supply a missing rule nor alter one already established for he can leave Legislature to exert, itself and change the law. But as respects Constitution, the position is different (*M. Hidayatullah*, Democracy in India and Judicial Process, 1965 PP 707).

The formalist theory that the Judges do not make law but have only to interpret and apply the law, had existed in the common law and elsewhere as a myth. Neither law nor society is static. The creative role of Judges is absolutely necessary and very desirable because in every country the law is not codified and have to be developed by the Judiciary. Even when there are extensive codes, the task of interpreting the code according to the needs of the age and applying the law to new situations which are not contemplated will have to continue. Such a role of the Judiciary in a democracy lends flexibility to an otherwise rigid system dominated by the doctrine of binding judicial precedent. It is of utmost importance to note that despite the doctrine of binding precedents embodied in Article 141 of Indian Constitution, our Courts have demonstrated the vitality of the law in fulfilling the emerging socio-economic politico-religious aspirations of the people.

Legal language has an open texture. Many legal terms like "reasonable" or "negligent" or "weasel words" are subject to varying interpretations. The meaning of the rule, sometimes, is not absolutely certain, there may be a core of certainty but there is always a penumbra of uncertainty. It is in this penumbra that lies the scope for a Judge to do legal tinkering. A Judge has to fulfil sometimes a lacuna in a statute. In overruling a previous decision or distinguishing between '*ratio*' and '*obiter*', judicial creativity is fully in play, when a previous decision is overruled.

More often than not, Judges have many alternative routes whereby to reach the decision and a choice is generally always there on policy considerations. He has to approach Justice through 'Highways' and sometimes through 'by-lanes' (to borrow the words of Justice *Hidayatullah*.) The "inarticulate major premises" influence his choice.

The 'Mechanical Jurisprudence', which was once a hallmark of common law, has given way to purposive or instrumental jurisprudence. As observed by Justice *Krishna Iyer*, "many of the Judges of England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is now being discarded everywhere. Every new situation is a development on the law. Law does not standstill. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must constantly seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect – thinking of the structure as a whole – building for society

a system of law which is strong, durable and just. It is on his work that civilized society itself depends (See, *Fuzlunbi v. K. Khader Vali* AIR (1980) 1730 at 1731-32").

In a country like India with a supreme Constitution the Judges have the onerous duty and an enviable task to preserve and protect the basic law. The Judges have to extract from the womb of the Constitution novel remedies, expand the horizons of rights including human rights. "The Judge is exalted as law giver and prophet in the temple of justice; he must have the wisdom of Solomon, the moral vision of Isaiah, the analytical power of Socrates, the intellectual creativity of Aristotle, the humanity of *Lincoln* and *Gandhi* and impartiality of Almighty." (See *Rajeev Dhavan,* Judge and Judicial Power (1985), at P42).

As stated by *Cardozo*, no doubt the limits for the Judges are narrower. He legislates only between gaps. He fills the open space in the law. How far he may go without travelling beyond the walls of interstices cannot be staked out for him upon a chart. (See *Cardozo*, The Nature of Judicial Process (2002) PP 119-114). He further states that the power to declare staked out for him upon a chart. (See *Cardozo*, The Nature of Judicial Process (2002) PP 119-114). He further states that the power to declare the law carries with it the power and within limits the duty to make law when none exists.

As *Frankfurtur* says in his book on Holmes Cardozo and Brandeis :

> "A Judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration. He must not read out except to avoid patent nonsense or internal contradiction."

On the other hand, Chief Justice *Taney* in *Dred Scott* case (60 US 393, 420), observed that "the Constitution must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning – Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or the passions of the day. This Court was not created by the Constitution for such purposes." (See B.N. Rau Memorial Lecture-series, "Judicial Methods" by Justice *M. Hidayatullah*, 1970, pp 26-27.)

The instrumental approach is clearly discernible in American Judiciary. Commenting on this, *H.L.A. Hart* writing under the caption "American Jurisprudence through British eyes : A Nightmare and the Noble Dream," in his essays in legal philosophy says that "Litigants in law Courts consider themselves entitled to have from Judges an application of the existing law to their dispute not to have new law made for them" (See *H.L.A. Hart*, Essays in Jurisprudence and Legal Philosophy (1985) P.123 at 126).

As we have seen above there are today two Schools of Thought both in the Anglo-American complex as well as in India on the question whether Judges should or should not make law. The question is not whether Judges should or should not make law but why and how they can make law. As observed by Justice *Mukherjee*, in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* (AIR 1991 SC 101 at 146) : "We have been reminded that Judges should not make laws but the question is can the Judges articulate what is inarticulate and what can be reasonably and plainly found to be inherent on the presumption that a Legislature with the limited authority would act only within limitations so as to make the legislation or law. The role of the Judiciary in a democracy is crucial as well as a sensitive one. For, the formidable task of the Judiciary is to uphold and neatly balance the conflict between the State and individual and conflicts between the individuals themselves.

The doctrine that the Judges cannot make law or create law is an outmoded doctrine and a myth. The creative role of the Judges is a *sine qua non* of judicial process. To borrow the words of *Douglas* J. of the United States Supreme Court, the problems before the Supreme Court require at times the economist's understanding, the poet's insight, the executive's experience, the politician's scientific understanding, the historian's perspective (See, Cornell Law Review, Vol. 45 1960, as cited by *T.K. Tope* in his Supreme Court of India and Social Jurisprudence (1988) Vol.1 SCC p.8).

In *State Financial Corporation v. M/s. Jagadamba Mills* (AIR 2002 SC at 843) Justice *Arijit Pasayat* has observed that, "Judges interpret Statutes, they do not interpret judgments. They interpret words of Statutes; their words area not to be interpreted as Statutes."

After 1970, the horizon of judicial activism expanded. Judges realized that in order to fulfil the socio-economic, political –religion aspirations of the people they have a role to play. Judges like Justice *Krishna Ayer*, Justice *Bhagwati*, Justice *Subba Rao*, Justice *M.H. Kania* to mention a few, adopted an activist stance and laid down remarkable and landmark judgments fulfilling the pious obligations embodied under the constitution (See *Kesavananda Bharati v. State of Kerala* (AIR 1973 SC 1461), *Hussain Ara Khatoon v. Home Secy. State of Bihar* (AIR 1979 SC), *Sunil Batra v. U.O.I.* (AIR 1978 SC 597), *Indra Sawhney v. U.O.I.* (AIR 1993 SC 477) *etc.*

This all told, we may say that the pendulum of Finding Law and Creating Law has been oscillating between judicial valor and judicial constraint.

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